THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

DECEMBER 13, 2002 and MAY 22, 2003

IN THE

Supreme Court of Nebraska

VOLUME CCLXV

PEGGY POLACEK

OFFICIAL REPORTER

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THE STATE OF NEBRASKA

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

For the benefit of the State of Nebraska

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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	Orville L. Coady	Hebron
		Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha
		J. Russell Derr	Omaha
		James T. Gleason	Omaha
		Thomas A. Otepka	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	Columbus
		Alan G. Gless	Seward
		Michael Owens	Aurora
		Mary C. Gilbride	Wahoo
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Darvid D. Quist	Blair
		Maurice Redmond	Dakota City
		F.A. Gossett III	Fremont
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Robert B. Ensz	Wayne
		Patrick G. Rogers	Norfolk
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William B. Cassel	Ainsworth
		Ronald D. Olberding	Burwell
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Stephen Illingworth	Hastings
		Terri Harder	Minden
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
		James E. Doyle IV	Lexington
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Robert O. Hippe	Gering
		Brian Silverman	Alliance
		Randall L. Lippstreu	Gering
		Kristine R. Cecava	Sidney

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		Paul R. Robinson	Hartington
		C. Matthew Samuelson	Blair
		Kurt Rager	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Philip R. Riley	Creighton
		Richard W. Krepela	Madison
		Donna F. Taylor	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	Jack Robert Ott	Hastings
		Robert A. Ide	Holdrege
		Michael Offner	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
		Kent D. Turnbull	North Platte
		Carlton E. Clark	Lexington
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
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	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
Ronald L. Brown	Lincoln
James M. Fitzgerald	Lincoln
Michael K. High	Lincoln
John R. Hoffert	Lincoln

ATTORNEYS
Admitted Since the Publication of Volume 264

JILL MARIE ABRAHAMSON
BRIAN JAMES ALSETH
JENNIFER L. BLISS
NICHOLE S. BOGEN
DAVID BRUGGEMAN
DANIEL E. BRYAN III
COREY ALLEN BURNS
STEVEN J. CHRISTOPHERSEN
KELLIE CLIFTON
RICHARD DEAN CROWL, JR.
MATTHEW R. DEAVER
RUSSELL SCOTT DUERKSEN
JEFFREY P. EDWARDS
RUTH ADELINE FEIERABEND
BRIAN EDWARD FLANNERY
GRANT ALAN FORSBERG
BRANDIE FOWLER
JEFFREY P. GALYEN
EMILY GLASGOW
KEELY GOLDBERG
JEANA GOOSMANN
MIKILIN GREENWOOD
JANET JENSON GUSTAFSON
TERRY LEE HADDOCK
STEVEN WILLIAM HOLLAND
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ROBERT SCHAAF HUME
MERCEDES S. IVENER
NORMAN D. JAMES
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RICHARD LEE JOHNSON
ROBERT L. KEITH
RENAE KELDERMAN
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EDWARD EARL KEY
MICHELE M. LEWON
RICHARD ALAN LIGHT
JOHN LOOS, JR.
REBECCA L. MAAHS
MAKAYLA MACLIN
PHILIP JOHN MCGARGILL
ANDREW W. MULLER
LINDA CHANNON MURPHY
JANETTE K. NELSON
CHAD DOUGLAS PRIMMER
ANGELA PROBASCO
CHARLES RONES
CAROLYN ANN ROWLAND
ROBERT C. SEILER II
TIMOTHY AARON SHULTZ
ALLEN L. SPIKER
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SHAWN SWELEY
CINDY ANN TATE
RONALD G. THEIS
PETER THEW
HEIDI KRINGS TONEY
TIMOTHY PAUL TRYSLA
DONALD GARY TYSON
RICHARD DEAN VROMAN

CHRISTOPHER GEORGE WADDLE
Y. EVETTE LOPER WATT
HORACIO JOSE WHEELOCK
JOHN WIECHMANN

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No. S-00-967: **Rydberg v. I.H.S. Inc**. Reversed and remanded with directions. Stephan, J.

No. S-01-897: **Gallner v. Gallner**. Affirmed. Miller-Lerman, J.

No. S-01-1269: **Dawes Cty. Bd. of Equal. v. Suchor**. Affirmed. Miller-Lerman, J.

No. S-01-1367: **State v. Caddy**. Sentence vacated, and cause remanded for resentencing. Stephan, J.

No. S-02-076: **State v. Beltran**. Affirmed. Per Curiam.

No. S-02-331: **Weeder v. Courtney**. Reversed and remanded for further proceedings. Miller-Lerman, J.

No. S-02-373: **Presle v. Presle**. Reversed and remanded for further proceedings. Per Curiam.

No. S-02-379: **Judd v. Olmeda**. Reversed and remanded for further proceedings. Gerrard, J.

No. S-02-477: **Fundco, Inc. v. Spatz**. Affirmed. Stephan, J.

No. S-02-605: **Chojolan v. Armour Food Co**. Reversed and remanded with directions. Hendry, C.J.

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No. S-01-440: **State v. West**. Judgment of Court of Appeals affirmed.

No. S-01-489: **State ex rel. Counsel for Dis. v. Thompson**. Respondent is reinstated to the practice of law, subject to the conditions of reinstatement set forth in the court's judgment entered November 1, 2002.

No. S-01-1150: **Teal v. Dickhaut**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. S-01-1395: **Miller v. Burlington Northern RR. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-02-226: **Gateway Construction v. Walter**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-02-261: **In re Proposed Amend. to Title 291**. Motion considered; appeal dismissed.

No. S-02-527: **Phelps Co. v. Olson**. Stipulation allowed; appeal dismissed.

No. S-02-554: **State v. Hess**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-604: **Bell v. Ridgetop Holding Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-02-663: **State v. Maly**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. S-02-666: **State v. Miner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-721: **State v. Simants**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-02-831: **State v. McCain**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-1040: **State v. Holt**. Motion of appellee for summary dismissal sustained; appeal dismissed.

No. S-02-1202: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-1286: **State v. Leon**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-1320: **State v. Marks**. Upon consideration of appellee's suggestion of remand, to which appellant has filed no response, the cause is remanded to the district court for Douglas County for resentencing on appellant's conviction of the offense of use of a firearm to commit a felony, in order to allow proper credit for time served, including time spent in custody pending resolution of the direct appeal. See, *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); Neb. Rev. Stat. § 83-1,106(1) (Reissue 1999).

No. S-02-1336: **State ex rel. Counsel for Dis. v. Wintroub**. Edward L. Wintroub suspended from the practice of law in the State of Nebraska effective immediately until further order of this court.

No. S-02-1375: **State v. El-Tabech**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). Issues procedurally barred.

No. S-03-152: **Morrison Enters. v. Aetna Cas. & Surety Co**. The July 22, 2002, order was a final, appealable order. No timely motion or appeal having been taken from that order, all subsequent orders by the district court are without jurisdiction. Appellant's motion to vacate the February 18, 2003, order is sustained, and the district court is directed to reinstate the July 22, 2002, order. Appellee's motion for summary dismissal is overruled. By order of the court, appeal dismissed. See rule 7A(2).

No. S-03-284: **State v. Carter**. Appeal dismissed. See rule 7A(2).

No. S-03-323: **State ex rel. Counsel for Dis. v. Rasmussen**. Judgment of suspension.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

No. A-00-1164: **Kieselhorst v. Schneiderheinz**. Petition of appellant for further review overruled on December 18, 2002.

No. A-00-1314: **Albers v. Atlas Roofing Corp**. Petition of appellant for further review overruled on January 3, 2003.

No. A-01-068: **Anderson Excav. & Wrecking Co. v. Argus Dev. Co**. Petition of appellant for further review overruled on April 9, 2003.

No. A-01-114: **State on behalf of Hannon v. Rosenberg**, 11 Neb. App. 518 (2002). Petition of appellee for further review overruled on January 30, 2003.

No. A-01-254: **Shilling v. Shanks**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-290: **Neff v. Wenzl**. Petition of appellant for further review overruled on December 18, 2002.

No. A-01-296: **Hyde v. Hyde**. Petition of appellee for further review overruled on December 11, 2002.

No. A-01-327: **Arias v. Krutz**. Petition of appellant for further review overruled on March 19, 2003.

No. A-01-390: **Harvey Oaks Homeowner's Assn. v. Aslan Company**. Petition of appellant for further review overruled on March 12, 2003.

No. A-01-507: **Deal v. State**. Petition of appellee for further review overruled on April 23, 2003.

No. A-01-513: **McGuire v. McGuire**, 11 Neb. App. 433 (2002). Petition of appellant for further review overruled on January 23, 2003.

No. A-01-613: **Harvey Oaks Dental v. Peter Letterese & Assocs**. Petition of appellee for further review overruled on March 12, 2003.

No. A-01-694: **American Bus. Info. v. Burgess**. Petition of appellee for further review overruled on March 19, 2003.

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No. A-01-771: **Washington Cty. Bd. of Equal. v. Rushmore Borglum**, 11 Neb. App. 377 (2002). Petition of respondent for further review overruled on April 9, 2003.

No. A-01-802: **In re Trust Created by Charles E. Fleecs**. Petition of appellee for further review overruled on February 12, 2003.

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No. A-01-1106: **Van Valkenburg v. Liberty Lodge No. 300**. Petition of appellant for further review overruled on February 26, 2003.

No. A-01-1126: **State v. Griess**, 11 Neb. App. 389 (2002). Petition of appellee for further review overruled on January 23, 2003.

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No. A-01-1261: **Wunderlich v. Miller**. Petition of appellee for further review overruled on December 11, 2002.

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No. A-01-1268: **State v. Arias**. Petition of appellant for further review overruled on February 28, 2003.

No. A-01-1283: **State v. Miller**, 11 Neb. App. 404 (2002). Petition of appellant for further review overruled on January 15, 2003.

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No. A-01-1344: **State v. Hernandez**. Petition of appellant for further review overruled on March 26, 2003.

No. A-01-1345: **State v. Shock**, 11 Neb. App. 451 (2002). Petition of appellee for further review overruled on January 29, 2003.

No. A-01-1387: **State v. Hall**. Petition of appellant for further review overruled on January 15, 2003.

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No. A-02-071: **State v. Chairez**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-075: **State v. Conrad**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-088: **In re Guardianship & Conservatorship of Hartwig**, 11 Neb. App. 526 (2003). Petition of appellee for further review overruled on March 12, 2003.

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No. A-02-282: **State v. Davis**. Petition of appellant for further review overruled on December 11, 2002.

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No. A-02-345: **State v. Carpenter**. Petition of appellant for further review overruled on March 12, 2003.

No. S-02-379: **Judd v. Olmeda**. Petition of appellant for further review sustained on February 12, 2003.

No. A-02-450: **State v. Thompson**. Petition of appellant for further review overruled on April 9, 2003.

No. A-02-508: **State v. Spencer**. Petition of appellant for further review overruled on March 19, 2003.

No. A-02-519: **State v. Gunter**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-570: **State v. Buggs**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-588: **State v. Neemann**. Petition of appellant for further review overruled on December 11, 2002.

No. A-02-600: **State v. Jackett**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-608: **Mihm v. American Tool**, 11 Neb. App. 543 (2003). Petition of appellant for further review overruled on March 12, 2003.

No. A-02-624: **In re Interest of Dylan M.** Petition of appellant for further review overruled on April 16, 2003.

No. A-02-626: **State v. Tinnell**. Petition of appellant for further review overruled on December 18, 2002.

No. A-02-628: **State v. Theodoropoulos**. Petition of appellant for further review overruled on January 29, 2003.

No. A-02-677: **State v. Vargas-Godinez**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-699: **State v. Christlieb**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-719: **State v. Jacobson**. Petition of appellant for further review overruled on April 16, 2003.

No. A-02-720: **State v. Ellis**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-734: **State v. Wessling**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-744: **State v. Polston**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-745: **State v. Core**. Petition of appellant for further review overruled on February 12, 2003.

No. A-02-763: **In re Interest of Sarah K. et al**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-776: **State v. Brody**. Petition of appellant for further review overruled on February 26, 2003.

No. A-02-784: **State v. Zuck**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-788: **In re Interest of Chico B. & Cheri B**. Petition of appellant for further review overruled on April 30, 2003.

No. A-02-805: **State v. Stewart**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-825: **State v. Thille**. Petition of appellant for further review overruled on March 12, 2003.

No. A-02-838: **State v. Jenkins**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-856: **Prokop v. Columbus Irrigation**. Petition of appellant for further review overruled on January 3, 2003.

No. A-02-910: **State v. Overstreet**. Petition of appellant for further review overruled on March 19, 2003.

No. A-02-915: **State v. Whitmer**. Petition of appellant for further review overruled on January 29, 2003.

No. S-02-967: **Mumin v. Dees**. Petition of appellant for further review sustained on March 12, 2003.

Nos. A-02-990 through A-02-992: **State v. Miner**. Petitions of appellant for further review overruled on March 19, 2003.

No. A-02-1009: **Martin v. Board of Parole**. Petition of appellant for further review overruled on January 15, 2003.

No. A-02-1025: **State v. Williams**. Petition of appellant for further review overruled on March 26, 2003.

No. A-02-1078: **Martin v. Lindner**. Petition of appellant for further review overruled on January 23, 2003.

No. A-02-1082: **State v. Van Meveren**. Petition of appellant for further review overruled on March 26, 2003.

No. A-02-1095: **State v. Threats**. Petition of appellant for further review overruled on March 12, 2003.

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No. A-02-1136: **Nebraska Furniture Mart v. Duffy**. Petition of appellant for further review overruled on January 29, 2003.

No. A-02-1191: **State v. Ramos**. Petition of appellant for further review overruled on February 26, 2003.

No. A-02-1231: **Patz v. Department of Corr. Servs.** Petition of appellant for further review overruled on April 9, 2003.

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No. A-02-1288: **Anzalone v. Department of Corr. Servs.** Petition of appellant for further review overruled on February 12, 2003.

No. A-02-1344: **State v. Roundtree**. Petition of appellant for further review overruled on April 23, 2003.

No. A-02-1354: **Nelson v. Weiler**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-1355: **Kirkpatrick v. Wiler**. Petition of appellant for further review overruled on February 20, 2003.

No. A-02-1402: **State v. Sorensen**. Petition of appellant for further review overruled on April 23, 2003.

No. A-03-070: **State v. Lang**. Petition of appellant for further review overruled on April 9, 2003.

No. A-03-082: **Holder v. Kenny**. Petition of appellant for further review overruled on May 6, 2003.

No. A-03-097: **Robinson v. Board of Parole**. Petition of appellant for further review overruled on April 16, 2003.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

TIMOTHY S. EGAN, APPELLANT, V.
ALAN G. STOLER, APPELLEE.
653 N.W.2d 855

Filed December 13, 2002. No. S-01-461.

1. **Summary Judgment: Appeal and Error.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Malpractice: Words and Phrases.** Any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice.
5. **Limitations of Actions: Malpractice: Torts: Contracts.** If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in Neb. Rev. Stat. § 25-222 (Reissue 1995) applies.
6. **Limitations of Actions.** The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit.
7. **Malpractice: Limitations of Actions.** The discovery exception of Neb. Rev. Stat. § 25-222 (Reissue 1995) applies only in those cases in which the plaintiff did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations.
8. ____: ____. The 2-year statute of limitations contained in Neb. Rev. Stat. § 25-222 (Reissue 1995) is applicable notwithstanding the fact that the plaintiff may not discover the cause of action until shortly before the expiration of the time period.
9. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.

10. **Malpractice: Limitations of Actions.** If an action is not to be considered time barred, a plaintiff must file within 2 years of the alleged act or omission or show that the action falls within the exceptions of Neb. Rev. Stat. § 25-222 (Reissue 1995) as to the discovery of a defendant's alleged negligence.
11. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.

Appeal from the District Court for Douglas County: J. MICHAEL COFFEY, Judge. Affirmed.

Thomas M. Locher and Robyn R. Loveland, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for appellant.

William R. Johnson and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Timothy S. Egan appeals from an order sustaining a motion for summary judgment in favor of appellee, Alan G. Stoler. The district court found Egan's claims barred by the statute of limitations for professional negligence. We conclude that Egan has abandoned all of his claims except whether a statute of limitations for professional negligence applies to the claim of a conflict of interest and, if so, whether the statute of limitations ran barring Egan from bringing a professional negligence cause of action against Stoler. We conclude that Egan's claim is time barred by the 2-year professional negligence statute of limitations, but our analysis differs from the district court's analysis. Accordingly, we affirm the district court's order.

BACKGROUND

In May 1992, Egan, a licensed attorney, was convicted in federal court on criminal conspiracy to distribute methamphetamine. In September 1992, Egan was sentenced to 188 months in federal prison. After trial, Egan dismissed his trial counsel and retained Stoler to appeal his conviction.

On November 23, 1992, Egan and Stoler met for the first time at the Federal Medical Center in Rochester, Minnesota, where Egan was confined. Initially and throughout their conversations, Egan alleges he indicated to Stoler his desire to pursue a claim of ineffective assistance of trial counsel. Egan claims specifically to have asked Stoler if he was aware of any rumors that his trial counsel had abused drugs or alcohol during his representation of Egan. Egan claims that Stoler denied having such knowledge. At the same time, however, Stoler was representing a client who testified before a grand jury investigating Egan's trial counsel's involvement in drug-related crimes. Egan alleges that Stoler did not advise Egan of his potential conflict of interest at this time.

In June 1993, Stoler filed Egan's direct appeal in the Eighth Circuit Court of Appeals. The appeal did not raise the issue of ineffective assistance of trial counsel. Both Stoler and Egan agreed to this strategy. On September 13, Stoler argued the appeal in front of the Eighth Circuit. On February 28, 1994, the Eighth Circuit affirmed Egan's conviction.

In the following months, Egan discussed with Stoler the possibility of filing for a rehearing en banc to the Eighth Circuit Court of Appeals and the possibility of filing a writ of certiorari to the U.S. Supreme Court. Neither strategy was employed. In May 1994, Stoler's formal representation of Egan ended. Egan paid Stoler $37,000 for his services.

In September 1994, Egan was disbarred as a result of his conviction. See *State ex rel. NSBA v. Egan*, 246 Neb. 583, 520 N.W.2d 779 (1994). While at the Federal Medical Center, Egan learned of the criminal investigation of his trial counsel by the office of the U.S. Attorney, the same office that had prosecuted Egan. Based on this newly discovered evidence, Egan asked Stoler to represent him again on a motion for new trial. Stoler considered the relevant case law for approximately a month. On October 5, 1994, Stoler informed Egan of his potential conflict of interest in that he had represented a client who testified at Egan's trial counsel's grand jury criminal investigation in September 1992.

On October 2, 1995, Egan sued Stoler in state district court on three counts: (1) negligence, (2) fraudulent misrepresentation, and (3) breach of contract. Specifically, Egan alleged that Stoler

failed to raise all relevant issues in Egan's direct appeal before the Eighth Circuit. Furthermore, Egan alleged that Stoler failed to disclose the existence of a conflict of interest throughout his representation of Egan, which directly affected Stoler's ability to independently and zealously represent Egan. Egan alleged that he would have been unable to discover the conflict of interest even in the exercise of reasonable diligence. In addition, Egan alleges that Stoler misrepresented his knowledge of Egan's trial counsel's alleged chemical dependency. Egan alleges that he relied upon Stoler's false representations to his detriment. Egan's petition seeks return of the $37,000 fee paid to Stoler.

The district court granted summary judgment in favor of Stoler on the basis that the 2-year statute of limitations under Neb. Rev. Stat. § 25-222 (Reissue 1995) for professional negligence had expired. The district court reasoned that the basis of Egan's damages was the alleged failure of Stoler to raise all relevant issues on Egan's direct appeal. Specifically, the court held that Egan knew or should have known, on or before July 1, 1993, of Stoler's alleged failure to raise an ineffective assistance of counsel claim at the time his appellate brief had been presented for review. Egan filed his lawsuit against Stoler on October 2, 1995, more than 2 years after he knew or should have known of the alleged acts giving rise to his claim. The district court granted summary judgment based upon its determination that the discovery exception of § 25-222 allowing suit within 1 year of discovery of the cause of action was not applicable. Egan appeals.

ASSIGNMENT OF ERROR

Egan assigns that the district court erred by ruling that the 2-year statute of limitations, at § 25-222 and applicable to professional negligence, barred him from seeking reimbursement for attorney fees paid to Stoler. Egan contends that the conduct of Stoler in agreeing to represent him while knowingly operating under a conflict of interest does not give rise to the application of any statute of limitations. Egan claims that therefore, the district court erred in applying the aforementioned statute of limitations and in not requiring that the aforementioned fees be disgorged. Egan claims the district court should have determined that there is no time limitation for the disgorgement of

fees paid to any attorney who knew of or should have known of a conflict of interest.

STANDARD OF REVIEW

[1] On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001); *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000).

[2] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Richmond v. Case*, 264 Neb. 319, 647 N.W.2d 90 (2002); *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002); *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002).

[3] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

ANALYSIS

In his reply brief, Egan states that "the issue before this Court is only one: whether a statute of limitations applies to the claim of conflicts of interest and, if so, whether the statute of limitations ran disabling [Egan] from bringing a professional negligence cause of action against Stoler." Reply brief for appellant at 1. We take this statement by Egan at face value and conclude that Egan has abandoned all of his claims save "whether a statute of limitations applies to the claim of conflicts of interest and, if so, whether the statute of limitations ran disabling [Egan] from bringing a professional negligence cause of action against Stoler."

The statute of limitations for professional negligence in § 25-222 provides in relevant part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or

> omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

[4,5] This court has determined that any professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice. *Olsen v. Richards*, 232 Neb. 298, 440 N.W.2d 463 (1989). If a plaintiff's claims are for professional malpractice, whether pled in tort or contract, the statute of limitations for professional negligence contained in § 25-222 applies. *Reinke Mfg. Co. v. Hayes*, 256 Neb. 442, 590 N.W.2d 380 (1999). Therefore, we view Egan's appeal before this court as a single cause of professional malpractice limited by the 2-year statute of limitations for professional negligence.

[6-8] The period of limitations begins to run upon the violation of a legal right, that is, when the aggrieved party has the right to institute and maintain suit. *Witherspoon v. Sides Constr. Co.*, 219 Neb. 117, 362 N.W.2d 35 (1985). The 1-year discovery exception of § 25-222 is a tolling provision. However, the discovery exception applies only in those cases in which the plaintiff did not discover and could not reasonably have discovered the existence of the cause of action within the applicable statute of limitations. *Berntsen v. Coopers & Lybrand*, 249 Neb. 904, 546 N.W.2d 310 (1996). In compliance with the plain meaning of the statute, we have determined that the 2-year statute of limitations is applicable notwithstanding the fact that the plaintiff may not discover the cause of action until shortly before the expiration of the time period. *Ames v. Hehner*, 231 Neb. 152, 435 N.W.2d 869 (1989).

In this case, the district court found that it was apparent from the face of Egan's petition that the action was barred by the 2-year professional negligence statute of limitations. The court reasoned that Egan's direct appeal submitted to the Eighth Circuit constituted Egan's basis of relief. The court concluded

that Egan knew his direct appeal did not raise the issue of ineffective assistance of counsel as of July 1, 1993. The court dismissed Egan's petition filed on October 2, 1995, because it was barred by the 2-year statute of limitations. The court determined that no exception applied.

[9] Although we agree with the district court's conclusion, our analysis of the facts and time periods differ. We conclude that Egan's cause of action accrued when Egan retained Stoler on November 23, 1992. At this time, Stoler had a duty to disclose any conflict of interest. See Canon 5, DR 5-105(A) through (C), of the Code of Professional Responsibility. If he did not disclose, he breached his fiduciary duty. On October 5, 1994, Stoler informed Egan that he could not represent him in his postconviction motion because of a possible conflict of interest. As of October 5, Egan was on notice of Stoler's failure to disclose. Since Egan discovered the facts upon which he bases his cause of action within the 2-year time limitation, the discovery rule is inapplicable. Since no other exception applied, Egan's action was time barred as of November 23, 1994, 2 years after Stoler's breach occurred. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002).

[10,11] If an action is not to be considered time barred, a plaintiff must file suit within 2 years of the alleged act or omission or show that the action falls within the exceptions of § 25-222 as to the discovery of a defendant's alleged negligence. *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994). Likewise, if a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute. *Teater v. State*, 252 Neb. 20, 559 N.W.2d 758 (1997); *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). We conclude that Egan's claim, as defined by Egan in his reply brief, alleges a cause of action barred by the statute of limitations and does not set forth an excuse which would toll the operation of the statute.

CONCLUSION

We conclude that Egan's claim is barred by the 2-year professional negligence statute of limitations and that no exception applies. Although our application of the statute of limitations differs from the district court's analysis, we affirm the district court's order sustaining a motion for summary judgment in favor of Stoler.

AFFIRMED.

HENDRY, C.J., not participating.

CRETE EDUCATION ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLEE, V. SALINE COUNTY SCHOOL DISTRICT NO. 76-0002, ALSO KNOWN AS CRETE PUBLIC SCHOOLS, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT.

654 N.W.2d 166

Filed December 13, 2002. No. S-01-617.

1. **Commission of Industrial Relations: Appeal and Error.** Any order or decision of the Commission of Industrial Relations may be modified, reversed, or set aside by an appellate court on one or more of the following grounds and no other: if the commission acts without or in excess of its powers, if the order was procured by fraud or is contrary to law, if the facts found by the commission do not support the order, and if the order is not supported by a preponderance of the competent evidence on the record considered as a whole.
2. **Commission of Industrial Relations: Supreme Court: Evidence: Appeal and Error.** In an appeal from a Commission of Industrial Relations order regarding prohibited practices stated in Neb. Rev. Stat. § 48-824 (Reissue 1998), the Nebraska Supreme Court will affirm a factual finding of the commission if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence.
3. ____: ____: ____: ____. The Nebraska Supreme Court will consider the fact that the Commission of Industrial Relations, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the commission's judgment as to credibility.
4. **Trial: Evidence: Appeal and Error.** An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection.
5. **Labor and Labor Relations: Federal Acts: Statutes.** Decisions under the National Labor Relations Act are helpful in interpreting the Nebraska Industrial Relations Act, but are not binding.

6. **Labor and Labor Relations: Employer and Employee.** Direct dealing occurs when an employer undercuts the authority of a collective bargaining agreement by negotiating directly with an individual employee regarding a mandatory subject of bargaining.
7. **Labor and Labor Relations: Federal Acts.** Wages, hours, and other terms and conditions of employment or any question arising thereunder are considered to be mandatory subjects of bargaining under the Nebraska Industrial Relations Act.
8. **Labor and Labor Relations: Waiver: Words and Phrases.** In the context of the Nebraska Industrial Relations Act, waiver is defined as a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right.
9. **Waiver: Estoppel.** In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his or her part.
10. **Commission of Industrial Relations: Administrative Law: Equity.** The Commission of Industrial Relations does not have authority to grant declaratory or equitable relief.
11. **Commission of Industrial Relations: Administrative Law: Statutes: Jurisdiction.** The Commission of Industrial Relations is an administrative body performing a legislative function. Thus, it has only those powers delineated by statute, and should exercise that jurisdiction in as narrow a manner as may be necessary.
12. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
13. **Injunction.** Injunctive relief is generally preventative, prohibitory, or protective.
14. **Commission of Industrial Relations.** Neb. Rev. Stat. § 48-825(2) (Reissue 1998) authorizes the Commission of Industrial Relations, upon a finding that a party has committed a prohibited practice, to order an appropriate remedy.
15. **Commission of Industrial Relations: Administrative Law: Federal Acts.** Cease and desist orders are nothing more than the Commission of Industrial Relations' ordering a party to cease and desist violating provisions of the Nebraska Industrial Relations Act.

Appeal from the Nebraska Commission of Industrial Relations. Affirmed in part, and in part reversed.

Kelley Baker and Karen A. Haase, of Harding, Shultz & Downs, for appellant.

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

Robert A. Bligh for amicus curiae Nebraska Association of School Boards.

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

HENDRY, C.J.

I. INTRODUCTION

The Crete Education Association (CEA) filed a complaint against Saline County School District No. 76-0002, also known as Crete Public Schools (District), with the Commission of Industrial Relations (CIR). The CEA alleged that the District engaged in prohibited labor practices under Neb. Rev. Stat. § 48-824(2) (a), (e), and (f) (Reissue 1998). The CIR found for the CEA. The District appeals. Both the District and the CEA filed petitions to bypass the Nebraska Court of Appeals, which this court granted.

II. FACTUAL BACKGROUND

On March 9, 2000, the CEA requested negotiations with the District regarding the terms and conditions of teacher employment for the upcoming 2000-2001 school year. The District agreed to negotiate, and negotiations began on April 19, 2000. At no time during the negotiation sessions was impasse reached or declared.

Near the time that negotiations were requested, a position for an industrial technology teacher at Crete High School became available. The District was concerned about its ability to fill this position with a qualified applicant and, accordingly, expanded its advertising for the position. Five or six applications for the position were received, but only three were deemed suitable to interview. Interviews for the three applicants were scheduled for April 3, 2000, but only two applicants were actually interviewed. The position was offered to Matthew Hintz on April 4.

Prior to offering the position to Hintz, Kim Sheppard, principal of Crete High School, discussed the results of the interview process with Dr. John Fero, superintendent of the District. Sheppard expressed concern over whether Hintz would accept the offer, given the $21,000 yearly salary. Due to Sheppard's concern, Dr. Fero authorized Sheppard to offer Hintz a starting salary of $24,000, an amount which Dr. Fero testified he felt would be within the range of the base salary after the negotiations between the District and the CEA were completed for the 2000-2001 school year.

At the District's school board meeting held April 10, 2000, the District approved the hiring of Hintz. While the minutes of

that board meeting do not reflect the $24,000 starting salary, there was testimony that the board did discuss the amount of the starting salary at that meeting. The meeting was attended by Chad Denker, past president of the CEA, as well as Jana Fulton, president of the CEA during the relevant negotiations. The record reflects that at this meeting, the board "opened up the floor" for general public comment, but none was made. When Hintz signed his contract on April 27, the salary amount was left blank pending the upcoming negotiations.

Negotiations between the CEA and the District commenced on April 19, 2000, with a goal to formulate a collective bargaining agreement for the 2000-2001 school year. Each side was represented by a negotiating team. Representing the District were Dr. Fero, then school board president Dr. Gary Lothrop, and chief negotiator Gary Williams, who was also a school board member. Representing the CEA were Denker, Fulton, Jennene Puchalla, and chief negotiator Mike Coe.

At this first meeting, one of the issues raised by the CEA was the salary to be paid some of the new teachers. In addressing this issue, Dr. Fero noted that Hintz had been promised $24,000, but had signed a blank contract.

The next three negotiation sessions took place between May 3 and June 14, 2000. The District made five different offers during these sessions, with an effective base salary ranging from $23,661 to $24,826. The CEA's proposals made during these negotiations included base salaries of $21,900 to $22,200.

A fifth and final negotiation meeting was held on August 8, 2000. At this meeting, the District presented its sixth proposal which included, in effect, a base salary of $23,716. The CEA countered with their sixth proposal, which included a base salary of $21,700. At this juncture, the District questioned why the CEA did not favor an increase in the base salary. According to the minutes of that session:

> Mike Coe explained CEA wanted to keep the current index. There is not a board policy that he is aware of that prohibits them [the District] from giving a bonus, because it would not affect the salary index.
>
> The entire CEA Negotiations team does not agree with giving a non-experienced teacher any extra steps.

The District then presented its seventh proposal, which included a base salary of $21,650. In response to Fulton's concern about the low base salary for the upcoming year, the minutes reflect that the District's business manager "stated that the CEA told them to give a bonus." The minutes further reflect that "Mike Coe explained again that there is no board policy which prevents the board from giving a bonus, but that the Negotiation Team did not endorse or approve of it."

The District's seventh proposal was approved by the membership of the CEA. This agreement contained, inter alia, a base salary of $21,650, but made no mention of signing bonuses. On August 30, 2000, however, the District and Hintz entered into a separate agreement to make up the difference between the $24,000 promised contract price and the $21,650 base price through the payment of a bonus.

The CEA learned of this separate agreement, and on November 16, 2000, filed suit in the CIR pursuant to the Nebraska Industrial Relations Act (NIRA), Neb. Rev. Stat. §§ 48-801 to 48-842 (Reissue 1998). The CEA alleged that the District had engaged in prohibited labor practices in violation of § 48-824(2)(a), (e), and (f) by refusing to bargain with respect to the " 'signing bonuses,' " by "dealing directly" with Hintz, and by unilaterally repudiating the salary schedule in the parties' negotiated agreement.

A hearing was held before the CIR on February 1, 2001. District superintendent Dr. Fero's testimony reflected that the District had made six proposals prior to the proposal which the CEA accepted and that all six proposals included a base salary at or near $24,000. Dr. Fero further testified that the District felt it was necessary to raise the base salary in order to attract new teachers and remain competitive with other districts. He then testified that after the District had expressed concern over the low base salary, the CEA responded by informing them that there was nothing in law or policy to prevent the District from paying a bonus, but that the CEA did not endorse or approve of it. Dr. Fero testified that he took these statements to mean that the CEA was "saying it's okay to pay bonuses" and further, that the District had changed its negotiating position in reliance on the CEA's apparent willingness to allow the payment of signing bonuses. He stated that the District would not have agreed to a

base salary of $21,650 without a "clear agreement" that it could pay a signing bonus to Hintz.

Dr. Lothrop, president of the District's school board during the time of the relevant negotiations, testified that the impetus for the school board's change in position regarding the desire for a $24,000 base was the fact that the beginning of the school year was fast approaching and that the District wanted a new agreement before the new school year began. He testified that "settling [this agreement] before school I don't think anybody would disagree in this room is in the best interest of the teachers, the board, the administration and the students." He similarly testified that he felt the CEA had agreed to the use of a bonus as a solution to the District's low base salary problem.

Coe, chief negotiator for the CEA, testified that the minutes were accurate in recording his statement that "there is no board policy which prevents the board from giving a bonus." However, he explained that he felt the minutes did not adequately express his emphasis that the CEA did not endorse or approve the idea of paying a bonus. He testified that he felt he had been clear in communicating that the CEA was not endorsing or approving the use of bonuses.

Fulton, on behalf of the CEA, testified that at the first negotiation meeting on April 19, 2000, Denker raised the issue of paying Hintz $24,000, but that Hintz' name did not come up in the discussions after that time. Fulton further testified recalling discussions on paying bonuses, but contended that those discussions occurred only in the last session and not throughout the negotiations and that she believed the CEA's opposition to the payment of bonuses to be clear.

Puchalla testified that it was her belief that the District intended to pay Hintz $24,000 regardless of how the negotiations proceeded. Puchalla further testified that she believed Coe was clear in communicating the CEA's position that it did not approve of the use of a signing bonus.

The CIR entered its order on May 1, 2001, finding that by directly communicating with Hintz in April 2000 regarding his base salary of $24,000, and in August 2000 regarding his signing, the District engaged in impermissible direct dealing in violation of § 48-824(2)(a), (e), and (f). The CIR further found that

payment of $2,350 in the form of a signing bonus, per the August 2000 agreement, was in violation of the collective bargaining agreement and § 48-824(2)(a) and (e).

The CIR further concluded that the CEA had not waived its right to object to the signing bonuses, nor had it waived its right to file a claim with the CIR by failing to first file a grievance pursuant to the negotiated agreement. Finally, the CIR found that the parol evidence rule prevented the consideration of any statements relating to the use of signing bonuses in an attempt to reform the final negotiated bargaining agreement.

The CIR granted several remedies to the CEA. First, while it allowed the District to pay Hintz the disputed signing bonus for the 2000-2001 school year, it ordered the District to cease and desist from paying that bonus after August 1, 2001. The District was further ordered to cease and desist from the payment of any signing bonuses or other compensation which would otherwise be the subject of mandatory bargaining and was not contained in a negotiated agreement. In addition, the District was ordered to cease and desist from deviating from the negotiated agreement and to cease and desist from directly dealing with its represented employees on matters which constituted terms and conditions of employment. Finally, the District was ordered to post notices explaining that it had engaged in prohibited labor practices and would not do so again in the future. The District appealed.

III. ASSIGNMENTS OF ERROR

The District assigns, restated, that the CIR erred in (1) failing to find that the CEA negotiated in bad faith thereby "bar[ring] it from litigating . . . the issue of a signing bonus"; (2) refusing to consider parol evidence in the course of negotiations between the CEA and the District pertaining to the payment of signing bonuses; (3) finding that the District engaged in direct dealing; (4) failing to find that the CEA had "waived its right" to complain about the District's payment of a bonus by failing to file a grievance pursuant to the negotiated agreement; and (5) entering declaratory and injunctive relief, which exceeded "the commission's limited statutory authority and is, therefore, contrary to law."

IV. STANDARD OF REVIEW

[1] Our scope of review of CIR orders relating to § 48-824 violations is specifically set forth in § 48-825(4), which states:

> Any order or decision of the commission may be modified, reversed, or set aside by the appellate court on one or more of the following grounds and no other:
>
> (a) If the commission acts without or in excess of its powers;
>
> (b) If the order was procured by fraud or is contrary to law;
>
> (c) If the facts found by the commission do not support the order; and
>
> (d) If the order is not supported by a preponderance of the competent evidence on the record considered as a whole.

See *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999).

[2,3] In an appeal from a CIR order regarding § 48-824 prohibited practices, concerning a factual finding, we will affirm that finding if, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a preponderance of the competent evidence. This court will consider the fact that the CIR, sitting as the trier of fact, saw and heard the witnesses and observed their demeanor while testifying and will give weight to the CIR's judgment as to credibility. *Id.*

V. ANALYSIS

1. Bad Faith

In its first assignment of error, the District asserts the CIR erred in failing to find the CEA negotiated in bad faith. The District contends the CEA acted in bad faith by first suggesting the payment of bonuses and then filing suit in the CIR when that course of action was followed. According to the District, Coe's statement that there was "no board policy which prevents" the District from paying a bonus waived any right the CEA had to complain about the District's payment of a signing bonus to Hintz.

The District relies on *Century Electric Motor Company v. N. L. R. B.*, 447 F.2d 10 (8th Cir. 1971), decided under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq.

(2000), for the proposition that it is bad faith for a union to remain silent on an issue of possible contention and then sue after an agreement is finalized. See, *Nebraska Pub. Emp. v. Otoe Cty., supra*; *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979) (determining that cases decided under NLRA can be helpful in interpreting NIRA, but are not binding).

In *Century Electric Motor Company v. N. L. R. B., supra*, an employer announced to its employees in late November 1968 that it would be unable to pay a Christmas bonus that year. At the time the announcement was made, the employer was involved in negotiations with the employees' union. On December 10, the two sides met to finalize their bargaining agreement. Though the members of the union's negotiating team were aware that there would be no Christmas bonuses that year, they did not complain about that fact at the final negotiating session. One week after a new agreement was finalized, the union attempted to force the employer to negotiate over the Christmas bonus for that year. When the employer refused, the union sued, arguing that since the bonus was a wage, hour, term, or condition of employment, the employer could not unilaterally withdraw it. The court rejected the union's argument, stating:

> The statutory purpose of having general collective bargaining agreements negotiated would inherently seem to be to have the parties engage in good-faith endeavor to effect as full a basis as possible for securing harmonious relations between them. This intent of the [NLRA] is not being properly served if the parties do not deal with each other in that approach and spirit in their negotiation of such an agreement. An attempt by either party in such a general negotiation to conceal and withhold some harbored grievance of which the other is not aware, in order to avoid discussion and possible fusion on it and so to keep the door open to subsequent controversy and contention between them, is not conduct which is entitled to administrative or judicial approbation, nor should it be lightly made the subject of any unrequired ancillary rewarding.

Century Electric Motor Company v. N. L. R. B., 447 F.2d at 13.

Century Electric Motor Company is distinguishable. In the case before us, the CIR found:

> The record reveals that there were no false representations or concealment of material facts on the part of the Association. On the contrary, the Association in negotiations with the District clearly stated that while the Association's representative could find no board policy which prevented the district from giving a bonus, the Association did not endorse or approve of such bonuses. We find no evidence in the record that this representation was false, nor do we find that the Association tried to conceal any policy.

It is clear from the record that the discussions between the District and the CEA concerning wages, hours, and other terms and conditions of employment included a dialog regarding signing bonuses. The parties, however, dispute the manner in which this dialog was resolved. The District maintains it left the final negotiating session on August 8, 2000, thinking it could pay bonuses, based in part upon the August 8 minutes wherein Coe is recorded to have said that "[t]here is not a board policy that he [Coe] is aware of that prohibits them from giving a bonus . . . ." The CEA, on the other hand, maintains it left believing it had made its opposition to bonuses clear, also relying, in part, on the August 8 minutes wherein it is further recorded that "Mike Coe explained again that there is no board policy which prevents the board from giving a bonus but that the Negotiation Team did not endorse or approve of it."

The issue before us on appeal is not whether there was evidence to support the District's claim, but whether, considering the whole record, a trier of fact could reasonably conclude that the finding is supported by a "preponderance of competent evidence." *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 53-54, 595 N.W.2d 237, 245 (1999). Accord § 48-825(4)(d). Based upon our review of the record, we determine that the CIR's findings on the issue of bad faith were supported by a preponderance of competent evidence, were within the scope of the CIR's statutory authority, and were not contrary to law. Accordingly, the District's first assignment of error is without merit.

2. Parol Evidence

In its second assignment of error, the District argues that the CIR erred in refusing to consider parol evidence regarding the course of negotiations between the CEA and the District. The District first contends this evidence should have been considered to show that (1) the CEA negotiated in bad faith, (2) the issue of signing bonuses was "actually negotiated," and (3) the signing bonus agreement supplemented the negotiated agreement and was not parol evidence. Brief for appellant at 18. Assuming, without deciding, the CIR erred in failing to admit some evidence related to the course of negotiations, we nonetheless conclude that a substantial amount of evidence regarding the purported relationship between signing bonuses and the negotiation process was received and considered by the CIR.

At the hearing before the CIR, Dr. Fero was asked by one of the District's attorneys whether there was anything that was not expressed in the written negotiated agreement that he believed to be a part of the agreement. The CEA made a parol evidence objection. The following exchange between one of the District's attorneys and the CIR judge then took place:

> [CIR judge:] Are you — so you are asking for an interpretation of this? Or —
>
> [District's counsel:] No, sir. No. I — I can approach it differently by asking him what happened in negotiations. And we'll get to the same end.
>
> [CIR judge:] I am concerned about the parol evidence rule as altering or seeking to interpret an otherwise unambiguous document. We haven't talked about whether this is ambiguous or not. If you can get it, what you're getting at in a different way, I think it would be better.
>
> I will sustain the objection on the basis of the parol evidence rule and allow you to proceed.

At that point, Dr. Fero proceeded to relate the chronology of the negotiations between the parties, including statements regarding the payment of bonuses:

> [District's counsel:] Okay. Now, let's go to August 8th of 2000, the negotiating session, the minutes of which . . . .
>
> . . . [state], "Mike Coe explained CEA wanted to keep the current index. There is not a board policy that he is

aware of that prohibits them from giving a bonus because it would not affect the salary index."

The penultimate paragraph . . . says, "Mike Coe explained again that there is no board policy which prevents the board from giving a bonus but that the negotiation team did not endorse or approve of it."

In prior negotiating sessions, had the Board of Education proposed starting salaries of 24,000 or $23,650?

[Dr. Fero:] Prior to Proposal No. 7, which was the . . . final accepted by both sides, there were six offers by the Board . . . and there were six offers made by the CEA. All six . . . offered either above or just under 24. . . .

. . . .

The board made . . . it very clear from the very outs[et] of negotiations that it . . . wanted to have the starting salary at $24,000. . . .

The board . . . wanted to be competitive. . . .

. . . .

. . . And it was discussed upon how can we get to 24 — how can we attract teachers if you're at $21,700 . . . .

And the response was, well, you can't give signing bonuses, we don't approve of it, we don't like it but there's nothing in board policy that prohibits you from doing that.

Q. When you say the response was, who are you referring to? Mr. Coe?

A. Mr. Coe.

. . . .

Q. Then let me ask you to focus on this. You said from the outset. Do you mean from the first negotiating session . . . you raised the issue of Mr. Hintz and the amount of pay that the board had committed to paying him?

. . . .

A. Yes, we did.

. . . .

Q. Okay. Now, you were discussing it at the negotiating session on August 10th of — or August 8th of 2000, the last session? That's the — reflected in the minutes . . . .

A. Correct.

> Q. . . . Mr. Coe is listed in these exhibits as saying that there is — he's not aware of any board policy that prohibits the board from giving . . . a signing bonus. What did you understand his statements to mean?
>
> A. That what we had done with Mr. Hintz they did not approve of but they saw no reason why we couldn't do it.
>
> The whole — the whole part up to where [the minutes] says the board asked to caucus, everything was how do we attract teachers into this district, especially in extremely difficult areas to fill.
>
> We discussed this at great length. And they said the CEA said there isn't any problem with giving bonuses. . . .
>
> . . . .
>
> . . . I understood that the — and the board negotiating committee understood that to mean that the CEA was saying its okay to pay bonuses.

The record further shows the CIR considered the course of negotiations in its decision and order. The CIR's order states:

> During negotiations, Mike Coe, an Association representative, informed the Board that he knew of no law or Board policy which would prevent the Board from giving teachers bonuses, but that the Association's negotiation team did not endorse or approve bonuses. The District then presented its seventh proposal with a base salary of $21,650 on a 5 x 4 salary schedule. The parties completed negotiations without reaching impasse and without impasse being declared when the Association accepted this proposal, and the parties signed the 2000-2001 collective bargaining agreement on August 14, 2000 . . . .
>
> . . . .
>
> . . . [T]he Association in negotiations with the District clearly stated that while the Association's representative could find no board policy which prevented the district from giving a bonus, the Association did not endorse or approve of such bonuses.

[4] This court has held, "An improper exclusion of evidence is ordinarily not prejudicial where substantially similar evidence is admitted without objection." *Leavitt v. Magid*, 257 Neb. 440, 444-45, 598 N.W.2d 722, 726 (1999). The record shows that

substantial evidence was admitted regarding signing bonuses and its effect on the course of negotiations between the parties. The record further demonstrates that such was considered by the CIR. Therefore, any error by the CIR was not prejudicial to the District and is harmless. The District's second assignment of error is without merit.

3. Direct Dealing

In its third assignment of error, the District argues the CIR erred in finding that it had engaged in direct dealing in violation of § 48-824(2)(a) and (e). For the sake of completeness, we note that the District makes no specific argument with respect to the CIR's findings (1) that the District's actions were direct dealing in violation of § 48-824(2)(f) or (2) that the District's unilateral actions in paying the signing bonuses violated the collective bargaining agreement and § 48-824(2)(a) and (e). We therefore limit our analysis to the specific arguments of the District. Section 48-824(2)(a) and (e) states:

> It is a prohibited practice for any employer or the employer's negotiator to:
>
> (a) Interfere with, restrain, or coerce employees in the exercise of rights granted by the Industrial Relations Act;
>
> . . . .
>
> (e) Refuse to negotiate collectively with representatives of collective-bargaining agents as required by the Industrial Relations Act.

[5] Section 48-824(2)(a) and (e) are similar to § 8(a)(1) and (5) of the NLRA, codified at 29 U.S.C. § 158(a)(1) and (5) (2000). As recognized earlier, we have said that cases decided under the NLRA can be helpful in interpreting the NIRA, but are not binding. See, *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 277 N.W.2d 529 (1979). We therefore look to federal decisions interpreting § 8(a)(1) and (5) for guidance.

The District cites *Permanente Medical Group, Inc.*, 332 N.L.R.B. No. 106 (Oct. 31, 2000), as setting forth the appropriate analysis when evaluating a claim of direct dealing. The analysis employed in *Permanente Medical Group, Inc.* has been

applied to labor relations cases by the U.S. Supreme Court. See *Medo Corp. v. Labor Board*, 321 U.S. 678, 64 S. Ct. 830, 88 L. Ed. 1007 (1944). We agree with the District that *Permanente Medical Group, Inc.* provides an appropriate test and proceed to evaluate the District's claim under its holding.

In *Permanente Medical Group, Inc., supra*, the NLRB identifies the elements of direct dealing as follows: (1) The employer was communicating directly with union-represented employees; (2) the discussion was for the purpose of establishing wages, hours, and terms and conditions of employment or undercutting the collective bargaining unit's role in bargaining; and (3) such communication was made to the exclusion of the collective bargaining unit. We will discuss these elements below.

(a) Dealing With Hintz to Exclusion of CEA

The District first argues that it did not engage in direct dealing with Hintz because direct dealing requires that the collective bargaining agent be excluded, and in this case, it contends, the CEA was not excluded. The CIR's order with respect to this issue found in relevant part:

> [T]he District met with Mr. Hintz and communicated with him directly for the purpose of establishing his wages. This communication was to the exclusion of the Association; the Association had absolutely no input before the District and Mr. Hintz agreed to a salary of $24,000 per year. After the collective bargaining agreement was entered, the District again met with Mr. Hintz on August 30, 2000 to set forth in writing that his annual compensation would total $24,000 . . . .

The CIR found that the District engaged in direct dealing with Hintz on two separate occasions—in April 2000 when Hintz and the District agreed to a contract for $24,000 and on August 30 when Hintz and the District entered into the signing bonus agreement.

(i) April Actions

[6] Direct dealing occurs when an employer "undercuts" the authority of a collective bargaining agreement by negotiating directly with an individual employee regarding a mandatory subject of bargaining. *Permanente Medical Group, Inc., supra.*

When the District made its initial offer to Hintz in April, he was not an employee of the District; nor is there evidence in the record to suggest that the April negotiations with Hintz would be covered by any other agreement between the District and the CEA. The CIR's finding that the District engaged in direct dealing in April 2000 is not supported by a preponderance of the evidence and is in error.

(ii) August Actions

The August 30, 2000, communication regarding the signing bonus, however, presents a different factual circumstance. On the date the signing bonus agreement was entered into, Hintz was an employee of the District and subject to the terms of the 2000-2001 negotiated agreement. By communicating with Hintz and thereafter entering into the "bonus" agreement, the District contracted for a different, higher starting salary. As a result, the agreement regarding signing bonuses clearly dealt with Hintz' wages. The CEA was not involved in the signing bonus agreement entered into between the District and Hintz, nor was it officially informed that such an agreement had been made.

The District cites *Toledo Typographical Union No. 63 v. N.L.R.B.*, 907 F.2d 1220, 1222 (D.C. Cir. 1990), for the proposition that "[a]n employer may deal directly with its employees over any lawful matter if it first obtains the consent of their union." This argument presupposes that the negotiations between the CEA and the District resulted in an understanding that signing bonuses could be paid, thus permitting the District to approach individual teachers to negotiate such a bonus. The CIR heard evidence pertaining to signing bonuses and the negotiation process and found that there was no understanding or agreement reached between the parties on that issue. Since we have earlier affirmed such finding, the District's argument that it had the consent of the CEA in that signing bonuses were negotiated, and thus did not act to the exclusion of the CEA, is without merit.

(b) Signing Bonus as Wage, Hour, or Condition of Employment

[7] The District next argues that it did not engage in direct dealing because a signing bonus is not a wage, hour, or condition of employment. "[W]ages, hours, and other terms and conditions

of employment or any question arising thereunder" are considered to be mandatory subjects of bargaining under the NIRA. See § 48-816(1). The CIR found that the bonus paid to Hintz was part of his wages, and thus a mandatory subject of bargaining.

The District relies on *N. L. R. B. v. Wonder State Manufacturing Company*, 344 F.2d 210 (8th Cir. 1965), to support its contention that bonuses are not the subject of mandatory bargaining. In *Wonder State Manufacturing Company*, the Eighth Circuit found that an employer was permitted to unilaterally withdraw a Christmas bonus over a union objection that the bonus was a subject of mandatory bargaining. The court emphasized that there had been no regularity in the paying of the bonus by the employer, there was no uniformity in how the employer determined the amount of the bonus, the bonus was not tied to the employee's usual remuneration, and whether a bonus was paid was tied to the financial condition and ability of the employer to afford to pay such a bonus. The District contends those same factors are present in this case: "The District had never before paid any type of signing bonus. There was no uniform bonus amount, because this was a one-time situation. Finally, the bonus was paid to Hintz because the District faced an exigency that demanded unique action." Brief for appellant at 27.

However, the court in *N. L. R. B. v. Wonder State Manufacturing Company*, 344 F.2d at 213, explained:

> The rule is that gifts per se—payments which do not constitute compensation for services—are not terms and conditions of employment, and an employer can make or decline to make such payments as he pleases, *but if the gifts or bonuses are so tied to the remuneration which employees received for their work that they were in fact a part of it, they are in reality wages and within the statute.*

(Emphasis supplied.) See, also, *N. L. R. B. v. Electric Steam Radiator Corporation*, 321 F.2d 733 (6th Cir. 1963) (containing similar language). In this case, the CIR found that "[a]fter the collective bargaining agreement was entered, the District again met with Mr. Hintz on August 30, 2000 to set forth in writing that his annual compensation would total $24,000, including a 'signing bonus' of $2,350." It is undisputed in the record that the " 'signing bonus' " was to be paid to Hintz in 12 equal installments, the

sum of which, when added to his base salary of $21,650, totaled $24,000. The CIR's finding that the bonus was a wage is, considering the whole record, supported by a preponderance of the competent evidence, is within the scope of the CIR's statutory authority, and is not contrary to law. See, *Nebraska Pub. Emp. v. Otoe Cty.*, 257 Neb. 50, 595 N.W.2d 237 (1999); § 48-825(4). The District's third assignment of error is without merit.

4. Waiver

In its fourth assignment of error, the District asserts that the CEA waived any right to "complain" about the District's paying of a bonus to Hintz due to its failure to comply with the grievance procedure set forth in the negotiated agreement between the parties. The CEA admits that no grievance was filed prior to filing its petition with the CIR.

Article IX of the 2000-2001 negotiated agreement states that "[g]rievances shall be filed and processed according to the procedure outlined in Appendix D." Appendix D defines a grievant as "any teacher, group of teacher [sic], *or* the association filing the grievance" and includes both an informal and formal procedure. See *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000) (word "or" when used properly is disjunctive). In accordance with appendix D, the informal procedure is implemented as follows: "a. A *teacher* who has a grievance should first discuss the matter with his or her department chairman, principal, or supervisor to whom he or she is directly responsible in an effort to resolve the problem." (Emphasis supplied.)

The formal procedure as set forth in appendix D states, in part, at B1(a) of appendix D, that

> [i]f an aggrieved person is not satisfied with the disposition of his or her problem, or if no decision has been rendered after seven days through the informal procedure, he or she may submit the claim as a formal grievance, in writing, to the appropriate principal and retain a copy.

Thereafter, at B1(c), it is stated that "[a] *teacher* who is not directly responsible to a . . . principal may submit a form grievance claim to the administrator to whom he or she is directly responsible." (Emphasis supplied.) Finally, under section D2

entitled "**Other Considerations**," a "written grievance [shall be] filled [sic] within 30 days . . . after the *teacher* knew, or should have known, of the act or condition on which the grievance is based, [or] the grievance shall be waived." (Emphasis supplied.)

[8,9] Waiver is defined as

> a voluntary and intentional relinquishment or abandonment of a known existing legal right or such conduct as warrants an inference of the relinquishment of such right. . . . In order to establish a waiver of a legal right, there must be clear, unequivocal, and decisive action of a party showing such a purpose, or acts amounting to estoppel on his part.

(Citation omitted.) *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 594, 452 N.W.2d 49, 53 (1990). See, also, *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). The issue is whether the language of the negotiated agreement evidences the CEA's intention to relinquish its right to bring an action in the CIR without first complying with the grievance procedure. We determine that it does not.

First, as noted earlier, in order for the CEA to have waived its right to immediately file its claim in the CIR, such waiver must be "clear, unequivocal, and decisive." The language of appendix D is not clear, unequivocal, or decisive. Although the definition of grievant can include the CEA, the grievance procedure, as set forth in appendix D, by its terms, could be read to limit its application to teachers. See *Pfizer v. Lancaster Cty. Bd. of Equal., supra.* Since the CEA is not a teacher, it is not "clear [and] unequivocal" that the CEA must also follow such procedures as a condition precedent to filing an action in the CIR. See *Wheat Belt Pub. Power Dist. v. Batterman, supra.*

Furthermore, to effectuate a waiver, the relinquishment must be "voluntary and intentional" and must be of a "known existing legal right." See *id.* The language of the negotiated agreement makes no mention of the CIR or the NIRA. As the CIR noted in its decision:

> The grievance procedure provides that if a grievance is not filed within 30 days after the grievant has knowledge of the alleged wrongful act, then the grievance shall be waived. This, however, does not specifically waive the statutory right to bring a case before the Commission. The Association has

a statutory right to file a prohibited practice case, and its non-filing of a grievance does not waive that right.

We agree with the CIR's finding and determine that the CEA did not waive its statutory right to file a claim with the CIR when it did not file a grievance. The CIR's finding to that effect is not contrary to law. The District's fourth assignment of error is without merit.

5. Statutory Authority

In its fifth and final assignment of error, the District asserts that the CIR's entry of "[d]eclaratory and injunctive relief in this case exceeds the Commission's limited statutory authority, and is, therefore, contrary to law." In its brief, the District appears to argue that the orders entered by the CIR exceeded its authority for two reasons. First, the remedies ordered grant declaratory and injunctive relief; second, the orders provide neither adequate nor appropriate remedies pursuant to §§ 48-819.01 and 48-825(2). We will discuss each separately.

In its decision, the CIR ordered the District, restated and summarized, to cease and desist from (1) deviating from the negotiated agreement in payment of salaries and benefits; (2) paying Hintz in deviation from the negotiated agreement after August 1, 2001; (3) bypassing the CEA and dealing directly with its represented employees regarding wages, terms, and conditions of employment; and (4) paying teachers "'signing bonuses'" or other compensation that is a mandatory subject of bargaining and is not included in a negotiated agreement. The CIR further ordered the District to post notices informing employees that it had engaged in prohibited labor practices.

[10,11] The CIR does not have authority to grant declaratory or equitable relief. See, *Calabro v. City of Omaha*, 247 Neb. 955, 531 N.W.2d 541 (1995); *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). Furthermore, this court has noted that the CIR is an administrative body performing a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha, supra.* Thus, it has only those powers delineated by statute, *Jolly v. State*, 252 Neb. 289, 562 N.W.2d 61 (1997), and should "exercise that jurisdiction in as narrow a manner as may be necessary," *University Police*

Officers Union v. University of Nebraska, 203 Neb. 4, 18, 277 N.W.2d 529, 537 (1979).

[12] In its petition, the CEA did not request declaratory relief. The CEA's petition alleged the existence of a pending dispute, namely whether the District engaged in prohibited labor practices by paying Hintz a bonus contrary to the 2000-2001 negotiated agreement. In *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 257, 518 N.W.2d 124, 128 (1994), we observed that "[t]he function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies." In this case, the CIR was confronted with a pending dispute. Its order did not grant declaratory relief.

[13] Nor did the Commission's orders, despite any similarity in language, grant equitable or injunctive relief. Injunctive relief is generally preventative, prohibitory, or protective. *Putnam v. Fortenberry*, 256 Neb. 266, 589 N.W.2d 838 (1999). Black's Law Dictionary 784 (6th ed. 1990) defines injunction as follows:

> A court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. A prohibitive, equitable remedy issued... by a court . . . directed to a party . . . forbidding the latter from doing some act . . . or restraining him in the continuance thereof . . . . A judicial process . . . requiring [a] person to whom it is directed to do or refrain from doing a particular thing.

The CIR is not a court, but an administrative body performing a legislative function. *Transport Workers of America v. Transit Auth. of City of Omaha, supra.* Its orders are not issued by a court and are merely advisory, given the CIR has no enforcement authority. The enforcement of any order issued by the CIR resides only in the district courts of this state. See §§ 48-819 (failure on part of any person to obey order of CIR shall constitute contempt, and upon application to appropriate district court, shall be dealt with as would similar contempt of said district court) and 48-825(2) (upon finding that party has committed prohibited practice, any remedy ordered by CIR can be enforced by district court only upon filing of action seeking injunctive relief).

The orders issued by the CIR in this case did not command, forbid, or restrain the District. They were not issued by a court, are merely advisory, and therefore, do not grant injunctive relief.

Having concluded that the orders of the CIR provided neither declaratory nor injunctive relief, we now consider whether they were "adequate" and "appropriate" remedies pursuant to §§ 48-819.01 and 48-825(2).

The remedies fashioned by the CIR essentially fall into two categories. The first category, identified above in Nos. (1) through (4), ordered the District to cease and desist from certain actions. The second category ordered the District to post notices informing employees that it had engaged in prohibited labor practices. We will discuss each category separately.

[14] Section 48-825(2) authorizes the CIR, upon a finding that a party has committed a prohibited practice, to "order an appropriate remedy." The District argues that the cease and desist orders are not appropriate and therefore contrary to law.

What is considered an appropriate remedy pursuant to § 48-825(2) is an issue of first impression. However, § 48-819.01 contains remedial language similar to § 48-825(2). Section 48-819.01 provides:

> Whenever it is alleged that a party to an industrial dispute has engaged in an act which is in violation of any of the provisions of the Industrial Relations Act, or which interferes with, restrains, or coerces employees in the exercise of the rights provided in such act, the commission shall have the power and authority to make such findings and to enter such temporary or permanent orders as the commission may find necessary *to provide adequate remedies* to the injured party or parties, to effectuate the public policy enunciated in section 48-802, and to resolve the dispute.

(Emphasis supplied.) We therefore look to § 48-819.01 to aid us in determining what are appropriate remedies under § 48-825(2).

In *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. 455, 344 N.W.2d 459 (1984), this court was presented with the issue of whether the CIR had the authority to enter temporary orders concerning wages, hours, and terms and conditions of employment while the CIR was attempting to resolve a labor dispute pending before it. Relying in part upon the version of

§ 48-819.01 then in effect, which is substantially similar to the current § 48-819.01, we observed:

> To be sure, the authority of the CIR to enter temporary orders is not unlimited. As we noted in *University Police Officers Union v. University of Nebraska, supra* at 18, 277 N.W.2d at 537: "We will not now attempt to enumerate all the possible circumstances under which the CIR may exercise its authority. We do note, however, that the authority granted to the CIR under the present act in general and section 48-816, R.R.S. 1943, in particular, is limited in nature. We would anticipate that the CIR will exercise that jurisdiction in as narrow a manner as may be necessary." The authority does, however, appear to be sufficient in this case. To hold otherwise would be to completely repeal §§ 48-816 and 48-819.01 by judicial fiat.

Transport Workers v. Transit Auth. of Omaha, 216 Neb. at 460, 344 N.W.2d at 463.

Having found violations of the NIRA, §§ 48-819.01 and 48-825(2) grant the CIR authority to issue such orders as it may find necessary to provide adequate remedies to the parties to effectuate the public policy enunciated in § 48-802. This court has previously commented upon the authority of the CIR to issue cease and desist orders. In *University Police Officers Union v. University of Nebraska*, 203 Neb. 4, 16-17, 277 N.W.2d 529, 537 (1979), we discussed § 48-811 and observed:

> The provisions of section 48-811, R. R. S. 1943, do not constitute matters similar to those prescribed in sections 8a and 8b of the NLRA. Thus, the CIR does not, by reason of section 48-811, R. R. S. 1943, have authority to declare unfair labor practices. If, in fact, the evidence discloses that a public employer is threatening or harassing an employee because of any petition filing by such employee, the CIR is limited to entering an order directing the employer to cease and desist such threat or harassment. The CIR has no authority, however, to require anything further. Upon failure of the public employer to cease and desist, action must be brought by the employee in the appropriate District Court seeking to hold the public employer guilty of contempt of court.

[15] In our view, the remedies provided by the CIR are nothing more than the CIR's ordering the District to cease and desist violating the terms of the negotiated agreement and are one of the "'circumstances under which the CIR may exercise its authority.'" *Transport Workers v. Transit Auth. of Omaha*, 216 Neb. at 460, 344 N.W.2d at 463. To prohibit the CIR from issuing such relief under these circumstances would be to repeal §§ 48-819.01 and 48-825(2) "by judicial fiat." *Id.*

Having concluded that the cease and desist orders issued by the CIR were "adequate" and "appropriate" under §§ 48-819.01 and 48-825(2), we now determine whether the CIR's order requiring the posting of notices was an "adequate" and "appropriate" remedy under these facts.

The District, in arguing that the CIR has no such authority, relies in part upon *University Police Officers Union v. University of Nebraska*, 203 Neb. at 17, 277 N.W.2d at 537, wherein this court stated:

> We note that the CIR directed UNL to post a copy of its temporary order, and in its opinion of December 20, 1977, suggested it was considering requiring UNL to post "mea culpa" notices. The CIR is without authority to make such orders. Its authority is limited to the provisions of section 48-818, R. R. S. 1943, wherein it is provided that the CIR's findings and orders may establish or alter the scale of wages, hours of labor, or conditions of employment.

However, *University Police Officers Union* was decided prior to the enactment of §§ 48-819.01 and 48-825. We therefore consider the CIR's authority to require the posting of notices within the statutory framework of identifying "adequate" and "appropriate" remedies.

In this case, it is difficult to envision how the posting of notices provides an adequate and appropriate remedy to the CEA. The CEA's grievances were remedied by the CIR's finding that the District had engaged in prohibited labor practices and its issuance of the cease and desist orders. Clearly, those remedies are adequate to resolve the dispute.

Furthermore, the mere posting of these notices does not appear to effectuate the public policy underlying the NIRA. That policy provides that

> [t]he continuous, uninterrupted and proper functioning and operation of governmental service . . . to the people of Nebraska are hereby declared to be essential to their welfare, health and safety. It is contrary to the public policy of the state to permit any substantial impairment or suspension of the operation of governmental service . . . . It is the duty of the State of Nebraska to exercise all available means and every power at its command to prevent the same so as to protect its citizens from any dangers, perils, calamities, or catastrophes which would result therefrom.

§ 48-802(1). Under these facts, we fail to see any relationship between the policy stated in § 48-802 and the posting of notices relating to the employer's engagement in prohibited labor practices under the NIRA.

Accordingly, we determine that ordering the District to post notices regarding its NIRA violation is, under the facts, not a proper remedy and therefore in excess of the CIR's powers. Such order is reversed.

Finally, the District argues that if § 48-819.01 gives the CIR the authority to issue declaratory and injunctive relief, then § 48-819.01 is unconstitutional as granting powers in violation of the Constitution of the State of Nebraska. However, we need not reach that issue, having determined that in this case, the CIR did not order such relief.

VI. CONCLUSION

The CIR's order is affirmed insofar as it (1) found that the District engaged in prohibited labor practices; (2) ordered the District to cease and desist from deviating from the negotiated agreement in payment of salaries and benefits; (3) ordered the District to cease and desist from paying Hintz in deviation from the negotiated agreement after August 1, 2001; (4) ordered the District to cease and desist from bypassing the CEA and dealing directly with its represented employees regarding wages, terms, and conditions of employment; and (5) ordered the District to cease and desist from paying teachers signing bonuses or other compensation that is a mandatory subject of bargaining and which is not included in a negotiated agreement.

The CIR's order is reversed insofar as it (1) found that the District engaged in prohibited labor practices in communicating with Hintz in April 2000 and (2) ordered the District to post notices regarding its violation of the negotiated agreement.

AFFIRMED IN PART, AND IN PART REVERSED.

ROBERT I. MARSHALL, APPELLANT, V. DAWES COUNTY BOARD OF EQUALIZATION AND TAX EQUALIZATION AND REVIEW COMMISSION OF NEBRASKA, APPELLEES.
ALFRED V. BARTLETT, APPELLANT, V. DAWES COUNTY BOARD OF EQUALIZATION AND TAX EQUALIZATION AND REVIEW COMMISSION OF NEBRASKA, APPELLEES.

654 N.W.2d 184

Filed December 13, 2002. Nos. S-02-068, S-02-069.

1. **Taxation: Judgments: Appeal and Error.** Decisions rendered by the Tax Equalization and Review Commission shall be reviewed by the court for errors appearing on the record of the commission.
2. **Judgments: Appeal and Error.** When reviewing a judgment 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. However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record.
3. **Taxation: Statutes: Appeal and Error.** The plain language in Neb. Rev. Stat. § 77-5019(2)(a) (Cum. Supp. 2002) referring to "the action complained of" refers to the particular Tax Equalization and Review Commission order being appealed and does not refer to a previous order of the commission which might be relevant to issues in the current appeal.

Appeals from the Nebraska Tax Equalization and Review Commission. Affirmed.

Laurice M. Margheim, of Curtiss, Moravek, Curtiss & Margheim, and Russell W. Harford, of Crites, Shaffer, Connealy, Watson & Harford, for appellants.

Dennis D. King, of Smith, King, and Freudenberg, P.C., for appellee Dawes County Board of Equalization.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Nebraska Tax Equalization and Review Commission.

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

MILLER-LERMAN, J.

NATURE OF CASE

In this consolidated appeal, Robert I. Marshall in case No. S-02-068 and Alfred V. Bartlett in case No. S-02-069 appeal from an order of the Nebraska Tax Equalization and Review Commission (TERC) reversing determinations made by the Dawes County Board of Equalization. Marshall and Bartlett and other parties previously appealed an earlier TERC decision in which TERC had affirmed determinations by the board. *Bartlett v. Dawes Cty. Bd. of Equal.*, 259 Neb. 954, 613 N.W.2d 810 (2000) (*Bartlett I*). (Note: Because Marshall and Bartlett were part of the original group of taxpayers in *Bartlett I*, in our discussions of either *Bartlett I* or the current appeal, we will refer to the plaintiffs as "the taxpayers.") In *Bartlett I*, we reversed TERC's decision and remanded the cause to TERC with orders to remand the taxpayers' consolidated protests of 1998 agricultural real property valuations to the board for further proceedings. On remand, the board again denied the taxpayers' protests with respect to certain properties, and the taxpayers appealed to TERC. The appeals were consolidated, and TERC reversed the board's decisions and ordered that the valuations of the subject properties be reduced to the amounts requested by the taxpayers. The valuation of Bartlett's property was reduced from $73,520 to $38,350. The valuation of Marshall's property was reduced from $59,430 to $28,970. Notwithstanding the fact that the taxpayers received the reduction in valuations they initially sought in their valuation protests, the taxpayers nevertheless appeal TERC's order on the basis that TERC did not further order adjustment and equalization of 1998 valuations for all agricultural real property throughout Dawes County or order the board to do so. Because the relief TERC ordered is adequate, we affirm TERC's order.

STATEMENT OF FACTS

The facts of prior proceedings are set forth more fully in *Bartlett I*. A summary of facts relevant to the current appeal follows. On May 14, 1998, TERC issued a written order, purportedly pursuant to Neb. Rev. Stat. § 77-5023 (Cum. Supp. 1998), adjusting values of the agricultural subclasses of property in Dawes County. The Dawes County assessor complied with TERC's order and implemented the adjustments. These adjustments caused the valuations of the taxpayers' properties to nearly double. The taxpayers filed property valuation protests with the board. The board filed its own petition with TERC pursuant to Neb. Rev. Stat. § 77-1504.01 (Cum. Supp. 1998), asking TERC to issue a stay or reverse TERC's order of May 14. TERC dismissed the board's petition on August 7. The board then denied the taxpayers' protests, and the taxpayers appealed to TERC. On September 22, 1999, TERC issued an order affirming the board's denial of the protests. In the order, TERC determined that the issues raised by the taxpayers constituted a collateral attack on TERC's prior orders of May 14 and August 7, 1998.

The taxpayers appealed the September 22, 1999, order to this court. *Bartlett I*. Noting that the taxpayers had filed valuation protests, we concluded that the taxpayers' appeals to TERC were not a collateral attack on TERC's prior orders because the protest procedure and appeals therefrom were the taxpayers' sole method of challenging the property valuations. We determined that TERC's May 14, 1998, order, which purported to adjust subclasses of agricultural land, was based on "market areas" which were not a subclass recognized by statute and that TERC was without authority to order the adjustment by market areas. We noted that the board essentially took no action on the taxpayers' protests and simply awaited the outcome of its own petition to TERC. Therefore, in *Bartlett I*, we reversed TERC's September 22, 1999, order and concluded that "TERC must remand these consolidated protests to the board for a determination on the merits, taking into consideration our determination that TERC's May 14, 1998, order in which it adjusted agricultural land values by market areas was unauthorized." 259 Neb. at 966, 613 N.W.2d at 819.

Pursuant to *Bartlett I*, TERC remanded the taxpayers' protests to the board. On remand from TERC, the board denied the taxpayers' requests for relief as to certain properties. The taxpayers appealed the board's decision to TERC, claiming, inter alia, that the board's action did not comply with this court's decision in *Bartlett I*.

On December 21, 2001, TERC entered an order vacating and reversing the board's decision and granting the taxpayers' requests for reductions in the assessed values of the subject properties. Finding that the only proper evidence regarding the values of the subject properties for the 1998 tax year was that offered by the taxpayers, TERC ordered that the 1998 valuations of the taxpayers' properties be reduced to the amounts requested by the taxpayers in their protests. TERC denied the taxpayers' further requests that it enter an order adjusting the values of all agricultural land in Dawes County for tax year 1998. Although the taxpayers argued that such an order was required by this court's decision in *Bartlett I*, TERC concluded the protests brought by the taxpayers were limited to the valuation of the subject properties and need not result in an order applicable to all agricultural properties throughout the county. On January 17, 2002, the taxpayers appealed TERC's December 21, 2001, order. TERC asserts that it should not have been named a party to this consolidated appeal.

ASSIGNMENT OF ERROR

On appeal, the taxpayers generally assert, restated and summarized, that TERC erred in failing to take action or requiring the board to take action to reverse all the unauthorized adjustments made pursuant to TERC's May 14, 1998, order and to equalize the 1998 valuations on all agricultural land throughout Dawes County.

STANDARDS OF REVIEW

[1,2] Decisions rendered by TERC shall be reviewed by the court for errors appearing on the record of TERC. Neb. Rev. Stat. § 77-5019(5) (Cum. Supp. 2002); *Bethesda Found. v. Buffalo Cty. Bd. of Equal.*, 263 Neb. 454, 640 N.W.2d 398 (2002). When reviewing a judgment 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. *Bethesda Found., supra*; *County of Douglas v. Nebraska Tax Equal. & Rev. Comm.*, 262 Neb. 578, 635 N.W.2d 413 (2001). However, in instances when an appellate court is required to review cases for error appearing on the record, questions of law are nonetheless reviewed de novo on the record. *Id.*

ANALYSIS

TERC as Party.

TERC asserts that it should not have been made a party to the present appeal and that it should therefore be dismissed from this appeal. In this regard, TERC notes that § 77-5019(2)(a) provides that TERC "shall only be made a party of record if the action complained of is an order issued by the commission [TERC] pursuant to section 77-1504.01 or 77-5023." TERC asserts that the order appealed from was issued pursuant to Neb. Rev. Stat. § 77-5018 (Cum. Supp. 2002), not § 77-1504.01 or § 77-5023, and therefore it should not have been made a party to this appeal.

Section 77-1504.01 provides that a county board of equalization may petition TERC to consider an adjustment to a class or subclass of real property within the county and that TERC shall enter an order specifying a percentage increase or decrease and the class or subclass of real property affected by the order. Section 77-5023 provides that TERC has the power to increase or decrease the value of a class or subclass of real property of any county or tax district so that all classes or subclasses in all counties fall within an acceptable range. Finally, § 77-5018 provides that TERC may issue decisions and orders in cases involving appeals of decisions by a county board of equalization or the Property Tax Administrator.

The taxpayers argue that the present appeal is the continuation of the dispute that was previously before this court in *Bartlett I* in which TERC was named as a party. The taxpayers argue that TERC should continue to be a party until the issues raised in *Bartlett I* are resolved in the present appeal. At the time the appeal in *Bartlett I* was filed, § 77-5019(2)(a) (Supp. 1999) provided: "If the Commission's only role in a case is to act as a neutral fact finding body, the Commission shall not be a party of record. In all other cases, the Commission shall be a party of

record." Pursuant to a legislative amendment which became effective April 7, 2000, this language was deleted and replaced by the language quoted above, making TERC a party only in cases involving orders pursuant to § 77-1504.01 or § 77-5023.

The taxpayers argue that TERC was a proper party to the appeal in *Bartlett I* under either version of the statute because they claim that "the action complained of" in *Bartlett I* was an order issued pursuant to § 77-5023. The taxpayers do not appear to take issue with TERC's assertion that the order appealed from in the current appeal was an order issued pursuant to § 77-5018. Instead, the taxpayers argue that because the current appeal is the continuation of issues related to the May 14, 1998, order issued pursuant to § 77-5023 involved in *Bartlett I*, TERC should remain a party to these proceedings. Despite TERC's having been named a party to the appeal in *Bartlett I*, the appellate record in *Bartlett I* contains a letter filed by TERC stating that the orders appealed from in *Bartlett I* were entered pursuant to § 77-5018 and that because TERC did not view itself as a proper party to *Bartlett I*, it did not intend to file any responsive pleadings.

[3] The determining factor of whether TERC should be a party to this appeal is whether under § 77-5019(2)(a) "the action complained of is an order issued by [TERC] pursuant to § 77-1504.01 or § 77-5023." We conclude that "the action complained of" in this appeal is the December 21, 2001, order of TERC and that such order was an order issued pursuant to § 77-5018 relating to appeals from decisions of a county board of equalization and not an order pursuant to § 77-1504.01 or § 77-5023. We conclude that the plain language in § 77-5019(2)(a) referring to "the action complained of" refers to the particular TERC order being appealed and does not refer to a previous order of TERC which might be relevant to issues in the current appeal.

In the present appeal, although the taxpayers refer to issues related to an earlier order which they claim TERC issued pursuant to § 77-5023, "the action complained of" in the instant appeal is the December 21, 2001, order involving the appeal of decisions by a board which is an order issued pursuant to § 77-5018. In sum, under § 77-5019(2)(a), TERC is to be made a party to an appeal only when the action complained of is an order issued pursuant to § 77-1504.01 or § 77-5023, and the December 21, 2001,

order complained of in the instant appeal was not issued pursuant to either § 77-1504.01 or § 77-5023. TERC should not have been made a party to this appeal. We therefore dismiss TERC as a party to this appeal.

TERC's Decision.

Although TERC is not a party to this appeal, the taxpayers and the board remain as proper parties, and the appeal may proceed with the taxpayers and the board as parties. In their assignment of error summarized above, the taxpayers generally assert that TERC failed to give full and proper relief because, although the taxpayers were awarded the requested reductions in the 1998 valuations of their individual properties, TERC did not take action or order the board to take action to equalize 1998 valuations on all agricultural land throughout Dawes County. We conclude that TERC did not err in refusing to order countywide adjustments because the relief afforded the taxpayers was adequate and the additional equalization relief the taxpayers seek was not required within the context of the present proceedings which were undertaken as individual property valuation protests.

As detailed above, the present proceedings began in 1998 when the taxpayers filed property valuation protests with the board alleging that certain identified properties owned by the taxpayers were overvalued. Such protests were filed pursuant to Neb. Rev. Stat. § 77-1502 (Cum. Supp. 2002). In *Bartlett I*, we stated:

> We have consistently held that a property owner's exclusive remedy for relief from overvaluation of property for tax purposes is by protest to the county board of equalization. *Olson v. County of Dakota*, 224 Neb. 516, 398 N.W.2d 727 (1987); *Riha Farms, Inc. v. Dvorak*, 212 Neb. 391, 322 N.W.2d 801 (1982). An appeal may then be taken from the order of the county board of equalization fixing the assessed value of the property. *Id.* This remedy is full, adequate, and exclusive. *Id.*

259 Neb. at 961, 613 N.W.2d at 816.

The board denied the taxpayers' initial protests, and TERC affirmed the board's decision on appeal. The taxpayers appealed the valuation ruling to this court, and in *Bartlett I*, we reversed the decision of TERC and remanded the cause to TERC with

directions to TERC to remand the cause to the board for further proceedings on the individual protests involved therein consistent with our opinion. *Bartlett I*. As part of our decision in *Bartlett I*, we determined that TERC's May 14, 1998, order was unauthorized, and we directed that upon remand, the board was to take such determination into consideration when conducting further proceedings on the taxpayers' protests.

The protests initiated by the taxpayers in 1998 were the "exclusive remedy for relief from overvaluation" as complained of with respect to the specific pieces of property identified in the property valuation protests. Although TERC's May 14, 1998, order applicable to all agricultural properties in Dawes County was relevant to the issues raised by the taxpayers in their individual protests and in the subsequent appeals to TERC and to this court in *Bartlett I*, the scope of the initial proceedings brought on by the filing of the property valuation protests was limited to a consideration of the valuation of the specific properties identified in the taxpayers' protests.

The remand to the board ordered by this court in *Bartlett I* was limited to further proceedings on the protests originally filed by the taxpayers. Although our analysis in *Bartlett I* unavoidably required an examination of the propriety of the May 14, 1998, order which was applicable to all agricultural properties in Dawes County, our opinion in *Bartlett I* did not expand the scope of the proceedings or direct the relief beyond the properties identified in the taxpayers' individual protests. Although the reasoning of *Bartlett I* may have had an implication beyond the interests of the taxpayers, the remand ordered in *Bartlett I* did not provide relief to all agricultural land in Dawes County.

On remand of these proceedings under *Bartlett I*, the board and TERC were directed to determine proper adjustments to the valuations of the properties that were the subjects of the original protests of the taxpayers in *Bartlett I*. Although the board on remand denied the protests with respect to certain properties, TERC on appeal gave the taxpayers the complete relief initially requested by them with respect to those properties. The relief afforded by TERC was adequate and comports with the relief originally sought by the taxpayers and the terms of this court's remand in *Bartlett I*. We therefore find no error in TERC's failure

to grant the taxpayers relief beyond the relief TERC granted with respect to the taxpayers' specific properties.

The taxpayers' arguments on appeal all relate to TERC's failure to take action or order the board to take action to remedy the adjustments made pursuant to TERC's May 14, 1998, order and to equalize 1998 valuations on all agricultural land throughout Dawes County. Such additional relief was not necessary to resolve the case. There is no merit to the taxpayers' assignment of error. Accordingly, we affirm.

CONCLUSION

We conclude that TERC should not have been made a party to the present appeal, and we therefore dismiss TERC as a party to this appeal. We further conclude that TERC did not err in failing to issue additional orders beyond the individual relief requested by the taxpayers because such additional relief was not required within the context of these proceedings. We therefore affirm TERC's order of December 21, 2001.

AFFIRMED.

IN RE ESTATE OF JOY EVONE CRAVEN, DECEASED. KATHERINE WEBB, APPELLANT, V. THOMAS CRAVEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF JOY EVONE CRAVEN, DECEASED, APPELLEE.

654 N.W.2d 196

Filed December 20, 2002. No. S-01-1223.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Domicile: Intent.** To acquire a domicile by choice, there must be both (1) residence through bodily presence in the new locality and (2) an intention to remain there.
3. ____: ____. Domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or by the present intention to make a location the person's permanent or fixed home.
4. ____: ____. To change domicile, there must be an intention to abandon the old domicile.
5. **Domicile.** All of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his or her domicile.

Appeal from the County Court for Custer County: GARY G. WASHBURN, Judge. Affirmed.

Michael S. Borders, of Sennett, Duncan & Borders, for appellant.

Michael A. England, of Stumpff, Guggenmos & England, for appellee.

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

CONNOLLY, J.

Katherine Webb appeals from the county court's decision determining that her deceased mother, Joy Evone Craven, was domiciled in Nebraska at the time of her death. The sole issue is whether Nebraska or Montana is her domicile. Joy died in Montana. She established a post office box in Montana, obtained a Montana driver's license, and registered a car there. But Joy checked on a change-of-address card filed with the postal service that she was making a temporary move. Furthermore, she had not told others that she planned to permanently move to Montana and had left many items at her home in Nebraska. Because the court's factual determination is not clearly erroneous, we affirm.

BACKGROUND

This case is a dispute between Webb and Thomas Craven, Joy's estranged husband and personal representative of her estate, about Joy's domicile at the time of her death. Joy filed a petition to dissolve her marriage to Thomas in 1998, but the petition was pending at the time of her death.

Joy died in Montana on November 26, 1999. Thomas began an intestate proceeding in Nebraska in December 1999 and was informally appointed personal representative of her intestate estate in January 2000. Formal probate proceedings were filed in Montana by Webb on December 1, 2000. The record contains a document purported to be Joy's will, dated September 19, 1999. The will does not have a domiciliary clause. The record contains evidence about Joy's mental competence at the time the will was signed. The validity of the will, however, is not the subject of this

appeal. An application to determine Joy's domicile was filed in Nebraska in May 2001.

According to Webb, the pending divorce caused friction between members of the family. She stated that her sister, Terry Owens, and her half sister sided with Thomas, while Webb sided with Joy. Webb testified that in late 1998 and early 1999, Joy discussed with her the possibility of moving to Montana to live with her. According to Webb, Joy began making preparations to move in the spring and summer of 1999. Joy contacted a moving consultant in March 1999 for a cost estimate of moving her belongings from Mason City, Nebraska, to Montana. Joy told the consultant that she wanted to move in June. But Joy did not hire the company. Joy arrived at Webb's residence in Montana on September 1.

Joy established a post office box in Montana. The record contains a mail forwarding change-of-address form that Joy filed on September 1, 1999, with the postal service. Joy checked on the form that her change of address was temporary and listed April 1, 2000, as the date to discontinue forwarding her mail.

On September 9, 1999, Joy obtained a Montana driver's license, using the Montana post office box as her address. Joy opened a bank account in Montana in 1999, but she had also opened accounts there in 1992 or 1993. She also jointly licensed and insured a vehicle with Webb in Montana. According to Webb, Joy intended to stay in Montana. The record contains a photocopy of an envelope from the Social Security Administration addressed to Joy at her Montana address. The record does not reflect what was in the envelope.

In August 1999, Joy was diagnosed with cancer and was later hospitalized in Montana for treatment. Webb testified that Joy instructed her not to contact family members about the hospital stay. Joy died and was buried in Montana. Webb testified that in accordance with Joy's request, she informed the family of Joy's death after the burial by calling Terry's oldest son.

Terry testified that before Joy went to Montana, Joy was living alone in her home in Mason City, Nebraska, because after Joy and Thomas separated, Thomas had moved into Terry's home. Terry stated that Joy had previously taken long visits to Montana to see Webb and estimated the visits lasted about a

month. According to Terry, there was no initial tension among family members about the pending divorce, but that some tension later occurred.

Joy never told Terry that she intended to relocate permanently to Montana. Instead, Terry stated that during an August court hearing about the divorce, Webb stated that Joy was going to Montana to receive medical treatment. After Joy went to Montana, Terry called the hospitals there trying to locate her, but was unsuccessful.

Staci Owens, Terry's daughter, testified that she had a good relationship with Joy and stated that if Joy was going to permanently move to Montana, she would have told her. According to Staci, Joy did not tell her she planned to move to Montana. Staci stated that in the past, Joy would not talk to her in front of Webb.

After Joy's death, Terry and Thomas gained access to her house. The house was not for sale or rent, and the utilities were turned on. The record contains photographs of the home. In the photographs, the house is completely furnished with personal items displayed. There were live plants in the home and food left in the cupboards and freezer. The closets contained linens and personal belongings.

Joan Cox, a neighbor of Joy's in Mason City, testified that Joy asked her to watch the house while she was in Montana. Cox watered the plants and made sure the electricity was on. Someone else had been hired to mow the lawn. When Joy left for Montana, she said that she would be back in October for a hearing. She did not say whether she would return to Montana after that. In October, Cox was told that Joy was in the hospital and could not return for the hearing.

The court stated that the documentary evidence was contradictory because, while Joy had obtained a Montana driver's license, she also filed a form with the postal service stating that her mail forwarding would be temporary. Because the documentary evidence was in conflict, the court relied on the credibility of the witnesses and other evidence. The court then found that Joy's domicile was in Nebraska at the time of her death. Webb's motion for a new trial was overruled, and she appeals.

ASSIGNMENT OF ERROR

Webb assigns that the county court erred by determining that Joy's domicile was in Nebraska instead of Montana.

STANDARD OF REVIEW

[1] In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002).

ANALYSIS

Webb contends that the court erred in its factual findings. Webb relies on Joy's presence in Montana at the time of her death and that she had registered a vehicle there. In particular, Webb emphasizes that Joy obtained a Montana driver's license and received mail from the Social Security Administration at her Montana address. Webb also disagrees with the court's determinations about the credibility of the witnesses. Thomas, however, counters that the evidence was contradictory about Joy's intention to move and argues that the court correctly considered the credibility of the witnesses.

[2,3] Although there are various statutory procedures relating to the determination of domicile, the probate statutes do not provide a definition of domicile. See, e.g., Neb. Rev. Stat. § 30-2411 (Reissue 1995). We have said that "'[t]he term "domicile" is difficult of accurate definition, and it has been stated that the concept cannot be successfully defined so as to embrace all its phases. Its meaning, in each instance, depends upon the connection in which it is used.'" *In re Estate of Meyers*, 137 Neb. 60, 64, 288 N.W. 35, 37 (1939). It is universally held, however, that to acquire a domicile by choice, there must be both (1) residence through bodily presence in the new locality and (2) an intention to remain there. See, *Huffman v. Huffman*, 232 Neb. 742, 441 N.W.2d 899 (1989); *In re Estate of Meyers, supra*. Consequently, domicile is obtained only through a person's physical presence accompanied by the present intention to remain indefinitely at a location or by the present intention to make a location the person's permanent or fixed home. *Huffman v. Huffman, supra*.

[4,5] We have stated that to change domicile, there must be an intention to abandon the old domicile. *In re Estate of Meyers, supra.* In addition, because the intent of a person is not readily susceptible of analysis, all of the surrounding circumstances and the conduct of the person must be taken into consideration to determine his or her domicile. *Id.*

In *In re Estate of Meyers*, the decedent owned a ranch in Arthur County, but had been living in Omaha, Douglas County. He was listed in the Omaha city directory and maintained a bank account in Omaha. There was evidence that he changed his residence to Omaha to benefit his health and obtain education for his daughter. But he also continued to maintain his business in Arthur County and was registered to vote there. The trial court determined that the decedent was domiciled in Arthur County.

On appeal, we stressed that the decedent was registered to vote in Arthur County and noted that all of the circumstances must be considered. We further stated that " '[a] change of residence for the purpose of benefiting one's health does not usually effect a change of domicile. Such a change is looked upon as temporary merely, even though the actual time spent in the new residence may be long.' " 137 Neb. at 67, 288 N.W. at 38.

Here, the court recognized evidence indicating that Joy may have intended to change her domicile to Montana. But the court also considered conflicting evidence. Although Joy obtained a Montana driver's license and registered a vehicle in Montana, she also listed her move as temporary on a form she filled out with the postal service. The record also contains photographs showing that Joy left a substantial amount of her belongings at her home in Nebraska. Although Webb testified that Joy intended to permanently relocate to Montana, others testified that Joy would have told them if that were the case. The record also allows the court to infer that Joy went to Montana to receive medical care. Thus, there was conflicting evidence about Joy's intent to change her domicile. In particular, there was evidence that she did not abandon her Nebraska domicile.

The court could reasonably infer that Joy traveled to Montana to receive long-term medical care but did not intend to permanently change her domicile. Webb argues, however, that the court's determinations about the credibility of the evidence and

the witnesses were in error. But the credibility of witnesses and the weight to be given their testimony are for the trier of fact. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). The county court's decision is not clearly erroneous. Accordingly, we affirm.

AFFIRMED.

JAMES JOHNSON, APPELLEE, V.
MIKE KENNEY, APPELLANT.
654 N.W.2d 191

Filed December 20, 2002. No. S-02-202.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Statutes.** A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous.
3. ____. A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
4. ____. 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.
5. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
6. **Statutes: Legislature: Intent: Presumptions.** If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed and remanded with directions to dismiss.

Don Stenberg, Attorney General, and Linda L. Willard for appellant.

Stephanie J. Garner Kotik, of Kleveland Law Offices, for appellee, and, on brief, James Johnson, pro se.

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

WRIGHT, J.

NATURE OF CASE

James Johnson pled guilty to charges of delivery of a controlled substance and being a habitual criminal, and he was sentenced to 10 years' imprisonment. Johnson subsequently filed a petition seeking habeas corpus relief, alleging that pursuant to Neb. Rev. Stat. § 83-1,107(1) (Reissue 1994), he was entitled to have his sentence reduced by 6 months for each year of the sentence and that as a result of not receiving such sentence reduction, he was being wrongfully held. (Although § 83-1,107 has subsequently been amended, all references in this opinion are to Reissue 1994.) The district court for Lancaster County found that Johnson was being detained without legal authority and ordered that he be discharged from the custody of the Department of Correctional Services (Department). Mike Kenney, warden of the Nebraska State Penitentiary, appeals.

SCOPE OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

FACTS

On September 16, 1996, Johnson pled guilty to charges of delivery of a controlled substance and being a habitual criminal. Thereafter, he was sentenced to a term of 10 years' imprisonment with credit for 243 days previously served.

On March 12, 2001, Johnson filed a pro se petition for writ of habeas corpus, seeking relief under Neb. Rev. Stat. § 29-2801 et seq. (Reissue 1995). Johnson alleged that pursuant to Nebraska's "good time statute," § 83-1,107(1), he was entitled to have his sentence reduced by 6 months for each year of the sentence, and that Kenney had failed to give him that credit. Johnson claimed that as a result of Kenney's failure to give Johnson good time credit, he was being wrongfully held by the Department.

Johnson was sentenced pursuant to Neb. Rev. Stat. § 29-2221(1) (Reissue 1995), which requires a mandatory minimum term of 10 years in prison for a habitual criminal conviction. Throughout these proceedings, Kenney has maintained that good time credit required by § 83-1,107(1) does not apply to a mandatory minimum sentence imposed under § 29-2221(1).

The trial court found that Johnson was entitled to receive good time credit of 6 months for each year of the sentence imposed. The court concluded that with a proper application of good time credit, the maximum portion of Johnson's sentence should have been reduced to 5 years. Finding that no evidence had been presented to establish that Johnson had lost any of his good time credit, the court determined that Johnson was being detained without legal authority and ordered that he be discharged. Kenney filed a timely notice of appeal, and we granted Johnson's petition to bypass.

ASSIGNMENT OF ERROR

Kenney asserts, restated, that the trial court erred in finding that good time credit applies to mandatory minimum sentences imposed on habitual criminals under § 29-2221(1).

ANALYSIS

The issue presented is one of statutory interpretation: whether the good time credit set forth in § 83-1,107(1) applies to the mandatory minimum sentence imposed upon Johnson pursuant to § 29-2221(1). We first set forth the relevant portions of each statute.

Before it was amended by 1995 Neb. Laws, L.B. 371, § 29-2221 provided that the minimum sentence imposed on a person found to be a habitual criminal was a term of not less than 10 years. See § 29-2221 (Cum. Supp. 1994). As amended by L.B. 371, § 29-2221(1) provides that a habitual criminal "shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years." L.B. 371 became operative on September 9, 1995, and is applicable to Johnson's case.

The relevant version of § 83-1,107 provides:

> (1) The chief executive officer of a facility shall reduce the term of a committed offender by six months for each

> year of the offender's term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:
>
> (a) From the minimum term, to determine the date of eligibility for release on parole; and
>
> (b) From the maximum term, to determine the date when discharge from the custody of the state becomes mandatory.

In granting Johnson habeas corpus relief, the trial court stated it was clear that § 29-2221(1) required a sentencing court in every case to impose a mandatory minimum sentence of 10 years. It noted, however, that such a requirement did not answer the question of whether Johnson, who received a straight sentence of 10 years, which represented both the mandatory minimum and the maximum sentence, was entitled to receive good time credit against his sentence.

The trial court stated that although the imposition of a mandatory minimum sentence affects a person's eligibility for probation and parole, § 83-1,107 does not address the effect imposition of a mandatory minimum sentence has on the application of good time credit to the maximum portion of the sentence. In essence, the court concluded that § 83-1,107 does not specifically exclude application of good time to the maximum portion of the sentence when a mandatory minimum sentence has been imposed. Finding no ambiguities in § 83-1,107, the court stated there was no need to resort to judicial interpretation nor any need to look to the legislative intent.

[2,3] We disagree with the trial court's finding that § 83-1,107 is not ambiguous. A statute is open for construction only when the language used requires interpretation or may reasonably be considered ambiguous. *State v. Hochstein and Anderson*, 262 Neb. 311, 632 N.W.2d 273 (2001). A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). It is undisputed that a

habitual criminal sentenced under § 29-2221 may not be released on parole until the individual has served the mandatory minimum sentence of 10 years. The fact that § 83-1,107 does not address whether good time may be applied to the maximum term of the sentence when the mandatory minimum and the maximum term are the same number of years gives rise to the ambiguity.

When the relevant statutes are considered in pari materia, the intent of habitual criminal sentencing is thwarted if good time credit is applied to the maximum term of the sentence before the mandatory minimum sentence has been served. The minimum portion of the sentence would have no meaning.

In 1992, the Legislature passed L.B. 816, which made significant changes to the law regarding good time credit for criminal offenders under § 83-1,107. In explaining one of the purposes of the changes, the introducer, Senator Ernie Chambers, stated:

> The other significant effects of this bill is [sic] that no one will become eligible for parole after their mandatory discharge date. . . . Under the current law, a person can reach a date when they must be discharged before they are even eligible to be considered for parole. Since they must mandatorily be discharged before the Parole Board can even consider their case, there is no way for there to be Parole Board supervision.

Floor Debate, 92d Leg., 2d Sess. 7678 (Jan. 14, 1992).

Under the trial court's interpretation, the application of good time credit to the maximum portion of the sentence would result in a mandatory discharge before Johnson was eligible for parole under the minimum portion of the sentence. Johnson's maximum sentence and mandatory minimum sentence are both 10 years. Although he could not be released on parole, Johnson would receive a mandatory discharge from custody after only 5 years if good time reductions were applied to the maximum portion of the sentence.

Section 29-2221(1) requires that a habitual criminal "shall be punished by imprisonment . . . for a mandatory minimum term of ten years." It is clear the Legislature intended that imposition of a mandatory minimum sentence would result in a person's not being eligible for parole until the mandatory minimum sentence had been served. It would not serve the legislative intent if a

defendant could be mandatorily discharged before being eligible for parole.

[4,5] The language of § 83-1,107 cannot be adequately understood when considered in pari materia with related statutes. See *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). 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. *State v. Portsche*, 261 Neb. 160, 622 N.W.2d 582 (2001). In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *State v. Baker*, 264 Neb. 867, 652 N.W.2d 612 (2002).

[6] Prior to its amendment, § 29-2221 provided that the sentence for a habitual criminal would be not less than 10 years. Section 29-2221 was subsequently amended to state that the sentence would be a mandatory minimum term of 10 years. If, in a subsequent enactment on the same or similar subject, the Legislature uses different terms in the same connection, a court interpreting the subsequent enactment must presume that the Legislature intended a change in the law. *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

Therefore, presuming that the Legislature intended a change in § 29-2221, we look to the legislative history concerning L.B. 371 in order to determine the Legislature's intent. The "Summary of L.B. 371 Referenced to the Judiciary Committee," which accompanied the Introducer's Statement of Intent, provided: "Habitual Criminal Sentencing . . . No person sentenced to a mandatory term under these statutes would be eligible for probation or reductions for 'good time.'" Judiciary Committee Hearing, 94th Leg., 1st Sess. (Feb. 8, 1995). The floor debate concerning L.B. 371 also supports this position.

From our review of the legislative history, we conclude the Legislature did not intend that good time credit under § 83-1,107(1) would apply to reduce mandatory minimum sentences imposed on habitual criminals under § 29-2221. Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to

reach an independent conclusion irrespective of the decision made by the court below. *State v. Mather*, 264 Neb. 182, 646 N.W.2d 605 (2002).

CONCLUSION

The trial court erred in finding that good time credit under § 83-1,107(1) applies to mandatory minimum sentences imposed on habitual criminals pursuant to § 29-2221(1). The judgment of the trial court is reversed, and the cause is remanded with directions to dismiss Johnson's petition for writ of habeas corpus.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

IN RE INTEREST OF PHYLLISA B., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. SAMUEL B., APPELLANT.

654 N.W.2d 738

Filed December 20, 2002. No. S-02-322.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
2. **Parental Rights: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
3. **Constitutional Law: Appeal and Error.** An appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court.
4. **Trial: Waiver: Appeal and Error.** Failure to make a timely objection waives the right to assert prejudicial error on appeal.
5. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists and that termination is in the child's best interests.
6. **Parental Rights: Final Orders: Appeal and Error.** An adjudication order is a final, appealable order.
7. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.
8. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.

Ann C. Mangiameli and Kurt Goudy, Senior Certified Law Student, of Nebraska Legal Services, Inc., for appellant.

Thomas K. Harmon, Special Prosecutor, of Respeliers and Harmon, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

The separate juvenile court of Douglas County terminated the parental rights of Samuel B. to his minor child Phyllisa B. pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998). Samuel appeals the termination of his parental rights. We affirm.

STATEMENT OF FACTS

Samuel and Phyllis B. are the natural parents of Phyllisa, born on September 19, 1991. On or about October 21, 1998, Phyllisa was removed from her parents' care and placed in protective custody with the Nebraska Department of Health and Human Services (DHHS) by the Omaha Police Department due to allegations of an unsafe home environment. Specifically, Phyllisa had reported, in response to her elementary school teacher's inquiry as to why Phyllisa was falling asleep in class, that her father would come into her room late at night and " 'stick something in her mouth.' " After school officials called the police department to report Phyllisa's statement, Phyllisa told the investigating police officer that "her father came into her room and laid on top of her and 'humped her.' " Phyllisa also later reported that her brother, who is approximately 2 years older than Phyllisa, had sexual contact with her. Juvenile court proceedings were filed on October 21, 1998, and on the same date, the juvenile court ordered Phyllisa to be placed in DHHS' custody. She has remained in foster care in DHHS' custody continuously since that date.

In count II of its second amended adjudication petition filed on December 17, 1998, the State alleged as follows:

A. On or about October 20, 1998, [Phyllisa] disclosed that she was being subjected to inappropriate sexual contact by Samuel [B.]

B. Samuel [B.] continues to reside at the family residence.

C. Samuel [B.] has a past conviction for sexual assault on a child.

D. Samuel [B.]'s use of alcohol and/or controlled substances places [Phyllisa] at risk for harm.

E. Due to the above allegations, [Phyllisa] is at risk for harm.

At the adjudication hearing, following the testimony of several witnesses, including Phyllisa's elementary school teacher and a school counselor, Samuel pled no contest to paragraphs A, B, and E of count II. Near the end of the adjudication hearing, the State dismissed paragraphs C and D of count II.

In an order filed February 26, 1999, the juvenile court determined that Phyllisa was a child as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), being under the age of 18 years and lacking proper parental care by reason of the faults or habits of Samuel. In its adjudication order, the juvenile court found that on or about October 20, 1998, Phyllisa disclosed that she was subjected to inappropriate sexual contact by Samuel, that Samuel continues to reside at the family residence, and that due to these allegations, Phyllisa is at risk for harm. Samuel did not appeal the juvenile court's adjudication order. In an additional order filed March 4, 1999, the juvenile court also determined that Phyllisa was a child as described in § 43-247(3)(a) by reason of the faults or habits of Phyllis. The parental rights of Phyllis are not at issue in this appeal.

A disposition hearing was held on July 7, 1999, followed by review hearings on January 25 and August 30, 2000, and February 8 and August 3, 2001. In orders entered following each of these hearings, the juvenile court found that the permanency objective was reunification, with a concurrent plan of adoption. In order to meet the reunification plan, Samuel was ordered, inter alia, (1) to have no contact or communication with Phyllisa pending further order of the court, (2) to participate in and successfully complete individual and family therapy to address the

sexual abuse of Phyllisa, and (3) to submit to random drug screens. In particular, in its order entered following the January 25, 2000, review hearing, the juvenile court ordered Samuel to "obtain meaningful therapy and rehabilitation to correct the findings of the adjudication that places [Phyllisa] and [Samuel] under the jurisdiction of the Court." Similar language was contained in subsequent orders. Comparable orders were entered as to Phyllis.

On June 7, 2001, the State filed a "Motion for Termination of Parental Rights and Notice of Hearing." The motion sought termination of both Samuel's and Phyllis' parental rights under § 43-292(2), (6), and (7). The motion also asserted that termination of parental rights was in Phyllisa's best interests.

Section 43-292(2) requires a finding that the parent has substantially and continuously or repeatedly neglected or refused to give the juvenile necessary parental care and protection. Section 43-292(6) requires a finding that following a determination that the juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. Section 43-292(7) requires a finding that the juvenile has been in out-of-home placement for 15 or more of the most recent 22 months.

On February 19, 2002, the State's motion for termination came on for hearing before the juvenile court. In a written order filed February 21, the juvenile court found that the State had proved by clear and convincing evidence the grounds for termination set forth in § 43-292(2), (6), and (7). The juvenile court further found that it was in Phyllisa's best interests that Samuel's and Phyllis' parental rights be terminated. Accordingly, the juvenile court terminated Samuel's and Phyllis' parental rights to Phyllisa. Samuel appeals.

ASSIGNMENTS OF ERROR

On appeal, Samuel alleges three assignments of error. Samuel alleges, renumbered and restated, that the juvenile court erred (1) in granting the State's motion to terminate Samuel's parental rights in violation of his Fifth Amendment privilege against self-incrimination, (2) in finding that the State proved by clear

and convincing evidence under § 43-292(2) that Samuel had substantially and continuously or repeatedly neglected and refused to give Phyllisa necessary parental care and protection, and (3) in finding that the State proved by clear and convincing evidence under § 43-292(6) that reasonable efforts had failed to correct the conditions leading to the adjudication of Phyllisa. We note that although Samuel raises a constitutional objection on appeal, he does not dispute the juvenile court's finding that Phyllisa had been in out-of-home placement for "over three years," which fact would serve as a basis for termination under § 43-292(7).

STANDARDS OF REVIEW

[1,2] Juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the juvenile court's findings; however, when the evidence is in conflict, the appellate court will consider and give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001). Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

ANALYSIS

Constitutional Objection.

On appeal, Samuel claims that compliance with various plan provisions would require that he admit to sexual contact with Phyllisa and that such terms would violate his right to exercise his Fifth Amendment privilege against self-incrimination. Samuel suggests on appeal that Phyllisa was continued in out-of-home placement due, in part, to Samuel's refusal to admit to sexual contact with Phyllisa. In this regard, we note that the record shows that the juvenile court's orders with regard to the reunification plan to obtain "meaningful therapy" employed the language of *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998), and that the termination order of February 21, 2002, states that "the parents still have not sufficiently progressed rehabilitatively."

[3,4] The record provided on appeal does not reflect that Samuel raised his constitutional objection in the proceedings before the juvenile court. Generally, an appellate court will not consider a constitutional question on appeal that was not raised and properly presented for disposition by the trial court. *In re Interest of Lisa W. & Samantha W., supra*; *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999). This is because a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Interest of Lisa W. & Samantha W., supra*. We have also stated that "[f]ailure to make a timely objection waives the right to assert prejudicial error on appeal." *In re Interest of Kassara M.*, 258 Neb. 90, 94, 601 N.W.2d 917, 922 (1999). Accordingly, we do not address Samuel's constitutional objection presented for the first time on appeal concerning his Fifth Amendment privilege against self-incrimination.

Termination of Parental Rights Under § 43-292(7).

[5] The juvenile court found that all three of the grounds for termination alleged in the State's motion, § 43-292(2), (6), and (7), were proved by the State. In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Our de novo review of the record shows that termination of Samuel's parental rights was sufficiently demonstrated pursuant to § 43-292(7), and we affirm on the basis of § 43-292(7). Accordingly, we need not consider Samuel's assigned errors relating to the sufficiency of evidence under other statutory provisions identified by the juvenile court as grounds for termination of his parental rights. See, *In re Interest of DeWayne G. & Devon G., supra*; *In re Interest of Clifford M. et al., supra*; *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

Section 43-292(7) requires that the child in question be in out-of-home placement for 15 or more of the most recent 22 months to support termination based on § 43-292(7). The record reflects that at the time of the termination hearing, Phyllisa had

been in continuous foster care for approximately 40 months. The only remaining issue is whether termination of Samuel's parental rights is in Phyllisa's best interests. The record amply demonstrates that termination of Samuel's parental rights is in Phyllisa's best interests.

[6,7] On February 26, 1999, the juvenile court determined that Phyllisa was a child within the meaning of § 43-247(3)(a) based on the court's factual findings that Phyllisa had disclosed that she was subjected to inappropriate sexual contact by Samuel and that Samuel still lived in the home. As a result of these findings, the juvenile court determined that Phyllisa was at risk, adjudicated Phyllisa, and ordered that Phyllisa should remain in the care and custody of DHHS. An adjudication order is a final, appealable order. See *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). The record reflects that Samuel did not appeal the juvenile court's adjudication order indicating that Phyllisa was a child at risk due to the fact Phyllisa had claimed that Samuel had subjected her to inappropriate sexual contact and that Samuel lived in the home. In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001).

At the February 19, 2002, termination hearing, the State called six witnesses to testify: Tina Flowers, Phyllisa's therapist; Cheryl Felix, Phyllis' therapist; Kathie McDaniel, Samuel's therapist; Letitia Kopp, Phyllisa's foster care specialist; and Nicole Rogert and Jennifer Bivens, DHHS child protection and safety workers assigned to Phyllisa's case. The State also introduced into evidence exhibit 30, which was composed of certified copies of the petitions and orders in the case. Phyllis testified on her own behalf. Samuel did not testify or call any witnesses or introduce any exhibits into evidence.

During the termination hearing, Flowers testified as to Phyllisa's conduct that supported Phyllisa's claim that she had been subjected to inappropriate sexual contact by Samuel, including that Phyllisa wet her bed nightly, had "ongoing nightmares regarding sucking men's penises [and] having sexual relations with men," and masturbated publicly. Flowers testified that

she could not explain this conduct as signifying anything other than that Phyllisa had been sexually molested. Although Flowers testified that Phyllisa had subsequently recanted her earlier statement that she had been subjected to inappropriate sexual contact by Samuel, Flowers responded "[y]es" when asked if it was normal for children who initially tell the truth regarding allegations of sexual molestation to later recant those statements. According to Flowers, Phyllisa's recantation was normal "especially since it's a parental figure [and] she wants to go home."

On appeal, Samuel disputes that the inappropriate contact occurred. The record shows that Samuel has not participated in meaningful therapy and rehabilitation relating to the molestation issue. The record further reflects that Samuel remains in the family home. Finally, the record reflects that Kopp testified that it would not be in Phyllisa's best interests to be returned to her family home and that Flowers and Bivens both testified that termination of Samuel's parental rights was in Phyllisa's best interests.

[8] We have stated that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Based upon the evidence, we conclude that the record clearly and convincingly shows that at the time of the termination hearing, Phyllisa had been in out-of-home placement for 15 or more of the most recent 22 months and that termination of Samuel's parental rights was in Phyllisa's best interests. Accordingly, we affirm the juvenile court's order terminating Samuel's parental rights as to Phyllisa pursuant to § 43-292(7).

CONCLUSION

Based upon our de novo review of the record, we conclude that there is clear and convincing evidence that Samuel's parental rights should be terminated pursuant to § 43-292(7) and that such termination is in Phyllisa's best interests. Accordingly, the judgment of the juvenile court is affirmed.

AFFIRMED.

ANDERSON EXCAVATING & WRECKING COMPANY, APPELLANT, V. SANITARY IMPROVEMENT DISTRICT NO. 177, APPELLEE.

654 N.W.2d 376

Filed December 27, 2002. No. S-01-1178.

1. **Breach of Contract: Damages: Appeal and Error.** A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Contracts: Damages.** A party's "reliance interest" is a measure of damages in a contract action.
3. **Breach of Contract: Damages: Proof: Words and Phrases.** Reliance damages are defined as an alternative measure of damages under which the injured party has a right to damages based on his or her reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.
4. **Breach of Contract.** The question whether there has been repudiation or whether repudiation was justified is a question of fact.
5. **Breach of Contract: Damages: Words and Phrases.** A repudiation is (1) a statement by the obligor to the obligee indicating that he or she will commit a breach that would of itself give the obligee a claim for damages for total breach or (2) a voluntary affirmative act which renders the obligor either unable or apparently unable to perform without such a breach.
6. **Breach of Contract.** Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.
7. ____. Where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his or her duties, the nonoccurrence is excused.
8. ____. In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform.
9. ____. Mere expression of doubt as to a willingness or ability to perform is not enough to constitute a repudiation, but language that under a fair reading amounts to a statement of intention not to perform except on conditions which go beyond the contract constitutes a repudiation.
10. ____. A repudiation can be nullified by a retraction of the statement before the injured party materially changes his or her position in reliance on the repudiation or indicates to the other party that he or she considers the repudiation to be final.
11. ____. To be effective, a retraction of a repudiation must be clear and unequivocal and it may not impose new conditions not in accord with the original contract.
12. ____. The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his or her repudiation or to retract his or her repudiation.

Appeal from the District Court for Douglas County: W. MARK ASHFORD, Judge. Affirmed.

James D. Sherrets, Theodore R. Boecker, Jr., and Scott D. Jochim, of Sherrets & Boecker, L.L.C., for appellant.

Patrick G. Vipond and Robert A. Mooney, of Lamson, Dugan & Murray, L.L.P., and Donald R. Overholt for appellee.

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

CONNOLLY, J.

Anderson Excavating & Wrecking Company (Anderson) appeals from an order of the district court finding that Anderson had repudiated a contract it entered into with Sanitary Improvement District No. 177 (SID) and determining that Anderson was not entitled to damages. We affirm because the court was not clearly wrong when it found that Anderson had repudiated the contract.

BACKGROUND

In 1992, the SID sought bids for a seawall construction and dredging project at Riverside Lakes, which consists of residential property and adjoining manmade lakes. The project involved erecting seawalls around three islands in a boating lake and dredging the lake to make it more uniform in depth. The plans for the project were designed by an engineering firm, Lamp, Rynearson & Associates, Inc. (Lamp). The plans called for the dredged material to be disposed of on the three islands.

After receiving bids, the SID split the project into two contracts and phases of work. Phase I of the project involved the construction of the seawalls and was awarded to Big River Construction. Anderson was awarded phase II of the project, which involved the dredging of the lake. Anderson was concerned before the contract was signed that the seawalls would not be able to hold the weight of the dredged material. Anderson entered into the contract, however, and obtained a performance bond and insurance. The "Special Conditions" portion of the contract documents between the SID and Anderson provided in part:

> The CONTRACTOR shall excavate the existing lake by means of hydraulic dredge and shall dispose of the excavated material on the islands in the lake. . . .

. . . .

> The dredged material shall be distributed on the islands in a manner to provide a generally smooth mounded surface capable of providing a seed bed. Trees do not have to be removed and lower vegetation can be buried in the fill. . . . Placement of dredged materials shall be done in such a manner as to provide a safe ledge at the seawall. Excess material surcharging the seawall shall be promptly removed and all damage to the seawall repaired by dredging contractor.
>
> The CONTRACTOR shall report to the ENGINEER the location and extent of all obstructions to dredging encountered, at which time a change order will be prepared for removal thereof if additional work is determined to be advisable. . . . Obstructions shall be considered materials exceeding five (5) inches in diameter.

The "Agreement" portion of the contract documents provided:

> The CONTRACTOR for the Seawall Construction shall commence work on the seawall within thirty (30) days after Notice of Award and shall complete the seawall on one island within twenty (20) working days. All seawall construction shall be completed by April 30, 1993. The CONTRACTOR for the lake dredging shall commence operations immediately upon completion of the seawall on the first island and shall complete all dredging and seeding operations on or before May 28, 1993.

There were delays in the progress of Big River Construction's work. Thus, on April 16, 1993, Lamp issued a change order which modified the contract to read: "The CONTRACTOR for the lake dredging shall commence operation after September 7, 1993, and shall complete all dredging and seeding operations on or before May 1, 1994." The "Supplementary Conditions" portion of the contract documents provided that "[t]he Contract Times will commence to run on the day indicated in the Notice to Proceed. In no event will the Notice to Proceed be issued later than six months after the Bid opening."

The record shows that in the normal course of construction business, a "notice to proceed" is sent to a contractor to formally notify the contractor to commence work. Anderson was never sent

a "notice to proceed," nor was it sent a notice that the contract had been terminated. Anderson also provided evidence that a notice to proceed is different from a change order. The SID, however, presented evidence that the change order fulfilled the notice-to-proceed requirement in the contract because it set a date fixing the date on which work would begin under the contract.

A dispute arose between Anderson and the SID about Anderson's ability to place the dredged material on the islands. According to Steven Braithwaite, Anderson's project manager, the islands were rounded on top and any material placed there would run off into the lake. Because the contract would hold Anderson liable for excess material surcharging the seawalls and for damage to the seawalls, Braithwaite was concerned about exposing Anderson to liability. According to Otto Ludewig, an engineer at Lamp, his firm's opinion was that the islands needed a "little bit of work" to flatten them out and that the addition of silt fences would allow the dredged material to be placed on the islands.

Anderson presented evidence that residents of the lake had complained about the possibility of depositing the dredged material on the islands and that the SID was looking for other sites for the material. Braithwaite testified that unless the island issue was resolved, there was nothing Anderson could do.

On August 16, 1993, Braithwaite sent a letter to Joel Bard, an engineer from Lamp, stating that Anderson had been assured in a meeting which had occurred during the past winter that the islands would be "bowled out in the middle" before Anderson commenced phase II and that this work had not been done. Braithwaite wrote that "it is not the responsibility of the dredger to prepare the islands for dredging materials. It is only the responsibility of the dredger to place the materials on the islands." The letter indicated that Anderson considered the problem to be an obstruction to dredging under the contract.

On August 17, 1993, Bard responded that the problem was not an obstruction under the contract. He further wrote that he agreed that bowling out the islands was one way to prepare the islands for disposal of the dredged material but also wrote that "[w]hile we and the [SID] were agreeing that you and Big River could make some agreement as to how to prepare the islands for

your convenience, neither Big River [n]or the [SID] was obligated to perform such work."

A meeting was held on August 19, 1993, between Braithwaite, Bard, Ludewig, and a consultant of Anderson to discuss the problem. Three options were discussed at the meeting: (1) issuance of a change order to allow additional payment to Anderson, (2) termination of the contract without financial liability to either party, and (3) execution of the work by Anderson according to Anderson's interpretation of the contract.

On August 24, 1993, Braithwaite wrote to Bard, stating:

> To prepare the islands for placement of dredged materials will cost approximately $27,000.00. If the S.I.D. is prepared to issue a Change Order to that effect Anderson will begin as agreed. However, if the S.I.D. is unwilling to issue the Change Order, then there appears to be only two other alternatives.
>
> First, they could rebid the dredging portion of the contract, and include the areas left unaddressed such as the island preparation. In this case Anderson would be willing to relinquish all rights under this contract without any further expense to the S.I.D., provided that the performance and payment bonds are returned . . . .
>
> The second alternative is less attractive in that it requires all parties to prepare for litigation and rely upon the judicial system for determination. This process is both very expensive and time consuming. However, should this become necessary, Anderson is also prepared to exercise this alternative.

After receiving the letter, Bard recommended that the SID accept the proposal to terminate the contract "[i]n view of the above disagreements and your desire to review the amount of dredging and possible alternate disposal sites . . . ." The SID did not terminate the contract. Anderson presented evidence that Lamp and the SID behaved as if there were a contract still in place after the August 24, 1993, letter was received. Bard stated that after August 1994, "the actual status of Anderson's contract was sort of in a never-land." Anderson never commenced work on the dredging project, and neither Lamp nor the SID demanded that work be commenced.

On December 20, 1996, Anderson brought suit against the SID alleging that (1) the SID refused to go forward with the contract or to sign a proposed change order to the contract about the responsibility for the preparation of the islands, (2) the SID failed to generate a notice to proceed for Anderson to begin work, (3) the SID abandoned and breached the contract, and (4) Anderson incurred expenses in preparing to begin work on the contract, including costs incurred for insurance and performance bonds. Anderson's petition alleged two causes of action: a breach of contract cause of action seeking lost profits, and a cause of action, labeled "Detrimental Reliance," seeking expenses for preparation for work on the project. The SID denied the allegations and alleged that Anderson had breached and abandoned the contract.

The SID moved for summary judgment. The district court granted the motion and dismissed Anderson's petition, and Anderson appealed. The Nebraska Court of Appeals, in an unpublished opinion, determined that there were genuine issues of material fact preventing summary judgment on the issue of Anderson's reliance on the contract and reversed, and remanded for further proceedings. See *Anderson Excavating v. SID No. 177*, No. A-98-1022, 2000 WL 559015 (Neb. App. May 2, 2000) (not designated for permanent publication). On remand, the SID moved for partial summary judgment on the breach of contract cause of action, arguing that the Court of Appeals' decision determined that there were issues of fact only on the "detrimental reliance" cause of action. The district court granted the motion.

After a bench trial, the court determined that Anderson had repudiated the contract when it sent the August 24, 1993, letter demanding a change order or that the project be rebid and threatening litigation. The court determined that the unilateral repudiation of the contract precluded any equitable claims for recovery or for breach of contract. The court dismissed the petition. Anderson's motion for a new trial was overruled. Anderson appeals.

ASSIGNMENTS OF ERROR

Anderson assigns, rephrased, that the district court erred by (1) failing to find that the SID was in breach of the contract by failing to issue a notice to proceed and by delaying Anderson's

performance of the contract; (2) failing to find that Anderson was entitled to equitable relief, including damages for expenses; and (3) finding that Anderson had repudiated or abandoned the contract.

STANDARD OF REVIEW

[1] A suit for damages arising from breach of a contract presents an action at law. In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000).

ANALYSIS

WHETHER ACTION IS AT LAW OR IN EQUITY

Anderson contends that the court wrongly determined that it had repudiated the contract and was not entitled to equitable relief. Anderson argues that this is an equity action because it seeks to recover damages for "detrimental reliance." We disagree and determine that Anderson's claim is for breach of contract and is an action at law.

[2,3] A party's "reliance interest" is a measure of damages in a contract action. Restatement (Second) of Contracts § 349 at 124 (1981). Reliance damages are defined as an alternative measure of damages under which "the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." *Id.* The Restatement does not treat "detrimental reliance" as a separate cause of action. Instead, it is a measure of damages for breach of contract.

Here, Anderson sought expenses for preparation of work on the project under the contract and contends that the SID breached the contract by failing to issue a notice to proceed. Thus, Anderson was seeking reliance damages for breach of contract which is an action at law. We note that the court tried the case as if it were an action in equity. Because Anderson's action was actually an action at law, however, we will not reverse the court's factual findings unless they are clearly wrong.

REPUDIATION

[4,5] Anderson contends that it did not repudiate the contract. The question whether there has been repudiation or whether repudiation was justified is a question of fact. *Chadd v. Midwest Franchise Corp.*, 226 Neb. 502, 412 N.W.2d 453 (1987). We have held that a repudiation is (1) a statement by the obligor to the obligee indicating that he or she will commit a breach that would of itself give the obligee a claim for damages for total breach or (2) a voluntary affirmative act which renders the obligor either unable or apparently unable to perform without such a breach. *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979); Restatement, *supra*, § 250.

[6-9] Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance. Restatement, *supra*, § 253(2). Also, where a party's repudiation contributes materially to the nonoccurrence of a condition of one of his or her duties, the nonoccurrence is excused. *Chadd v. Midwest Franchise Corp.*, *supra*; Restatement, *supra*, § 255.

> In order to constitute a repudiation, a party's language must be sufficiently positive to be reasonably interpreted to mean that the party will not or cannot perform. Mere expression of doubt as to his willingness or ability to perform is not enough to constitute a repudiation . . . . However, language that under a fair reading "amounts to a statement of intention not to perform except on conditions which go beyond the contract" constitutes a repudiation.

Restatement, *supra*, § 250, comment *b*. at 273. Accord Neb. U.C.C. § 2-610, comment 2 (Reissue 2001).

Here, Anderson sent a letter stating that it was facing additional expenses to prepare the seawalls. The letter then stated Anderson would perform if a change order was entered to provide for additional payment of $27,000. The letter stated that if a change order could not be made, the two remaining options were to rebid the contract or have the dispute settled through legal action. A reasonable reading of the letter shows that Anderson would not perform the contract as originally agreed. Thus, it was

not clearly erroneous for the court to find that the letter was a repudiation of the contract.

Anderson argues that the court wrongly focused on only the August 24, 1993, letter and should have considered events that happened before and after the letter was sent. For example, Anderson contends that the SID continued to behave as if a contract existed after the letter was sent and that there was evidence that the parties were still attempting to find a solution to the problem.

[10-12] A repudiation can be nullified by a retraction of the statement before the injured party materially changes his or her position in reliance on the repudiation or indicates to the other party that he or she considers the repudiation to be final. See, *Gilmore v. Duderstadt*, 125 N.M. 330, 961 P.2d 175 (N.M. App. 1998); Restatement (Second) of Contracts § 256(1) (1981). But, to be effective, a retraction must be clear and unequivocal and it may not impose new conditions not in accord with the original contract. *Gilmore v. Duderstadt, supra.* The injured party does not change the effect of a repudiation by urging the repudiator to perform in spite of his or her repudiation or to retract his or her repudiation. See, *Cedar Point Apartments v. Cedar Point Inv. Corp.*, 693 F.2d 748 (8th Cir. 1982); Restatement, *supra*, § 257.

Anderson's arguments fail because Anderson never specifically retracted its repudiation. Further, any additional attempts by the SID to change the location for the placement of the dredged material did not change the fact that a repudiation occurred. When Anderson repudiated the contract, the SID was excused from performing the condition of issuing a notice to proceed and was excused from performing any of its contractual duties. Thus, the court was not clearly wrong when it determined that Anderson had repudiated the contract and could not recover reliance damages.

CONCLUSION

We determine that Anderson's claim for damages for detrimental reliance on the contract is an action at law for breach of contract. We further determine that the district court was not clearly wrong when it determined that Anderson had repudiated

the contract and could not recover reliance damages. Accordingly, we affirm.

AFFIRMED.

IN RE APPLICATION OF LINCOLN ELECTRIC SYSTEM. LINCOLN ELECTRIC SYSTEM, LINCOLN, APPELLANT, V. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, AND NEBRASKA TELECOMMUNICATIONS ASSOCIATION ET AL., INTERVENORS-APPELLEES.

655 N.W.2d 363

Filed January 10, 2003. No. S-01-286.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. 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.
2. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
3. **Judgments: Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
4. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.
5. **Constitutional Law: Statutes.** Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid.
6. **Constitutional Law: States: Words and Phrases.** There are three varieties of preemption: express, implied, and conflict preemption.
7. ____: ____: ____. Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law.
8. **Constitutional Law: States.** Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law.
9. **Constitutional Law: Statutes: States.** By virtue of the Supremacy Clause of the U.S. Constitution, Neb. Rev. Stat. §§ 86-128(1)(b) and 86-575(2) (Cum. Supp. 2002) are preempted by federal law and are unconstitutional.
10. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

11. **Municipal Corporations.** A charter defining powers and duties is essential to the creation and existence of a municipal corporation.
12. **Municipal Corporations: Legislature: Ordinances.** A legislature's grant of powers to a municipality is often referred to as a "legislative charter." Legislative grants of power are strictly construed pursuant to what has become known as Dillon's rule, which provides a municipal corporation possesses and can exercise these powers only: (1) those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable.
13. **Municipal Corporations.** The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs.
14. ____. While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs.
15. ____. While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power.
16. ____. A home rule city may act in all matters necessary or incidental to its government, although municipal action will take precedence over conflicting state action only if the matter is one of strictly local concern.

Appeal from the Nebraska Public Service Commission. Affirmed.

William F. Austin, of Erickson & Sederstrom, P.C., Douglas L. Curry, of Lincoln Electric System, and Mark J. Ayotte, of Briggs and Morgan, P.A., for appellant.

Jack L. Shultz and Gregory D. Barton, of Harding, Shultz & Downs, for intervenor-appellee Nebraska Telecommunications Association.

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

STEPHAN, J.

This is an appeal of an order of the Nebraska Public Service Commission (Commission) dismissing an application for contract carrier permit authority filed by Lincoln Electric System (LES). LES appeals, arguing the Commission erred in determining that LES lacked legal authority to provide contract carrier telecommunications services.

I. PROCEDURAL HISTORY

LES is an operating division of the city of Lincoln, a Nebraska municipal corporation and political subdivision of the State of Nebraska. On October 4, 2000, LES filed an application and request for authority with the Commission, seeking a contract carrier permit authorizing LES to provide competitive access transport services. In its application, LES sought authority to operate as a switchless facilities-based provider of dedicated digital information transmission services over its fiber-optic network facilities to and from customer user points.

The application identifies LES as a citizen-owned electric utility serving a 190-square-mile area surrounding the city of Lincoln. It states that LES provides electrical service to approximately 111,000 metered customers and also engages in wholesale power and energy transactions, including buying from and selling to other regional public utilities. According to the application, LES owns and maintains extensive fiber-optic facilities located throughout its authorized electric service area, which are used to meet LES' telecommunications needs through the interconnection of its operations center, generation stations, and substations. LES sought contract carrier permit authority to allow it

> to fully utilize its existing fiber optic system for the benefit of the Lincoln area by making these facilities available on a non-exclusive basis to provide digital transmission to and from user points within its requested geographic service area, including services to other licensed telecommunications carriers as a provider of competitive access services.

LES stated in its application that its proposed telecommunications services would not make use of the local or interexchange public switched telephone network and that it expected the proposed service to be "used primarily by business customers and governmental entities to meet their telecommunications needs."

The Nebraska Telecommunications Association (NTA) formally intervened in the matter. On November 9, 2000, the NTA filed a motion for declaratory relief alleging that LES lacked the legal authority to perform for-hire telecommunications services or to hold a contract carrier permit to perform such services. A hearing on the motion was held on December 11, 2000. On January 9, 2001, the Commission entered an order concluding

that LES did not have legal authority to provide for-hire telecommunications services. The Commission reasoned that no statute gave LES the requisite authority and that Lincoln's home rule charter, strictly construed, contained no express grant of such authority. One concurring commissioner found that the city had the requisite authority pursuant to its home rule charter, but had not delegated such authority to LES. After its motion for rehearing was denied, LES filed this timely appeal.

II. ASSIGNMENTS OF ERROR

LES assigns that the Commission erred in (1) concluding that the charter of the city of Lincoln does not authorize the city to offer for-hire telecommunications services when such activity is not in contravention of any applicable constitutional or statutory provision; (2) applying a rule of strict construction, referred to as "Dillon's rule," to the limitation of powers charter under which the city of Lincoln currently operates and from which it derives its primary authority; (3) declaring that Neb. Rev. Stat. § 15-201 (Reissue 1997) does not permit the city of Lincoln to provide for-hire telecommunications services; and (4) concluding that the city of Lincoln does not have the inherent authority to make the efficient business judgment of offering its unused fiber-optic capacity for telecommunications purposes when it is engaged in the proprietary function of operating an electric utility.

III. STANDARD OF REVIEW

[1] The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. *In re Proposed Amend. to Title 291*, 264 Neb. 298, 646 N.W.2d 650 (2002); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002). 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. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

[2] Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *Id.*

[3] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Gernstein v. Lake*, 259 Neb. 479, 610 N.W.2d 714 (2000).

IV. ANALYSIS

1. Mootness and Preemption

The question of law presented by this appeal is whether the Commission erred in determining that LES lacked the legal authority to operate as a for-hire telecommunications carrier. During the pendency of this appeal, the Nebraska Legislature enacted 2001 Neb. Laws, L.B. 827. Certain sections of this bill, originally codified at Neb. Rev. Stat. §§ 75-604(5) and 86-2302(2) (Supp. 2001), became effective on September 1, 2001. These statutes provided that the Commission "shall not issue . . . a permit . . . to an agency or political subdivision of the state" and that "[n]o agency or political subdivision of the state shall provide telecommunications services for a fee . . . or be issued . . . a permit as a telecommunications contract carrier." §§ 75-604(5) and 86-2302(2). We note that 2002 Neb. Laws, L.B. 1105, transfers § 75-604(5) to Neb. Rev. Stat. § 86-128(1)(b) (Cum. Supp. 2002), operative January 1, 2003, without substantive change. In addition, 2002 Neb. Laws, L.B. 1105, transfers § 86-2302(2) to Neb. Rev. Stat. § 86-575(2) (Cum. Supp. 2002), operative January 1, 2003, also without substantive change. Due to this recodification, we refer to the current statutes, rather than the statutes referenced by the parties. In its appellate brief and in a subsequently filed motion for summary dismissal, NTA asserted that the enactment of these statutory provisions rendered the issue presented by this appeal moot. LES filed an objection to the motion for summary dismissal and supporting brief in which it asserted that the pertinent provisions of L.B. 827 are preempted by the Telecommunications Act of 1996, 47 U.S.C. § 253 (2000), and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. LES also addressed this issue in its reply brief, filed a separate "Notice of Constitutional Question," and served copies of its briefs assigning the unconstitutionality of L.B. 827 pursuant to Neb. Ct. R. of

Prac. 9E (rev. 2000). The Attorney General has not entered an appearance or filed a brief on this issue.

[4] Although we overruled the motion for summary dismissal, the mootness issue has now been fully briefed and is before us. A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001). The Nebraska statutory provisions enacted after the Commission's order at issue in this case would clearly prohibit the city of Lincoln and LES from seeking authority as a telecommunications contract carrier. Unless LES is correct in its assertion that these statutory provisions are preempted by federal law, the single issue presented in this appeal would be moot. We therefore address the preemption issue.

The federal statute upon which LES bases its preemption argument provides in part:

> **(a) In general**
>
> No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any entity* to provide any interstate or intrastate telecommunications service.
>
> **(b) State regulatory authority**
>
> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> **(c) State and local government authority**
>
> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(Emphasis supplied.) 47 U.S.C. § 253. Federal courts interpreting the statute generally hold that subsection (a) imposes a

substantive limitation on state and local governments, while subsections (b) and (c) are "safe harbors" or exceptions to the general prohibition stated in subsection (a). See, *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002); *New Jersey Payphone Ass'n v. Town of West New York*, 299 F.3d 235 (3d Cir. 2002); *BellSouth Telecommunications v. Town of Palm Beach*, 252 F.3d 1169 (11th Cir. 2001).

[5-7] Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002), citing U.S. Const. art. VI, cl. 2. There are three varieties of preemption: express, implied, and conflict preemption. *Id.* Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law. *Id.* LES contends that express preemption arises from the plain language of 47 U.S.C. § 253(a) because it is an "entity" which Congress has determined may not be prohibited by the state from providing telecommunications services. Thus, it contends that §§ 86-128(1)(b) and 86-575(2) are preempted and unconstitutional. On the other hand, NTA argues that under rules governing federal statutory construction, the phrase "any entity" in 47 U.S.C. § 253(a) does not include municipalities which are traditionally subject to the overriding control of state legislatures, and thus the Nebraska statutes are not preempted. Both arguments are supported by case law.

NTA relies upon *City of Abilene, Texas v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), in which the U.S. Court of Appeals for the District of Columbia Circuit upheld a determination by the Federal Communications Commission (FCC) that § 253(a) did not preempt a Texas statute forbidding municipalities from providing telecommunications services. In its analysis, the court determined that § 253(a) must be construed in accordance with the precept enunciated in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991), because "[t]o claim . . . that § 253(a) bars Texas from limiting the entry of its municipalities into the telecommunications business is to claim that

Congress altered the State's governmental structure." *City of Abilene, Texas*, 164 F.3d at 52. The precept of *Gregory, supra*, requires that if Congress intends to alter the usual constitutional balance between a state and its municipalities, it must make its intention "'"unmistakably clear"'" in the language of the statute. *Gregory*, 501 U.S. at 460, quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985) (specific holding superseded by statute). In *City of Abilene, Texas*, the court concluded that there was no such clarity in § 253(a), reasoning that the term "'entity'" was not defined in the Telecommunications Act. 164 F.3d at 52. Noting that it was linguistically possible to include a municipality under the heading "entity," the court found that it was not enough under the *Gregory* standard that the statute *could* bear such meaning. *City of Abilene, Texas, supra*. Instead, the court focused on the fact that there was no textual evidence to suggest that Congress, in using the word "entity," deliberated over the effect such use would have on state-local governmental relationships. *Id.* Noting that *Gregory* requires construction of a statute in favor of state sovereignty when the text fails to indicate congressional intent to the contrary, the court held that § 253(a) did not preempt the Texas statutes. *City of Abilene, Texas, supra*.

A similar conclusion was reached by the Iowa Supreme Court in *Iowa Telephone Ass'n v. City of Hawarden*, 589 N.W.2d 245 (Iowa 1999). In that case, the court began its analysis with the "plain-statement rule" derived from *Gregory, supra*, that "the courts will not interpret a federal statute in such a way as to intrude upon an area traditionally regulated by the states absent a clear expression of congressional intent to do so." *City of Hawarden*, 589 N.W.2d at 251. Relying on the decision of the FCC in *City of Abilene, Texas* (which was affirmed on appeal by the D.C. Circuit Court as discussed above), the Iowa court held without significant additional analysis that § 253(a) did not prevent the State of Iowa from regulating the provision of telecommunications services by its political subdivisions.

Subsequent to the decisions in *City of Abilene, Texas, supra*, and *City of Hawarden, supra*, two courts have reached the opposite conclusion. In *City of Bristol, VA v. Earley*, 145 F. Supp. 2d

741 (W.D. Va. 2001), a municipality sought a declaratory judgment that a Virginia statute prohibiting local governmental entities from offering telecommunications services to the general public was preempted by § 253(a). The court acknowledged that the challenged law related to the relationship between states and their political subdivisions, an area traditionally regulated by states. It also affirmed the principle that when a federal statute touches on an area traditionally within the exclusive control of states, Congress must make its intention to preempt " 'clear and manifest' " based on *Gregory v. Ashcroft*, 501 U.S. 452, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). *Earley*, 145 F. Supp. at 747. However, guided by Supreme Court decisions holding that the use of the modifier "any" denoted an unambiguous legislative intent to impart an expansive scope to a statutory term, the district court determined that Congress' use of the phrase " 'any entity' " made it " 'clear and manifest' " that § 253(a) was intended to have sweeping application, including application in those areas in which states traditionally enjoyed exclusive regulatory power. 145 F. Supp. at 747, citing *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and *United States v. Gonzales*, 520 U.S. 1, 117 S. Ct. 1032, 137 L. Ed. 2d 132 (1997). On this basis, the court held that the Virginia statute was preempted by § 253(a) and therefore invalid and unenforceable under the Supremacy Clause.

In *Missouri Mun. League v. F.C.C.*, 299 F.3d 949 (8th Cir. 2002), released after the instant case was argued and submitted, the U.S. Court of Appeals for the Eighth Circuit employed similar reasoning to conclude that a Missouri statute which prevented municipalities and municipally owned utilities from providing telecommunications services or facilities was preempted by § 253(a). In vacating an FCC order which relied heavily upon *City of Abilene, Texas v. F.C.C.*, 164 F.3d 49 (D.C. Cir. 1999), the court acknowledged its responsibility under *Gregory, supra*, to determine whether the statutory language plainly requires preemption. Focusing on the phrase " 'any entity,' " the court determined that the plain meaning of the term " 'entity' " included all business or governmental organizations, including municipalities. *Missouri Mun. League*, 299 F.3d at 953. Noting that "[t]ime and time again the Court has held that the modifier

'any' prohibits a narrowing construction of a statute," *id.* at 954, the court concluded that "Congress's use of [the term] 'any' to modify 'entity' signifies its intention to include within the statute all things that could be considered as entities." *Id.* at 953-54, citing, inter alia, *Gonzales, supra*, and *Salinas, supra*. Specifically rejecting the reasoning of *City of Abilene, Texas*, the court in *Missouri Mun. League* stated:

> The court, however, made no mention of the Supreme Court's cases regarding the effect of the modifier "any" on the modified term, referring instead to Congress's "tone of voice" regarding the term "any" and the "emphasis" Congress meant to place on different words. [Citation omitted.] . . . Whatever the reason for the D.C. Circuit's decision not to consider and discuss *Salinas* and like cases, we view the lack of such a discussion as detracting from the persuasiveness of its opinion. The Supreme Court has repeatedly instructed us regarding the proper manner of interpreting the modifier "any," and we follow that direction here.

299 F.3d at 955. The court therefore concluded that municipalities are included within the phrase "any entity" as used in § 253(a).

[8,9] Under the Supremacy Clause of the U.S. Constitution, state courts have a concurrent duty to enforce federal law. *Howlett v. Rose*, 496 U.S. 356, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990); *Preister v. Madison County*, 258 Neb. 775, 606 N.W.2d 756 (2000). The Supreme Court has not addressed the specific preemption issue before us, and in the absence of an interpretation of § 253(a) by the Court, we are not bound by any circuit court's interpretation. See *In re Search Warrant for 3628 V St.*, 262 Neb. 77, 628 N.W.2d 272 (2001). See, also, *Lockart v. Fretwell*, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993) (Thomas, J., concurring) (state courts bound by Supreme Court's interpretation of federal law, but not bound by circuit court's interpretation); *Bromley v. Crisp*, 561 F.2d 1351 (10th Cir. 1977) (state courts may express differing views on federal questions until guided by binding decision of Supreme Court). Here, we are persuaded by the reasoning of the Eighth Circuit that under the rule of statutory construction applied by the Supreme Court in *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), and other cases, Congress' use of the phrase

"any entity" in § 253(a) is indicative of an expansive statutory scope which includes a governmental entity, such as a municipally owned utility, seeking to provide telecommunications services. We conclude that §§ 86-128(1)(b) and 86-575(2) are absolute prohibitions which, as a matter of law, do not fall within the "safe harbor" provisions in § 253(b) and (c). Therefore, by virtue of the Supremacy Clause, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are unconstitutional.

2. Authority to Operate as Telecommunications Carrier

Having concluded that LES is not *prohibited* by state law from seeking a certificate of public convenience and necessity to operate as a telecommunications carrier, we must now consider whether it is *authorized* to do so.

(a) Statutory Authority

[10] LES assigns that the Commission erred in declaring that § 15-201 does not permit the city of Lincoln to provide for-hire telecommunications services. This assignment, however, is not argued in the brief filed by LES. Errors that are assigned but not argued will not be addressed by an appellate court. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001).

(b) Charter Authority of City of Lincoln

LES also contends that the home rule charter of the city of Lincoln confers authority on LES to provide for-hire telecommunications services. This charter was adopted in 1917 pursuant to article XI, § 2, of the Constitution of the State of Nebraska. This provision of our constitution, adopted in 1912, permits a city having a population of more than 5,000 to "frame a charter for its own government, consistent with and subject to the constitution and laws of this state." Neb. Const. art. XI, § 2.

[11,12] A charter defining powers and duties is essential to the creation and existence of a municipal corporation. 2A Eugene McQuillin, The Law of Municipal Corporations § 9.01 (3d ed. 1996). Historically, states were viewed as possessing all powers necessary for the protection of the general public, and thus a municipality or local city government could exercise only

those powers specifically granted to it by the sovereign state. See *id.* A legislature's grant of powers to a municipality is often referred to as a "legislative charter." See *id.*, § 9.07 at 177. Legislative grants of power are strictly construed pursuant to what has become known as Dillon's rule, which provides:

> "[A] municipal corporation possesses and can exercise these powers only: (1) Those granted in express terms; (2) those necessarily or fairly implied in, or incident to, the powers expressly granted; and (3) those essential to the declared objects and purposes of the municipality, not merely convenient, but indispensable."

Consumers Coal Co. v. City of Lincoln, 109 Neb. 51, 69-70, 189 N.W. 643, 650 (1922).

[13-15] In 1875, the home rule charter was originated by the constitution of Missouri. 2A McQuillin, *supra*, § 9.08. Other states, including Nebraska, adopted similar state constitutional provisions allowing for the adoption of home rule charters. See Neb. Const. art. XI, § 2. The purpose of a home rule charter is to render the city as nearly independent as possible from state interference. *Mollner v. City of Omaha*, 169 Neb. 44, 98 N.W.2d 33 (1959); 2A McQuillin, *supra*, § 9.08. Legally, a home rule charter is simply another method of empowering a municipality to govern its own affairs. See *id.* While a legislative charter emanates from the sovereign legislature, a home rule charter has as its basis a constitutional provision enacted by the sovereign people authorizing the electorate to empower municipalities with the authority to govern their own affairs. See *id.* While legislative charters are always grants of power that are strictly construed, home rule or constitutional charters may be either grants of power or limitations of power. 2A McQuillin, *supra*.

As noted, the Nebraska Constitution authorized the city of Lincoln to adopt a home rule charter. Neb. Const. art. XI, § 2. The question of the nature and extent of the power granted to the electorate of a city by this constitutional provision was addressed by this court in *Consumers Coal Co.*, *supra*. In that case, the plaintiff argued that there was no legal authority permitting the city to operate a public market for the purchase and sale of coal and wood. After examining the language of the Nebraska Constitution authorizing the adoption of home rule charters, we stated:

> We hold that the city may by its charter under the Constitution provide for the exercise by the council of every power connected with the proper and efficient government of the municipality, including those powers so connected, which might lawfully be delegated to it by the legislature, without waiting for such delegation. It may provide for the exercise of power on subjects, connected with municipal concerns, which are also proper for state legislation, but upon which the state has not spoken, *until* it speaks.

(Emphasis in original.) *Consumers Coal Co.*, 109 Neb. at 58-59, 189 N.W. at 646. We further held that "it was within the competency of the electorate of the city of Lincoln to adopt a charter which under settled principles of construction would be a limitation as distinguished from a grant of power." *Id.* at 66, 189 N.W. at 649. To determine what the people of the City of Lincoln did " 'with the sovereignty acquired by the adoption of a home rule charter,' " we held that it was necessary to examine the particular charter adopted in order to determine its effect. *Id.* A similar analysis is necessary in the instant case.

At the time *Consumers Coal Co.* was decided in 1922, article II, § 1, of the Lincoln Charter provided that " '[w]ithout denial or disparagement of other powers held under the Constitution and laws of the state, the city of Lincoln shall have the right and power' " to perform specifically enumerated functions. *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 67, 189 N.W. 643, 649 (1922). Based upon this language, we concluded that the charter was within that class of home rule charters that are construed to be grants of power, rather than limitations of power. As such, it was subject to the same principle of strict construction that was applicable to legislative grants of municipal charters. Finding no express grant of power authorizing the city to operate a private coal and wood market in the charter language, we concluded that the city lacked the authority to do so.

Article II of the Lincoln Charter, as amended in 1992, is significantly different. It provides in relevant part:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that

> it is possible for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution or restricted by this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers. The city shall also have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that now are, or hereafter may be, granted by the laws of the State of Nebraska to all cities and villages or applicable to cities of the primary class, provided that such laws are not inconsistent with this charter.

Lincoln Charter, art. II, § 1, approved by voters on May 12, 1992. Unlike the 1922 charter, the broad language in this current charter does not merely enumerate specified powers, but, rather, grants all powers possible to the city. We conclude that the present charter is a limitation of powers charter, not a grant of powers charter. As such, the rule of strict construction, or Dillon's rule, does not apply, and the Commission erred in examining the charter language for an express or implied grant of power. See, *Consumers Coal Co., supra*; 2A Eugene McQuillin, The Law of Municipal Corporations § 9.08 (3d ed. 1996). To determine whether the city of Lincoln possesses the requisite power to operate as a for-hire telecommunications carrier, we need only consider whether the charter's broad authorization to engage in municipal powers and functions encompasses the provision of for-hire telecommunications services.

(c) Is Provision of Proposed Services a Municipal Power?

NTA contends that the charter grants the city only "strictly municipal" powers. Brief for appellee at 31. It argues that the provision of for-hire telecommunications does not fall within this definition and is therefore precluded. LES, in contrast, argues that the limitation of powers charter grants the city all powers " 'which might lawfully be delegated to the municipality by the legislature.' " Brief for appellant at 26. Because the Legislature could confer authority to engage in for-hire telecommunications upon the city, LES contends that it, as an operating division of the city, necessarily possesses that authority. We conclude that NTA's

interpretation of the powers granted by a limitation of powers charter is too narrow, while LES' is too broad.

[16] NTA's contention that a limitation of powers charter grants a city authority in only matters of "strictly municipal" concern is based upon a misinterpretation of our prior law and a mischaracterization of the legal issue presented in this case. NTA relies upon cases interpreting the "subject to the constitution and laws of this state" language in Neb. Const. art. XI, § 2. This language requires that a provision of a home rule charter must yield to a conflicting state statute, unless the provision relates to a matter of "strictly municipal" concern. E.g., *Jacobberger v. Terry*, 211 Neb. 878, 320 N.W.2d 903 (1982). Contrary to NTA's assertions, however, this analysis does not mean that a home rule city may act in only those areas that are "strictly municipal." Instead, such an entity may act in all matters necessary or incidental to its government, although municipal action will take precedence over conflicting state action only if the matter is one of strictly local concern. See, *id.*; *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 189 N.W. 643 (1922).

NTA also misconstrues the legal issue present in the instant case. It contends that the state's regulation of telecommunications services through the Commission necessarily establishes that this is an area of statewide concern and that a municipality therefore cannot, pursuant to its home rule charter, act in a conflicting manner. This rationale would be applicable if LES was attempting to *regulate* the telecommunications field. However, the issue in this case is whether LES has the legal authority to *provide* for-hire telecommunications services pursuant to the Lincoln home rule charter. In the instant case, there is no question that if LES may lawfully provide the services, it is subject to regulation by the Commission. Compare *Omaha & C.B. Street R. Co. v. City of Omaha*, 125 Neb. 825, 252 N.W. 407 (1934) (holding home rule charter did not authorize city to regulate bus service contrary to state regulation). There is no conflict between state law and the charter in this case, and therefore the "strictly municipal" analysis is inapplicable.

LES' interpretation of the powers granted by a limitation of powers charter in Nebraska is incorrect because in *Consumers Coal Co.*, we recognized that such a charter adopted pursuant to

the Nebraska Constitution does not grant "unlimited" power to a city. Quoting *State ex rel. v. Telephone Co.*, 189 Mo. 83, 88 S.W. 41 (1905), we held:

> "But it is not every power that may be essayed to be conferred on the city by such a charter that is of the same force and effect as if it were conferred by an act of the general assembly, *because the Constitution does not confer on the city the right, in framing its charter, to assume all the powers that the state may exercise within the city limits, but only powers incident to its municipality*; yet the Legislature may, if it should see fit, confer on the city powers not necessary or incident to the city government. There are governmental powers the just exercise of which is essential to the happiness and well being of the people of a particular city, yet which are not of a character essentially appertaining to the city government. Such powers the state may reserve to be exercised by itself, or it may delegate them to the city, but until so delegated they are reserved. *The words in the Constitution, 'may frame a charter for its own government,' mean may frame a charter for the government of itself as a city, including all that is necessary or incident to the government of the municipality, but not all the power that the state has for the protection of the rights and regulation of the duties of the inhabitants in the city, as between themselves.*"

(Emphasis supplied.) *Consumers Coal Co.*, 109 Neb. at 57, 189 N.W. at 645. Thus, the city may exercise every power "*connected with the proper and efficient government of the municipality, including those powers so connected*, which might lawfully be delegated to it by the legislature, without waiting for such delegation." (Emphasis supplied.) *Id.* at 58-59, 189 N.W. at 646. See, *Michelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951); *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W.2d 613 (1942). Pursuant to the "for its own government" limitation in our constitution, see article XI, § 2, the question is not whether the Legislature could have delegated the authority to provide for-hire telecommunications services to the city of Lincoln. Rather, the question is whether the provision of for-hire telecommunications services is an area that is necessary, incidental, or

connected with the proper and efficient government of the municipality of the city of Lincoln.

As we noted in *Consumers Coal Co. v. City of Lincoln*, 109 Neb. 51, 58, 189 N.W. 643, 646 (1922), resolution of this question is difficult for "[i]t is not easy in all cases to distinguish between municipal powers and state powers . . . ." Due to the difficult nature of the question, we must "content ourselves with the consideration of each case as it arises, applying those principles which precedent and logic approve." *Id.*

Our precedent indicates that a city's provision of retail services can be necessary or incidental to its proper and efficient government. This is particularly true in those circumstances where retail services are directly related to the provision of a public service. In *Consumers Coal Co.*, we impliedly held that the operation of a public market for the sale of wood and coal by the city was necessary or incidental to the proper and efficient government of the city. Four years later, we reached a similar conclusion in *Standard Oil Co. v. City of Lincoln*, 114 Neb. 243, 207 N.W. 172 (1926). In that case, an amendment to the Lincoln home rule charter expressly granted the city the power to engage in the business of selling gasoline and oil to the inhabitants of the city. The constitutionality of the amendment was challenged by a local business on the ground, inter alia, that the sale of gasoline and oil by the city " 'is not of, and does not pertain to, the government of said defendant city.' " *Id.* at 246, 207 N.W. at 173. We rejected the plaintiff's argument, noting that the use of the commodity of gasoline had so steadily increased that it was "well-nigh universal" and that thus, its provision by the city was for a public purpose. *Id.* at 251, 207 N.W. at 175. We held that the charter provision delegated power to the city so that it "may do that which the state may do." *Id.* at 252, 207 N.W. at 176.

Consideration of our precedent and the dictates of logic lead us to conclude that the provision of for-hire telecommunications services by the city of Lincoln is incidental to or connected with its powers of municipal government granted under its limitation of powers charter. Although the charter does not grant the city authority to do all that the state could do, provision of for-hire telecommunications, much like the provision of gasoline, serves a public purpose that is sufficiently related to the government of

the municipality of the city of Lincoln. See *Standard Oil Co., supra*. The city seeks to provide telecommunications services by making efficient use of the facilities it already uses to provide public utilities, thus providing a further connection between the provision of for-hire telecommunications services and the necessary and incidental powers of municipal government. See, also, *Speidell Monuments v. Wyuka Cemetery*, 242 Neb. 134, 493 N.W.2d 336 (1992) (finding cemetery organized as public corporation had implied power to sell grave markers and monuments); *Nelson-Johnston & Doudna v. Metropolitan Utilities District*, 137 Neb. 871, 291 N.W. 558 (1940) (finding metropolitan utilities district empowered to engage in business of supplying water and gas had implied authority to sell gas appliances).

Based upon the foregoing, the Commission erred as a matter of law in determining that the city of Lincoln lacked the legal authority to engage in the provision of for-hire telecommunications services.

3. Authority of LES

The remaining question is whether the city of Lincoln has properly delegated its authority to provide for-hire telecommunications services to LES. LES is an operating division of the city of Lincoln. The Lincoln City Council gives LES all of its powers and responsibilities by ordinance. According to Lincoln Mun. Code § 4.24 (2001), LES is governed by the LES administrative board. Section 4.24.060 of the code sets forth the general powers and duties of the administrative board and provides in pertinent part: "The Lincoln Electric System Administrative Board shall have general control of the Lincoln Electric System of the City of Lincoln including the responsibility for the control and management of the property, personnel, facilities, equipment, and finances of said Lincoln Electric System." Section 4.24.070, which addresses the specific powers and duties granted to the board, further states: "The Board shall . . . (e) Do and perform all other acts necessary to efficiently maintain and operate the Lincoln Electric System including the management of the property, personnel, facilities and finances of the Lincoln Electric System, except those otherwise limited by the provisions of the ordinance."

LES argues that "[i]nherent in these provisions is the Administrative Board's mandate to maximize the use of all of LES's resources in order to efficiently manage its property and finances." Brief for appellant at 29. LES contends that productive use of its unused fiber-optic network falls within this mandate and that thus, the city council has authorized LES to engage in for-hire telecommunications services.

We disagree. LES is clearly authorized to provide electric service to citizens and businesses in Lincoln and the surrounding area in its capacity as a public utility. To the extent management of LES facilities and property relates to the provision of electric service, the city has delegated such authority to the LES board. However, use of LES' facilities or property for an entirely different purpose, i.e., the provision of for-hire telecommunications services, is not a use that can be fairly considered to be within the powers delegated to LES by the city. This is especially true because the ordinance gives the LES board the power to perform all acts *necessary* to the efficient operation of the electric system. The record does not reflect that the use of excess fiber-optic capacity for the provision of for-hire telecommunications services is *necessary* to the efficient operation of the electric system. Therefore, the city of Lincoln has not, at this time, properly delegated authority to LES to utilize the excess fiber-optic capacity for the provision of for-hire telecommunications services.

V. CONCLUSION

For the foregoing reasons, §§ 86-128(1)(b) and 86-575(2) are preempted by federal law and are therefore unconstitutional under the Supremacy Clause of the U.S. Constitution. The current Lincoln home rule charter is a limitation of powers charter, and the Commission erred in applying a rule of strict construction to such charter. The Commission further erred as a matter of law in finding that the city of Lincoln lacked the legal authority to provide for-hire telecommunications services. However, because LES has not been authorized by ordinance to seek regulatory authority to provide such services, the Commission properly denied its application. We therefore affirm the denial of

the application on grounds other than those relied upon by the Commission majority.

AFFIRMED.

CHRIS M. NAUENBURG, APPELLANT AND CROSS-APPELLEE, V. SHARON LEWIS, APPELLEE AND CROSS-APPELLANT. JEREMY MCCLOUD AND LOGAN MCCLOUD, APPELLANTS AND CROSS-APPELLEES, V. SHARON LEWIS, APPELLEE AND CROSS-APPELLANT.

655 N.W.2d 19

Filed January 10, 2003. Nos. S-01-576, S-01-577.

1. **Jury Instructions.** Whether a jury instruction given by a trial court is correct is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
4. **Jury Instructions: Appeal and Error.** In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error.
5. **Police Officers and Sheriffs: Arrests: False Imprisonment: Liability.** A private citizen who, by affirmative direction, persuasion, or request, procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his or her knowledge of a supposed offense and the officer makes the arrest entirely upon the officer's own judgment and discretion, the informer is not liable. If an informer knowingly gives to an officer false information which is a determining factor in the officer's decision to make an arrest, the informer is liable.
6. **Police Officers and Sheriffs: Public Health and Welfare.** A police officer on "off-duty" status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. Indeed, police officers are considered to be under a duty to respond as police officers 24 hours a day.
7. **Police Officers and Sheriffs: Probable Cause.** Probable cause is to be evaluated by the collective information of the police engaged in a common investigation.

8. **Motor Vehicles: Police Officers and Sheriffs: Investigative Stops: Probable Cause: Corroboration.** A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message.
9. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.

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

James L. Zimmerman, of Sorensen, Zimmerman & Mickey, P.C., for appellants.

Steven W. Olsen, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Chris M. Nauenburg, Jeremy McCloud, and Logan McCloud (collectively the appellants) brought these civil actions for false imprisonment against Sharon Lewis in the district court for Scotts Bluff County. The appellants allege that Lewis, acting as a private citizen, provided information to the Nebraska State Patrol which caused the State Patrol to falsely arrest and detain the appellants. A consolidated jury trial resulted in verdicts in Lewis' favor. The appellants filed these appeals, arguing error in the jury instructions, and Lewis cross-appealed. We find no error in the jury instructions and thus affirm.

BACKGROUND

On October 26, 1998, Lewis traveled from Kimball, Nebraska, to Scottsbluff, Nebraska, to attend a class. Lewis was employed as a Kimball police officer, but was off duty at all relevant times that day. On her way out of Kimball, Lewis drove past an apartment complex that was under surveillance. One of the residents of the complex had previously been arrested for possession of

drugs, and another was under suspicion for a burglary in which weapons had been stolen. Lewis was driving her personal vehicle at the time.

As Lewis approached the apartment complex, she saw a gray Mercury Cougar that had backed out of the complex's parking lot into the street. The Cougar was driven by Nauenburg, and Jeremy was a passenger in the car. The two drove off in the Cougar, but several blocks later, Lewis again encountered the Cougar as both vehicles departed Kimball on the same highway, with Lewis trailing behind the Cougar. As the vehicles were leaving Kimball on the highway, Lewis estimated that the Cougar was traveling approximately 55 m.p.h. in the 40-m.p.h. zone. After exiting the city limits, Lewis estimated that the Cougar was traveling at 75 m.p.h. in the 60-m.p.h. zone.

After a short distance, both vehicles reached the location at which the highway turns into a four-lane highway, with two lanes traveling in either direction. Lewis then observed the Cougar weaving in its lane, swerving across the centerline and onto the shoulder. Lewis called a State Patrol dispatcher to report her observations of Nauenburg's driving behavior, as well as the circumstances surrounding the apartment in Kimball from which they had left. The dispatcher relayed the information to a State Patrol trooper.

Lewis continued to follow the Cougar as both vehicles traveled toward Scottsbluff. After some time, Lewis noticed a second vehicle pass her and follow Nauenburg and Jeremy at a distance of less than one car length. This vehicle was driven by Logan. Lewis made a second call to the dispatcher to report her observations that the two vehicles were speeding and driving erratically, and the dispatcher again relayed the information to the State Patrol trooper.

The two vehicles driven by Nauenburg and Logan were stopped by several State Patrol troopers. With their guns drawn, the troopers ordered Nauenburg and Jeremy out of the Cougar and handcuffed them. Logan exited his vehicle and was also handcuffed. During the approximately 2-hour detainment at the side of the highway, the troopers did not discover any weapons or drugs. The troopers also determined that none of the

appellants were under the influence of drugs or alcohol. Nauenburg and Logan were cited for reckless driving, although the citations were later dismissed.

On May 4, 1999, Jeremy and Logan jointly filed a tort action against Lewis for outrageous conduct and false imprisonment. On June 4, Nauenburg did the same. After answering the petitions, Lewis filed a motion for summary judgment in each case. The district court granted each motion in part and denied each in part. The court found that there were no genuine issues of material fact and that Lewis was entitled to judgment as a matter of law on the appellants' outrageous conduct claims. However, the court also found that genuine issues of material fact existed as to the appellants' false imprisonment claims; thus, the now-consolidated cases proceeded to trial on these claims.

At trial, the jury was instructed that to recover, the appellants had to prove the following:

> 1. That
>
> a. Sharon Lewis knew her reports to the dispatcher were false, and that the reports were a determining factor in the officer's decision to arrest, or
>
> b. Sharon Lewis procured the [appellants'] unlawful arrest through her affirmative direction, persuasion, or request; and
>
> 2. That no probable cause existed to arrest the [appellants]; and
>
> 3. The nature and extent of damage suffered by the [appellants] proximately caused by the arrest.

The jury also received the following instructions:

> In Nebraska, a peace officer may arrest a person without a warrant if the officer has probable cause to believe that such person has committed:
>
> (1) A felony; or
>
> (2) A misdemeanor, and the officer has probable cause to believe that such person either
>
> (a) will not be apprehended unless immediately arrested,
>
> (b) may cause injury to himself or herself or others or damage to property unless immediately arrested,

(c) may destroy or conceal evidence of the commission of such misdemeanor, or

(d) has committed a misdemeanor in the presence of the officer.

A private citizen who by affirmative direction, persuasion, or request procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his or her knowledge of a supposed offense and the officer makes the arrest entirely upon the officer's own judgment and discretion, the informer is not liable. If an informer knowingly gives to an officer false information which is a determining factor in the officer's decision to make an arrest, the informer is liable.

After deliberating, the jury returned verdicts in favor of Lewis and against each of the appellants. The appellants' motions for new trial were denied, and these appeals followed. We moved the cases to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The appellants assign, restated, that the district court erred in (1) instructing the jury when a peace officer may arrest a person without a warrant and (2) refusing to allow them to ask Trooper Kevin Krzyzanowski at trial whether he agreed with the county attorney's decision to dismiss the traffic citations issued to Nauenburg and Logan.

On cross-appeal, Lewis assigns that the district court erred in (1) denying her motion for summary judgment on the issue of false imprisonment and (2) finding that the information supplied by Lewis was not privileged.

STANDARD OF REVIEW

[1,2] Whether a jury instruction given by a trial court is correct is a question of law. See *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions

independently of the conclusion reached by the trial court. *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002).

ANALYSIS

[3,4] The issue presented by the appellants is whether the district court erred in instructing the jury when a peace officer may arrest a person without a warrant. 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. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). In reviewing a claim of prejudice from instructions given or refused, the 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 evidence, there is no prejudicial error. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001).

[5] There is no dispute concerning the elements of a civil action for false imprisonment. A private citizen who, by affirmative direction, persuasion, or request, procures an unlawful arrest and detention of another is liable for false imprisonment. If an informer merely states to a peace officer his or her knowledge of a supposed offense and the officer makes the arrest entirely upon the officer's own judgment and discretion, the informer is not liable. If an informer knowingly gives to an officer false information which is a determining factor in the officer's decision to make an arrest, the informer is liable. *Johnson v. First Nat. Bank & Trust Co.*, 207 Neb. 521, 300 N.W.2d 10 (1980). The jury was correctly instructed regarding these elements.

[6] In addition, the jury was correctly instructed concerning when a peace officer may arrest a person without a warrant because such an instruction was supported by the evidence at trial. In *State v. Wilen*, 4 Neb. App. 132, 141-42, 539 N.W.2d 650, 658 (1995), the Court of Appeals recognized that

> "[a] police officer on 'off-duty' status is nevertheless not relieved of the obligation as an officer to preserve the public peace and to protect the lives and property of the citizens of the public in general. Indeed, police officers are

> considered to be under a duty to respond as police officers 24 hours a day."

Quoting 16A Eugene McQuillin et al., The Law of Municipal Corporations § 45.15 (3d ed. 1992). Despite the fact that Lewis was off-duty on October 26, 1998, she nevertheless retained her status as a police officer, and the nature of her activities that day while off duty was connected to her official duties. She testified that she drove past the apartment complex where she had initially encountered Nauenburg and Jeremy because the complex had been under surveillance by the police. While Lewis' status as a police officer may implicate issues of immunity, the parties have not raised this issue and we will not consider it.

[7,8] We have recognized that probable cause is to be evaluated by the collective information of the police engaged in a common investigation. See *State v. Soukharith*, 253 Neb. 310, 570 N.W.2d 344 (1997). A reasonably founded suspicion to stop a vehicle cannot be based solely on the receipt by the stopping officer of a radio dispatch to stop the described vehicle without any proof of the factual foundation for the relayed message. *Id.* The evidence in this case establishes that the State Patrol troopers who stopped the appellants had no firsthand knowledge of any facts constituting probable cause. However, probable cause was established by the collective knowledge of the police involved in the appellants' stop. That includes the factual information personally observed by Lewis, acting in her official capacity as a police officer, and ultimately relayed to the State Patrol troopers.

Based on this analysis, the appellants' argument fails. The inclusion of the disputed jury instruction did not prejudice the appellants. The instruction, a nearly verbatim reproduction of the relevant portions of Neb. Rev. Stat. § 29-404.02 (Reissue 1995), correctly stated the law in Nebraska. Furthermore, the instruction was supported by the evidence adduced at trial.

[9] The appellants also assign that the district court erred when it refused to allow them to ask Trooper Krzyzanowski at trial whether he agreed with the county attorney's decision to dismiss the traffic citations issued to Nauenburg and Logan. However, the appellants fail to discuss this claimed prejudicial error in their briefs, and we will not consider it. See *Henriksen*

v. Gleason, 263 Neb. 840, 643 N.W.2d 652 (2002) (claimed prejudicial error must not only be assigned, but must also be discussed in brief of asserting party, and appellate court will not consider assignments of error which are not discussed in brief).

Given our resolution of the appellants' assignments of error, we need not address Lewis' cross-appeal.

CONCLUSION

The district court did not err in instructing the jury concerning when a peace officer may make an arrest without a warrant because such an instruction was warranted by the evidence and did not prejudice the appellants. Thus, the judgments of the district court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
TYLER J. KEUP, APPELLANT.
655 N.W.2d 25

Filed January 10, 2003. No. S-01-758.

1. **Motions to Suppress: Warrantless Searches: Probable Cause: Appeal and Error.** In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure, an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge.
2. **Trial: Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
4. **Criminal Law: Trial: Judges: Presumptions.** A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise.

5. **Criminal Law: Judgments: Appeal and Error.** While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law.
6. **Police Officers and Sheriffs: Search and Seizure: Evidence.** A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself.
7. **Police Officers and Sheriffs: Search and Seizure: Probable Cause.** For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity.
8. **Search and Seizure: Probable Cause: Presumptions.** A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.
9. **Probable Cause: Words and Phrases.** Probable cause is a flexible, commonsense standard. It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability that incriminating evidence is involved is all that is required.
10. **Homicide: Intent: Weapons.** The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death.
11. **Intent.** From circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act.
12. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
13. **Jury Instructions: Appeal and Error.** Failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous.
14. **Trial: Lesser-Included Offenses: Appeal and Error.** In a bench trial, the defendant must timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review.
15. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
16. ____. Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
17. ____. Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
18. **Criminal Law: Lesser-Included Offenses.** In a bench trial, where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court may, in its discretion, dismiss the charge and consider all

properly submitted evidence relative to a lesser-included offense of the crime charged in the information.

19. **Homicide: Lesser-Included Offenses.** Second degree murder is a lesser-included offense of first degree murder.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Affirmed.

Robert P. Lindemeier, Lincoln County Public Defender, for appellant.

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

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

GERRARD, J.

PROCEDURAL BACKGROUND

The defendant, Tyler J. Keup, was charged by complaint on August 8, 2000, with first degree murder, use of a firearm to commit a felony, and being a felon in possession of a firearm, in connection with the shooting death of Maricela Martinez. Keup waived a preliminary hearing and was bound over to the district court. An information was filed charging Keup with the offenses listed above, and on September 18, Keup entered a plea of not guilty. On January 16, 2001, Keup waived his right to a jury trial.

On February 16, 2001, Keup filed a pretrial motion to suppress evidence seized from Keup's home allegedly in violation of Keup's Fourth Amendment rights. As pertinent to this appeal, Keup sought to suppress a spiral notebook containing a "letter" written by Keup that described one version of the circumstances of Martinez' death. The district court overruled Keup's motion to suppress on February 27, based on the district court's conclusion that the notebook was in plain view when examined and seized. The facts relating to Keup's motion to suppress will be discussed in more detail below.

The case was tried to the court on February 27, 2001. Keup renewed his motion to suppress with a timely objection to the offer into evidence of the notebook. After the close of all the

evidence, Keup filed a motion to dismiss the charge of first degree murder, which was granted by the district court because there was no evidence of premeditation. The district court indicated, however, that it would consider lesser-included offenses of first degree murder. Keup and the State made closing arguments, during which Keup argued that the evidence did not prove beyond a reasonable doubt that Keup acted intentionally and that Keup should be convicted only of the lesser-included offense of manslaughter. At no point did Keup object to the court's consideration of lesser-included offenses.

The district court found Keup guilty of second degree murder, use of a weapon to commit a felony, and being a felon in possession of a firearm. Keup was sentenced to 25 to 50 years' imprisonment for second degree murder, 5 to 10 years' imprisonment for the use of a firearm to commit a felony, and 1 to 3 years' imprisonment for being a felon in possession of a firearm; the latter two terms of imprisonment were to run concurrently, and the second term of imprisonment was to run consecutively to the first. Keup appeals.

FACTUAL BACKGROUND

In June or July 2000, Keup told a friend, Michael L., that Keup wanted a handgun. Michael stole a ".25 millimeter semiautomatic handgun" in a burglary, and on August 3, Michael sold the gun to Keup for $72. Keup later showed the gun to two of his friends. Keup told them that Keup intended to scare a person who had "ripped [Keup] off" in a drug-related transaction.

On August 4, 2000, Keup telephoned Martinez and tried to arrange the purchase of drugs. Tanya Lynn Barnett, Martinez' roommate, told Martinez to call Keup back so that they could "rip him off," meaning that they would take Keup's money but not provide drugs. Barnett then left the residence to go shopping. Keup went to Martinez' residence while Barnett was gone.

Keup took the gun with him when he went to Martinez' residence. Keup testified that he had no plan or intent to shoot Martinez and that he took the gun in order to trade or sell it to get drugs. Keup testified at trial that he and Martinez were playing with the gun by pointing it at each other and, in jest, threatening to fire. Keup's testimony at trial was that although he

knew the gun was loaded, he thought the safety was on, and was pointing the gun at Martinez' head with his finger on the trigger and the hammer pulled back when the gun just "went off."

Sgt. Mark F. Bohaty, an expert from the Nebraska State Patrol Criminalistics Laboratory, testified that he later tested the weapon and was unable to induce an accidental discharge. Bohaty also testified that he conducted a "trigger-pull test," intended to determine how much force could be applied to the trigger of the gun before the gun would fire. Bohaty testified that between 4 and 5.25 pounds would need to be applied, depending on which part of the trigger was pressed, before the trigger would activate. This was well above the industry standard of 3 pounds.

Keup testified that after the shooting, he grabbed his cigarettes, fled Martinez' residence, and went home, where, because he was scared, he lied to his parents and said that he had seen Martinez commit suicide. Additionally, Barnett testified that after she returned home, she noticed that Keup's telephone number had been erased from the caller identification device at Martinez' residence, although she and Martinez never erased telephone numbers from the device and all of the other calls remained in the device's memory.

When Barnett returned home, she called the 911 emergency dispatch service. Police responded and found Martinez dead, seated on her couch, with an apparent wound to the right temple. A single, small-caliber firearm casing was found on the floor 2 to 3 feet from Martinez' body. Martinez was taken to the hospital and was determined to have suffered a single gunshot wound to the head. It was determined, based on the bullet path and nature of the wound, that the gun was between 1 and 2 inches from Martinez' head when discharged.

Lt. Rick Ryan, of the North Platte Police Department, was at the hospital following Martinez' transport there, when he received a telephone call from Keup's father. Keup's father said that Keup had witnessed a suicide. Ryan met with Keup and Keup's parents at the police station. Keup's father brought a small handgun that had been given to him by Keup. This gun was later identified as the gun sold to Keup by Michael and was also determined to have discharged the shell casing that was found near Martinez' body.

Keup and his parents were read their *Miranda* rights and waived those rights and agreed to speak to Ryan. Keup stated to Ryan that Keup had telephoned Martinez and gone to Martinez' residence to retrieve some personal belongings. Keup told Ryan that Martinez had produced the gun, that Keup had handled it and given it back to Martinez, and that then, while Keup was looking away, the gun went off. Keup claimed to Ryan that because Keup was a convicted felon and Keup's fingerprints were on the gun, Keup took the gun and fled the scene.

Ryan asked Keup to take a polygraph examination, which was administered by Investigator Randy Billingsley of the North Platte Police Department. Based on the examination, Billingsley told Keup that Keup was being untruthful. The results of the polygraph examination were admitted into evidence at trial only as foundation for Keup's ensuing statements to Billingsley. When accused by Billingsley, Keup broke down and admitted that he had shot Martinez. Keup still claimed that the gun was Martinez' and that Keup had unloaded it and was playing with it when it went off. At trial, Keup admitted lying to both Ryan and Billingsley.

Investigator Matt Phillips of the North Platte Police Department testified that he was required to collect evidence of physical characteristics from Keup, including hair, blood, and urine samples. During these procedures, Keup asked if the judge would see the results of Keup's blood tests for drugs and alcohol. Phillips replied that the judge probably would see those test results. According to Phillips, Keup replied, " 'Good, because there was nobody present when I shot her, and the only witnesses were those outside when I left.' "

Phillips also testified regarding the execution of a search warrant at Keup's residence on August 5, 2000. The search warrant described the items to be found, generally, as .25-caliber ammunition, the clothing and sunglasses worn by Keup at the time of the shooting, and the bicycle Keup used as transportation to and from Martinez' residence.

Phillips was searching the basement of the Keup residence looking for .25-caliber ammunition, which he described as being about one-half inch long and one-quarter inch wide. While searching the basement, Phillips saw a spiral notebook

"[l]aying in plain view on a shelf" about 2 to 3 feet off the ground. Phillips lifted the notebook up and saw that the page to which the notebook was open had text written on it that related to the death of Martinez, so Phillips seized the notebook. Phillips testified that he picked the notebook up and began reading it after he saw some of the words written on the top page.

The record contains a photograph taken at the scene of the notebook as it appeared when it was found, which indicates that the top page of writing was visible and legible to anyone in a position to look at the shelf. The page to which the notebook was open contains text that clearly relates to the death of Martinez. The writing begins "Dear Lord, I am afraid and scared" and sets forth a version of events that generally corresponds to the statement Keup made to Ryan, but later repudiated. At trial, Keup acknowledged the writing and claimed that he wrote it because he was "just trying to fool myself."

The primary issue contested at trial was whether the gun fired accidentally or Keup fired the gun intentionally. After the close of the evidence and closing arguments, the district court concluded that Keup had pulled the trigger and fired the weapon intentionally, and was guilty of second degree murder.

ASSIGNMENTS OF ERROR

Keup assigns, restated, that the district court erred in (1) overruling his motion to suppress when the notebook was outside the scope of the warrant, no probable cause existed for the seizure, and the notebook was not in plain view; (2) finding Keup guilty of second degree murder when the specific findings by the district court are contradictory and confusing, indicating an erroneous application of the law and facts with regard to the element of intent; and (3) finding Keup guilty of second degree murder as a lesser-included offense of first degree murder, without jurisdiction and in violation of Keup's right to due process, because (a) second degree murder is not a lesser-included offense of first degree murder and (b) Keup was acquitted of second degree murder when the district court dismissed the charge of first degree murder.

STANDARD OF REVIEW

[1] In reviewing a district court's ruling on a motion to suppress evidence obtained through a warrantless search or seizure,

an appellate court conducts a de novo review of reasonable suspicion and probable cause determinations, and reviews factual findings for clear error, giving due weight to the inferences drawn from those facts by the trial judge. *State v. Roberts*, 261 Neb. 403, 623 N.W.2d 298 (2001).

[2-4] A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. In making this determination, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on denial of rehearing* 264 Neb. 654, 650 N.W.2d 481. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). A trial judge is presumed in a jury-waived criminal trial to be familiar with and apply the proper rules of law, unless it clearly appears otherwise. *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

[5] While in a bench trial of a criminal case the court's findings have the effect of a verdict and will not be set aside unless clearly erroneous, an appellate court has an obligation to reach an independent, correct conclusion regarding questions of law. *State v. Robbins*, 253 Neb. 146, 570 N.W.2d 185 (1997).

ANALYSIS

Seizure of Notebook

The first issue we discuss is Phillips' seizure of Keup's notebook, which contained a "letter" written by Keup setting forth his initial, untruthful account of Martinez' death. It is not disputed that the notebook fell outside the scope of the search warrant Phillips was executing at the time he found the notebook; therefore, the subsequent seizure and search of the notebook were warrantless. The question is whether the notebook fell within the

plain view exception to the warrant requirement of the state and federal Constitutions.

[6] A warrantless seizure is justified under the plain view doctrine if (1) a law enforcement officer has a legal right to be in the place from which the object subject to the seizure could be plainly viewed, (2) the seized object's incriminating nature is immediately apparent, and (3) the officer has a lawful right of access to the seized object itself. *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000). In the present case, Keup admits that the search warrant gave Phillips the legal right to be in the place from which the notebook could be viewed, and Keup does not contest that Phillips had a lawful right of access to the notebook. Keup contends that the plain view exception does not apply because the incriminating nature of the notebook was not immediately apparent.

[7-9] For an object's incriminating nature to be immediately apparent, the officer must have probable cause to associate the property with criminal activity. See *Brayman v. U.S.*, 96 F.3d 1061 (8th Cir. 1996). A seizure of property that is in plain view is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. *State v. Holman*, 221 Neb. 730, 380 N.W.2d 304 (1986). Probable cause is a flexible, commonsense standard. *Id.* It merely requires that the facts available to the officer would warrant a person of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. *Id.* A practical, nontechnical probability that incriminating evidence is involved is all that is required. *Id.* See *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502 (1983).

In the instant case, the evidence shows that the notebook was found open and that the visible page of writing clearly related to the death of Martinez. Little more than a cursory glance at the notebook would have been necessary to warrant a reasonable belief that the notebook could be useful as evidence of a crime. The district court's factual conclusion in that regard is not clearly wrong. Once the incriminating nature of the notebook was established, Phillips had probable cause to seize the notebook.

Keup argues that the incriminating nature of the notebook was not immediately apparent because the notebook had to be read before its contents were known. This argument is without merit. Courts have generally held that the incriminating nature of written material is immediately apparent even if the material must be read in order to discern its content. See, e.g., *United States v. Crouch*, 648 F.2d 932 (4th Cir. 1981); *United States v. Ochs*, 595 F.2d 1247 (2d Cir. 1979); *Mapp v. Warden, N.Y. State Corr. Inst., Etc.*, 531 F.2d 1167 (2d Cir. 1976); *U.S. v. Small*, 664 F. Supp. 1357 (N.D. Cal. 1987); *Commonwealth v. D'Amour*, 428 Mass. 725, 704 N.E.2d 1166 (1999); *Daniels v. State*, 683 N.E.2d 557 (Ind. 1997); *State v. Andrei*, 574 A.2d 295 (Me. 1990); *State v. Parker*, 236 Kan. 353, 690 P.2d 1353 (1984); *People v. Dressler*, 317 Ill. App. 3d 379, 739 N.E.2d 630, 250 Ill. Dec. 867 (2000); *State v. Dobbs*, 100 N.M. 60, 665 P.2d 1151 (N.M. App. 1983). A billboard, placed by the side of a busy highway, is no less in "plain view" because passersby must read the billboard in order to determine its content. Similarly, in the instant case, the words written in the notebook were in plain view and their nature was immediately apparent, despite the fact that Phillips had to read the page in order to determine that.

Keup also argues that in order to determine whether the notebook contained any evidence of a crime, Phillips "had to read the note which this court can see is quite lengthy to determine that it was signed by [Keup] and that it referred to the crime the officer was investigating." Brief for appellant at 9. This argument is also without merit. The page to which the notebook was open, which was visible to Phillips, clearly related to the death of Martinez and afforded probable cause to seize the notebook and examine the rest of its contents. While further examination was necessary to verify that Keup had written the page that was visible, there was still a reasonable basis to associate the writing with the death of Martinez. In other words, even if the writing in the notebook had been signed by someone else, it was still immediately apparent that the writing was associated with Martinez' death.

Keup primarily relies on *Arizona v. Hicks*, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), to support his claim that the notebook was unlawfully seized. *Hicks*, however, does not

support Keup's argument. In *Hicks*, police entered an apartment after a bullet was fired through the floor of the apartment and into an apartment below. The police were searching for the shooter, weapons, and any other shooting victims. A police officer observed expensive stereo equipment and suspected it might be stolen, so the officer recorded the serial numbers of the equipment. The officer was required to move a turntable to view the serial numbers. When the equipment was determined to have been stolen, it was seized. See *id.*

The U.S. Supreme Court determined that the officer's warrantless search and seizure of the equipment did not fall within the plain view exception to the warrant requirement. The Court reasoned that the officer had conducted a search, without probable cause, by moving the turntable to view the serial numbers. However, the Court noted that the lawful objective of the officer's entry into the apartment was the search for the shooter, weapons, and any victims, and specifically stated that "[m]erely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent's privacy interest." 480 U.S. at 325.

In *Hicks*, the determinative fact was that the officer was required to move the equipment in order to view the serial numbers—in other words, the serial numbers were not in plain view and revealing them required a search without probable cause. See *id.* In this case, by contrast, the top page of the notebook was in plain view, and Phillips was not required to move the notebook in order to view the top page. After seeing the top page, Phillips had probable cause to seize and examine the notebook.

The district court found that the notebook was in plain view, and it was immediately apparent that the first page of the notebook was evidence concerning the crime. The district court's factual findings in that regard are supported by competent evidence and are not clearly wrong. Therefore, Keup's first assignment of error is without merit.

Element of Intent

[10] A person commits murder in the second degree if he or she causes the death of a person intentionally, but without

premeditation. Neb. Rev. Stat. § 28-304(1) (Reissue 1995). The intent to kill may be inferred, sufficient to support a murder conviction, from the defendant's deliberate use of a deadly weapon in a manner likely to cause death. *State v. Sims*, 258 Neb. 357, 603 N.W.2d 431 (1999).

Keup's argument with respect to the element of intent is somewhat perplexing. Keup's argument appears to be directed less at the sufficiency of the evidence to support a finding that Keup acted intentionally than at the district court's purportedly erroneous legal basis for that finding. Nonetheless, we note that to the extent Keup is arguing the evidence of intent was insufficient, that argument is without merit. The district court's factual finding that Keup acted intentionally is supported by competent evidence, described above, which, viewed and construed most favorably to the State, is sufficient to support the conviction. See *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on denial of rehearing* 264 Neb. 654, 650 N.W.2d 481.

Keup's primary argument seems to be that in making detailed findings of fact for the record, the district court somehow demonstrated a misunderstanding of the element of intent. A review of the district court's findings, however, reveals no error sufficient to overcome the presumption that the district court was familiar with and applied the proper rules of law. See *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999).

The district court specifically referred to and relied upon our decision in *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). In that case, the defendant, Larry Rokus, who was eventually convicted of second degree murder, gave several conflicting versions of how the victim, Joseph Kashuba, was shot in the head at point-blank range. We summarized the interrogation of the defendant as follows:

> In the course of this interrogation, Rokus said that he had wanted to show Kashuba how to load the .44 Magnum; therefore, he placed six hollow-point bullets in the revolver's cylinder and handed the loaded revolver to Kashuba. As Rokus described the situation, after Kashuba had examined the loaded revolver, he began "handing it back to [Rokus], butt first, the barrel towards Mr. Kashuba, and the gun . . . discharged." In response to

> Rokus' description of the shooting, [the interrogating officer] said that in view of the fact that the Magnum was a "wheel gun or a cylinder type revolver," [he] "had problems with that story." At that point, Rokus acknowledged that he "had lied" and that the shooting actually occurred as Rokus was demonstrating a quick draw from the shoulder holster, which he was wearing, and when Rokus "quick drawed," the revolver discharged the bullet that struck Kashuba. After additional questioning, the interrogation ended.
>
> [Later, the interrogating officer] informed Rokus concerning Kashuba's wounds and told Rokus that the account of the shooting related by Rokus in the earlier interrogation was "not matching up" with the results of the autopsy. Rokus responded that Kashuba was killed while the pair was "playing Russian roulette." [The interrogating officer] asked how anyone could play Russian roulette with six bullets in the cylinder chambers of the fatal revolver, and Rokus answered that he and Kashuba "were simply pointing the gun at each other's heads and not pulling the trigger." Rokus then told the officers that while engaged in Russian roulette, he pointed the .44 Magnum at Kashuba, and the gun discharged. Rokus maintained that he did not intend to pull the trigger and that the shooting was an accident. Later in the course of this second interrogation, Rokus gave still another version of the shooting: Rokus, while Kashuba had his head turned away from Rokus, "took the gun out of the holster, placed it to the back of [Kashuba's] head," and said, "Surprise, mother fucker," as Rokus pulled the trigger.

Id. at 616-17, 483 N.W.2d at 152.

At trial, despite his earlier statements, Rokus testified that Kashuba was sitting in a chair when Rokus approached him from behind, pulled the .44 Magnum from its shoulder holster on Rokus, and then put the revolver to Kashuba's head, " 'just joking around,' " and said, " 'Surprise,' " as the gun discharged. *Id.* at 619, 483 N.W.2d at 153. Rokus had believed that the revolver was " 'unloaded' " when he put the firearm to Kashuba's head and could not recall whether the revolver had been cocked. *Id.*

On appeal, we concluded that the evidence was sufficient to support the conviction. We stated:

> Circumstances surrounding the fatal shot from Rokus' revolver allow and support the inference that Rokus intended to shoot and kill Kashuba. The jury was entitled to find that Kashuba was seated in a dining room chair while Rokus was approaching from behind Kashuba. From the location of the contact wound on Kashuba's head, the jury could infer that the fatal hollow-point bullet was fired at point-blank range from the .44 Magnum's muzzle at the base of Kashuba's skull; hence, Rokus was deliberately pointing the revolver at Kashuba when the weapon discharged. None can argue that a hollow-point bullet fired from a .44 Magnum is not a life-threatening projectile. Intent to kill may be inferred from deliberate use of a deadly weapon in a manner reasonably likely to cause death.

State v. Rokus, 240 Neb. 613, 621-22, 483 N.W.2d 149, 154-55 (1992).

[11] The pertinence of our decision in *Rokus* is evident, given the parallel between the issues presented in that case and the instant case. From circumstances around a defendant's voluntary and willful act, a finder of fact may infer that the defendant intended a reasonably probable result of his or her act. See *Rokus, supra*. The evidence presented in this case indicates that when the weapon was discharged, Keup was deliberately pointing the weapon at Martinez' head, at a distance of 1 to 2 inches, with his finger on the trigger and the hammer cocked. The State's firearms expert, Bohaty, testified that the trigger on the weapon required between 4 to 5.25 pounds of force before the weapon would discharge and that Bohaty was unable to induce an accidental discharge of the weapon. The evidence adequately supports the inference that Keup's firing of the weapon required a conscious and appreciable effort by Keup; thus, Keup's intent to cause Martinez' death may be inferred from the evidence. The district court's reliance on *Rokus* demonstrates that contrary to Keup's suggestion, the court correctly applied the law to the facts of the instant case with regard to the element of intent. Keup's assignment of error is without merit.

LESSER-INCLUDED OFFENSES

[12] Keup argues that the district court erred when, after dismissing the charge of first degree murder, the district court considered lesser-included homicide offenses. However, Keup waived any error in this regard by failing to present the issue to the district court with a timely objection. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[13,14] The record in the instant case shows that Keup never objected to the district court's consideration of lesser-included offenses. The district court dismissed the first degree murder charge prior to closing arguments, then stated that it would consider lesser-included offenses. Keup and the State then made closing arguments. Keup specifically argued that the district court should find Keup guilty only of the lesser-included offense of manslaughter. This would be a peculiar trial strategy unless Keup was aware that the district court was considering second degree murder—yet Keup failed to object throughout. With respect to jury trials, we have often stated that failure to timely object to jury instructions prohibits a party from contending on appeal that the instructions were erroneous. See, e.g., *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). Likewise, in a bench trial, the defendant must timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review.

[15-17] In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Tyma*, 264 Neb. 712, 651 N.W.2d 582 (2002). Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion. *State v. Nelson*, 262 Neb. 896, 636 N.W.2d 620 (2001). Plain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Tyma, supra*.

[18,19] We find no plain error in the district court's consideration of the lesser-included offense of second degree murder. In a bench trial, where the State fails to demonstrate a prima facie case on the crime charged, but does so on a lesser-included offense, the trial court may, in its discretion, dismiss the charge and consider all properly submitted evidence relative to a lesser-included offense of the crime charged in the information. See *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988). We have repeatedly held that second degree murder is a lesser-included offense of first degree murder. See, *State v. McCracken*, 260 Neb. 234, 615 N.W.2d 902 (2000), *abrogated on other grounds, State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002); *State v. Dixon*, 259 Neb. 976, 614 N.W.2d 288 (2000); *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997). Thus, the district court did not commit plain error when it dismissed the first degree murder charge but considered the lesser-included offense of second degree murder. Keup also argues that he was not given notice that the State would be seeking a conviction on second degree murder, as Keup was charged only with first degree murder. However, Keup had notice that lesser-included offenses of first degree murder would be considered, pursuant to *Foster, supra*.

Finally, Keup argues that he was somehow impliedly acquitted of second degree murder when the district court dismissed the charge of first degree murder. This argument is contradicted by our holding in *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). In *White*, the defendant was charged with first degree murder and convicted of the lesser-included offense of second degree murder, but the second degree murder conviction was later vacated. We concluded that the conviction for second degree murder operated as an implied acquittal of first degree murder and that the Double Jeopardy Clause barred the State from retrying the defendant for the crime of first degree murder. See *White, supra*. However, we also stated that the State was not prevented from proceeding with a new trial on the vacated second degree murder conviction. See *id.* In the instant case, pursuant to *White*, the district court's dismissal of the charge of first degree murder did not acquit Keup of the lesser-included offense of second degree murder. Keup's argument provides no basis for a finding of plain error.

Keup did not make a timely objection to the district court's consideration of the lesser-included offenses to first degree murder, and the record does not show plain error. Keup's final assignment of error is without merit.

CONCLUSION

The district court did not err in denying Keup's motion to suppress evidence. The evidence is sufficient to sustain the district court's finding that Keup acted intentionally, and the court applied the correct legal standards in reaching that conclusion. Keup did not object to the district court's consideration of lesser-included offenses and has shown no basis for finding the court's consideration of lesser-included offenses to be plain error. Because Keup's assignments of error are without merit, the judgment of the district court is affirmed.

AFFIRMED.

AMERICAN LEGION POST 52, APPELLANT, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLEE.

655 N.W.2d 38

Filed January 10, 2003. No. S-01-1041.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** Appeals from orders or decisions of the Nebraska Liquor Control Commission are taken in accordance with the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
3. ____: ____: ____. A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
4. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
5. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Reversed and remanded with directions.

John M. Boehm and Patrick T. O'Brien, of Butler, Galter, O'Brien & Boehm, for appellant.

Don Stenberg, Attorney General, and Hobert B. Rupe for appellee.

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

MCCORMACK, J.

NATURE OF CASE

The Nebraska Liquor Control Commission (Commission) suspended the liquor license of American Legion Post 52 (Legion) after an administrative hearing. The district court affirmed the Commission's order, and the Legion appeals. We removed the case to this court's docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

BACKGROUND

In March 2000, Nebraska State Patrol investigators conducted an inspection of the American Legion Club in Kearney. The inspection was conducted due to information received from the Nebraska Department of Revenue and "different individuals" that there was an illegal gambling device on the premises. During the inspection, investigators discovered and seized the following: (1) a wheel similar to a roulette wheel, which the Legion claims was purchased for fundraising and had yet to be used; (2) exhibit 1, what was determined to be an "8-liner" video gambling machine, which machine was unplugged and in an area away from the customers; (3) exhibit 2, a note which stated: "Mar 1 Wednesday VFW raided, machines and cash in safe confiscated; Legion machine in back room"; (4) exhibit 3, football sheets listing the teams and the point spreads for games in December 1998 and December 1999; (5) exhibit 4, sheets of paper which at the top was typed "$3—33-Club" and listed a person's name, a team, and

whether they were "in or out for 1999"; and (6) exhibit 5, which is what appears to be a flyer that has typed on it:

> Attention 33 Club participants[:] The N.F.L. [s]tarts on 9/12/99 if you want to be in this year's 33-club, we are requiring that total dues for the season be paid in full before the season begins. Please let the bartender know if you want "in" or "out" of this year's 33-club.
>
> $5 club= $85
>
> $3 club=$51
>
> $5-weekly payout/carryover [w]ill be $150.00
>
> $3-weekly payout/carryover [w]ill be $90.00

Prior to leaving the premises, the Legion was given an administrative citation for allowing unlawful activity and possessing a gambling device. A report was sent to the county attorney's office, but there was no prosecution or conviction for any criminal charge arising out of this inspection.

On July 5, 2000, a letter was sent by the administrator of the legal division of the Commission to the Legion's attorney, stating: "This is to confirm that, as per your request, the hearing upon the charge of an illegal activity, i.e., gambling, against the above licensee . . . has been continued to August 16 or 17, 2000."

In August 2000, a hearing was held before the Commission in order to determine if the Legion's liquor license should be suspended, canceled, or revoked pursuant to 237 Neb. Admin. Code, ch. 6, § 019.01Q (1999), of the rules and regulations of the Commission. The aforementioned rule provides that if the Commission finds by a preponderance of the evidence that the petitioner committed the offense of gambling or knowingly allowed such offense to be committed by others on the licensed premise it may suspend, cancel, or revoke the petitioner's liquor license. In its order dated September 21, 2000, the Commission found: "[T]he licensee did, on or about March 8, 2000, permit or knowingly allow conduct on or about the licensed premise in violation of 237-LCC6-019.01Q of the Rules and Regulations of the Nebraska Liquor Control Commission, i.e., gambling." The Commission suspended the Legion's liquor license for 10 days.

Pursuant to Neb. Rev. Stat. §§ 84-917 to 84-919 (Reissue 1999) of the Administrative Procedure Act (APA), the Legion appealed the Commission's decision to the district court. The district court

found that (1) there is a nexus between gambling and alcoholic liquor and therefore § 019.01Q is not in excess of the statutory authority granted to the Commission; (2) the Commission may exercise quasi-judicial power when it comes to civil proceedings to suspend, cancel, or revoke a liquor license and therefore is not in violation of the separation of powers with the judiciary; and (3) the exhibits, particularly exhibit 5, establish, by a preponderance of the evidence, that the Legion knowingly permitted others to engage in gambling at the license premises. Accordingly, the district court affirmed the Commission's decision. The Legion timely appealed, and pursuant to our power to regulate the caseloads of Nebraska's appellate courts, we moved the case to our docket.

ASSIGNMENTS OF ERROR

The Legion assigns, rephrased, that the district court erred in finding that (1) the Commission did not exceed its jurisdiction and statutory authority in promulgating rule and regulation § 019.01Q as it relates to gambling; (2) the Commission's finding that the Legion committed the offense of gambling was authorized and constitutional and did not interfere with the power of the judiciary pursuant to article II, § 1, of the Nebraska Constitution; and (3) there was competent evidence in the record to support the Commission's finding that the Legion permitted or knowingly allowed gambling on its premises on or about March 8, 2000.

STANDARD OF REVIEW

[1-4] Appeals from orders or decisions of the Commission are taken in accordance with the APA. Neb. Rev. Stat. § 53-1,116 (Cum. Supp. 2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. *City of Omaha v. Kum & Go, supra.* A judgment or final order rendered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Id.* When reviewing an order of a district court under the APA 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.*

[5] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

The Commission's charge against the Legion, pursuant to its "Illegal Activities" regulation, was for "illegal activity, i.e., gambling" on a specific date, March 8, 2000. Therefore, we limit the scope of our inquiry to the charge as framed by the Commission and as set forth in its order of September 21 that the Legion permitted or knowingly allowed gambling on the licensed premises on March 8.

The Commission's "Illegal Activities" regulation, § 019.01Q, states in relevant part:

> Illegal Activities: The Commission finds that certain illegal activities may induce individuals to enter licensed premises and that the Commission has an interest in [e]nsuring that licensees do not use illegal means to promote the sale and consumption of alcohol. The Commission also believes the consumption of alcohol could impair judgment and could lesson inhibitions, causing some consumers to engage in illegal activities or to be victims of illegal activities on or about licensed premises, endangering the health, safety and welfare of individuals. The Commission, therefore, finds there is a nexus between the consumption of alcohol and certain illegal activities that occur within licensed premises or in adjacent related outdoor areas.
>
> Such activities are: drug-related offenses, prostitution or pandering, assaults, sexual assaults, homicide, gambling, vandalism, weapons-related offenses, theft, disturbing the peace, violations of statutes or local ordinances relating to entertainment, acceptance of food stamps for the sale of alcohol or otherwise in violation of federal laws or regulations, and any offense referred to in Section 53-125 (4) or (5), whether or not there has been a plea of guilty or a conviction in criminal court.

> If the Commission finds by a preponderance of the evidence that a licensee or employee or agent of a licensee has committed any of the foregoing illegal activities or has knowingly allowed such offense to be committed by others on the licensed premises or adjacent related outdoor areas, the Commission may suspend, cancel or revoke such license.

The Commission suspended the Legion's liquor license for illegal conduct, gambling, pursuant to its "Illegal Activities" regulation. The district court affirmed the suspension. On appeal, in assignment of error No. 3, the Legion asserts there was no competent evidence in the record to support the Commission's finding that the Legion permitted or knowingly allowed gambling on its premises on or about March 8, 2000. We agree.

Our analysis focuses on the date that the alleged gambling took place and its relation to the evidence found. We determine that none of the evidence found at the Legion supports the charge that gambling was permitted on the Legion's premises on or about March 8, 2000. Exhibit 1, the 8-liner video machine, was unplugged and in the back room; exhibit 2, the note, includes the date "Mar 1" but does not give the year it refers to; exhibit 3, the football sheets, were dated 1998 and 1999; exhibit 4, the "$3—33-Club," was for the year 1999; exhibit 5, the flyer, talks of the 1999 football season. This leaves the wheel as the only potential evidence of "gambling" on March 8, 2000. The Legion claimed that the wheel had been purchased for fundraising and had yet to be used. There is no evidence to the contrary. We determine, in short, that there was no competent evidence presented that the Legion knowingly allowed gambling to be committed by others on March 8, 2000, in violation of § 019.01Q. Therefore, we reverse the findings of the district court.

CONCLUSION

In our review of the district court's decision, we determine that the decision of the district court is not supported by competent evidence. Therefore, we reverse the decision of the district court and remand the cause with directions to enter an order reversing the findings of the Commission and remanding the matter to the Commission with directions to dismiss.

REVERSED AND REMANDED WITH DIRECTIONS.

LORENA HERRERA, APPELLANT, V. FLEMING COMPANIES, INC., A FOREIGN CORPORATION FROM THE STATE OF OKLAHOMA LICENSED TO DO BUSINESS IN THE STATE OF NEBRASKA, DOING BUSINESS AS FESTIVAL FOODS, APPELLEE.

655 N.W.2d 378

Filed January 17, 2003. No. S-01-008.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Negligence: Liability: Proximate Cause.** A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor 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 lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff.
3. **Negligence: Evidence: Proximate Cause.** A plaintiff in a premises liability case is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury.
4. **Negligence: Proximate Cause.** An allegation of negligence is insufficient where the finder of fact must guess at the cause of the accident.
5. **Negligence: Circumstantial Evidence: Proof: Proximate Cause.** While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury.
6. **Negligence: Proof.** A person who alleges negligence on the part of another bears the burden to prove such negligence by direct or circumstantial evidence.
7. **Negligence: Presumptions.** The mere fact that an injury or accident occurred does not raise a presumption of negligence.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and CARLSON, Judges, on appeal thereto from the District Court for Hall County, JAMES LIVINGSTON, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Todd V. Elsbernd, of Bradley, Maser, Kneale, Elsbernd & Emerton, P.C., for appellant.

Thomas J. Culhane, Patrick R. Guinan, and John C. Brownrigg, of Erickson & Sederstrom, P.C., for appellee.

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

WRIGHT, J.

NATURE OF CASE

In this personal injury action, Fleming Companies, Inc., doing business as Festival Foods (Fleming), was granted further review of the decision of the Nebraska Court of Appeals which reversed an order of summary judgment entered by the Hall County District Court and remanded the cause for further proceedings. See *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002).

SCOPE OF REVIEW

[1] 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. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002).

FACTS

On December 18, 1998, Lorena Herrera slipped and fell as she entered a public restroom in the Festival Foods grocery store in Grand Island, Nebraska. Fred Groenke, the store director, was notified by an employee that Herrera had fallen. Groenke in turn called paramedics.

In an affidavit, Groenke stated that he observed a few drops of water on the restroom floor, as if someone had dripped water from his or her hands after washing them. He stated that no one had reported water on the restroom floor and that he did not know how long the water had been there prior to Herrera's fall. He asserted that the store had a policy of keeping the floors clean, that the floors were regularly inspected for spills by store employees, and that spills were cleaned up immediately.

Herrera stated in her deposition that after she opened the door to the restroom, she fell as she stepped in and stretched out her

hand to turn on the light. Herrera claimed that she did not notice water on the floor prior to her fall. She said that the entire floor was wet and that her clothes were wet after the fall. She did not know where the water came from or the length of time the floor had been wet. Herrera said that she hurt her right wrist, her back, and her head, which hit the wall as she fell, and that she was hospitalized for 3 days. She has had memory problems since the accident. Herrera's testimony was corroborated by Arturo Pimitel and their daughter Erika, who both accompanied Herrera to Festival Foods on the day of the accident.

Brad Jerman, one of the paramedics who was called to assist Herrera, stated in his affidavit that when he entered the restroom, he saw Herrera lying on the floor and observed water underneath and around her. He squatted next to Herrera to treat her rather than kneeling on the floor because he wanted to avoid getting his pants wet.

The Hall County District Court granted summary judgment in favor of Fleming. The court stated that the case raised a question of storekeeper liability to a business invitee. The court held that in such a case, the plaintiff must establish several elements, including that the business owner created the condition that caused the accident, knew of the condition, or by exercise of reasonable care should have discovered the condition. The court found that Herrera failed to present evidence to establish that Fleming knew of the water or should have known of the water and failed to present evidence from which liability could be inferred.

The Court of Appeals reversed the judgment and remanded the cause for further proceedings. See *Herrera v. Fleming Cos.*, 10 Neb. App. 987, 641 N.W.2d 417 (2002). In doing so, the Court of Appeals construed *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), as establishing a new standard for determining when an owner or possessor of land is liable to a lawful visitor for injury caused by a condition on the premises, stating that under *Heins*, the test is whether the landowner or possessor exercised reasonable care.

The Court of Appeals held that Fleming did not establish the standard of care used by similar facilities, nor did it establish the meaning of the term " 'regularly inspected.' " *Herrera v. Fleming Cos.*, 10 Neb. App. at 992, 641 N.W.2d at 422. Therefore,

according to the Court of Appeals, Fleming had not presented sufficient evidence to make a prima facie showing that it exercised reasonable care, which would then require Herrera to rebut the evidence. The Court of Appeals concluded that the district court erred as a matter of law in granting Fleming's motion for summary judgment because Fleming did not make a prima facie showing and because the amount of water on the restroom floor was a material issue of fact in dispute. We granted Fleming's petition for further review.

ASSIGNMENTS OF ERROR

In seeking further review, Fleming assigned as error (1) the Court of Appeals' holding that *Heins* abrogated Herrera's burden to establish a prima facie case of negligence; (2) the Court of Appeals' holding that Herrera was not required to present evidence that Fleming created the condition, knew of the condition, or by exercise of reasonable care could have discovered the condition present on the restroom floor; (3) the Court of Appeals' holding that *Heins* shifted the burden of proof to Fleming to prove that Herrera's fall was not caused by negligence on its part; and (4) the Court of Appeals' failure to affirm the order granting summary judgment.

ANALYSIS

In *Heins*, this court abrogated the common-law distinction between business invitees and licensees and the duty of care owed them. Prior to *Heins*, landowners owed invitees a duty of reasonable care to keep the premises safe for the use of the invitee, see *Neff v. Clark*, 219 Neb. 521, 363 N.W.2d 925 (1985), and a greater duty was owed to an invitee than was owed to a licensee. A licensee was defined as a person who was privileged to enter or remain upon the premises of another by virtue of the possessor's express or implied consent but who was not a business visitor. *Heins v. Webster County, supra.* The duty owed by an owner or occupant of a premises to a licensee was to refrain from injuring the licensee by willful or wanton negligence or designed injury, or to warn him, as a licensee, of a hidden danger or peril known to the owner or occupant but unknown to or unobservable by the licensee, who was required to exercise ordinary care. *Id.*

In *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), we held that a landowner must exercise reasonable care toward all lawful visitors, and we set forth several factors to be considered in evaluating whether reasonable care has been exercised. Among the factors to be considered are (1) the foreseeability or possibility of harm; (2) the purpose for which the entrant entered the premises; (3) the time, manner, and circumstances under which the entrant entered the premises; (4) the use to which the premises are put or are expected to be put; (5) the reasonableness of the inspection, repair, or warning; (6) the opportunity and ease of repair or correction or giving of the warning; and (7) the burden on the land occupier and/or community in terms of inconvenience or cost in providing adequate protection. *Id.* We retained a separate classification for trespassers because we concluded that one did not owe a duty to exercise reasonable care to those not lawfully on one's property. We expressly stated that our holding did not mean that owners and occupiers of land were now insurers of their premises. *Id.*

[2] *Heins* did not abrogate the elements necessary to establish liability on the part of a possessor of land for injury caused to a lawful visitor by a condition on the land. A possessor of land is subject to liability for injury caused to a lawful visitor by a condition on the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to the lawful visitor; (3) the defendant should have expected that a lawful visitor 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 lawful visitor against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. See, *Derr v. Columbus Convention Ctr.*, 258 Neb. 537, 604 N.W.2d 414 (2000); *Chelberg v. Guitars & Cadillacs*, 253 Neb. 830, 572 N.W.2d 356 (1998). The several factors described in *Heins* regarding reasonable care are to be considered under subsection (4) above.

The Court of Appeals erred in its analysis of *Heins*. In a premises liability case involving a slip-and-fall accident, it is

incumbent upon the plaintiff to show that the accident was a result of the defendant's negligence. The Court of Appeals found that Fleming had not established the standard of care used by similar facilities to inspect its floors and did not establish the meaning of the term "regularly inspected." The court therefore concluded that Fleming did not present sufficient evidence to make a prima facie showing that it had exercised reasonable care, thereby requiring Herrera to rebut the evidence.

[3-5] A plaintiff in a premises liability case is required to adduce evidence showing that there was a negligent act on the part of the defendant and that such act was the cause of the plaintiff's injury. See *King v. Crowell Memorial Home*, 261 Neb. 177, 622 N.W.2d 588 (2001). An allegation of negligence is insufficient where the finder of fact must guess at the cause of the accident. *Id.* While circumstantial evidence may be used to prove causation, the evidence must be sufficient to fairly and reasonably justify the conclusion that the defendant's negligence was the proximate cause of the plaintiff's injury. *Id.*

[6,7] A person who alleges negligence on the part of another bears the burden to prove such negligence by direct or circumstantial evidence. See *Bargmann v. Soll Oil Co.*, 253 Neb. 1018, 574 N.W.2d 478 (1998). The mere fact that an injury or accident occurred does not raise a presumption of negligence. See, *id.*; *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987).

At the hearing on its motion for summary judgment, Fleming offered the deposition of Herrera. In her deposition, Herrera stated she did not know how long the water had been on the floor. Fleming's store director stated in his affidavit that no one had reported water on the restroom floor and that he did not know how long the water had been there. The store had a policy of keeping the floors clean, and the floors were regularly inspected for spills. From this evidence, no reasonable inference could be drawn as to how long the water had been on the floor.

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. *R.W. v. Schrein*, 264 Neb. 818, 652 N.W.2d 574 (2002). A

prima facie case for summary judgment is shown by producing enough evidence to demonstrate that the movant is entitled to a judgment in its favor if the evidence were uncontroverted at trial. At that point, the burden of producing evidence shifts to the party opposing the motion. *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000).

In a premises liability case, the plaintiff must establish that the defendant created the condition, knew of the condition, or by the exercise of reasonable care should have discovered or known of the condition. Herrera did not allege that Fleming created this condition but that Fleming knew or should have known of the water on the restroom floor. As the party moving for summary judgment, Fleming established that no one knew how long the water had been on the floor. There was no evidence or reasonable inference that Fleming created the condition, knew of the condition, or should have known of the condition. If these facts remained uncontroverted, Fleming was entitled to a judgment as a matter of law. Therefore, the burden shifted to Herrera.

The burden having been shifted to Herrera, she failed to produce any evidence from which a reasonable inference could be drawn that Fleming knew or by the exercise of reasonable care should have known of the water on the floor. Thus, the district court correctly determined that Fleming was entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth herein, we reverse the decision of the Court of Appeals and remand the cause thereto with directions to affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTIONS.

KELLY GUENZEL-HANDLOS, APPELLANT, V. THE COUNTY OF LANCASTER, NEBRASKA, A POLITICAL SUBDIVISION, APPELLEE.

655 N.W.2d 384

Filed January 17, 2003. No. S-01-1118.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented.
2. **Judgments: Statutes: Appeal and Error.** In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Political Subdivisions: Counties: Legislature.** A county is a political subdivision of the state and has only that power delegated to it by the Legislature.
4. **Political Subdivisions: Counties.** Any grant of power to a political subdivision is to be strictly construed, and any reasonable doubt of the existence of a power is to be resolved against the county.
5. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
6. **Counties: Public Officers and Employees: Criminal Law: Liability.** A county is interested in a criminal action against a county official within the meaning of Neb. Rev. Stat. § 23-1201(2) (Reissue 1997) when a conviction could expose the county to liability or substantially impair the performance of an essential governmental function.
7. **Public Purpose.** Public funds cannot be expended for private purposes.
8. **Public Purpose: Legislature.** What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine.

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

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellant.

William F. Austin, of Erickson & Sederstrom, P.C., for appellee.

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

STEPHAN, J.

Following her acquittal on misdemeanor charges relating to an incident which occurred in the performance of her duties as

clerk of the district court for Lancaster County, Kelly Guenzel-Handlos brought this action against the county seeking reimbursement of fees and expenses incurred in her defense. The district court for Lancaster County sustained the county's motion for judgment on the pleadings and dismissed the petition. Guenzel-Handlos appeals.

FACTS

At all relevant times, Guenzel-Handlos was the duly elected clerk of the district court for Lancaster County, Nebraska, a body corporate and politic. After receiving allegations of Guenzel-Handlos' misconduct, the Lancaster County Attorney's office requested appointment of a special prosecutor. This request was granted by the district court. On September 25, 2000, the special prosecutor filed a complaint charging Guenzel-Handlos with official misconduct and misuse of public property or funds in the discharge of her official duties. Guenzel-Handlos requested legal representation by the county attorney but was advised that she would be required to retain her own counsel, which she subsequently did. Following a bench trial in Lancaster County Court on December 13 and 14, 2000, Guenzel-Handlos was acquitted of all charges.

Guenzel-Handlos filed a claim with the Lancaster County Board seeking reimbursement in the amount of $18,453.89 for attorney fees, costs, and expenses incurred by her in defending the misconduct charges. The county board denied the claim on July 10, 2001. Guenzel-Handlos then commenced this action in the district court for Lancaster County, seeking reimbursement on three alternate legal theories, each of which she designated as a cause of action. This court appointed the Honorable James A. Buckley, a retired district court judge, to serve as an active judge of the district court for Lancaster County for the purpose of hearing and deciding this case.

Under her first theory of recovery, Guenzel-Handlos contended that the county board erred in denying her claim, properly filed under Neb. Rev. Stat. § 23-135 (Cum. Supp. 2002). Under her second theory, Guenzel-Handlos sought a declaratory judgment that Neb. Rev. Stat. §§ 13-1801 and 23-1201(2) (Reissue 1997), as well as principles of indemnification, permit the expenditure of

public funds to reimburse a public official for defending herself against charges arising from the performance of her official duties. Under her third theory, Guenzel-Handlos contended that the county is liable to her under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 13-901 et seq. (Reissue 1997 & Supp. 1999), because it had a duty to defend her pursuant to § 23-1201(2), it breached its duty, and that breach proximately caused her to incur defense costs.

In its answer, the county admitted the material facts underlying Guenzel-Handlos' claim, but asserted several affirmative defenses and alleged that Guenzel-Handlos failed to state a claim upon which relief could be granted. The county subsequently filed a motion for judgment on the pleadings. In granting the motion and dismissing the action, the district court concluded that "no Nebraska statute or case law or any common law doctrine would require indemnification." Guenzel-Handlos perfected this timely appeal, which we moved to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Guenzel-Handlos assigns, restated, that the trial court erred in sustaining the motion for judgment on the pleadings with respect to (1) her claim based on § 23-135, (2) her claim for declaratory judgment, and (3) her claim under the Political Subdivisions Tort Claims Act.

STANDARD OF REVIEW

[1] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only questions of law are presented. *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999); *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997); *Bohl v. Buffalo Cty.*, 251 Neb. 492, 557 N.W.2d 668 (1997).

[2] In connection with questions of law and statutory interpretation, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Jeffrey Lake Dev. v. Central Neb. Pub. Power*, 262

Neb. 515, 633 N.W.2d 102 (2001); *In re Estate of Tvrz*, 260 Neb. 991, 620 N.W.2d 757 (2001).

ANALYSIS

Guenzel-Handlos argues that the district court improperly dismissed her appeal, properly filed under § 23-135, "without a full examination of the underlying facts." Brief for appellant at 10. However, a motion for judgment on the pleadings admits the truth of all well-pled facts in the opposing party's pleadings, together with all reasonable inferences to be drawn therefrom, and the moving party admits, for the purpose of the motion, the untruth of the movant's allegations insofar as they have been controverted. *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000); *Becker v. Hobbs*, 256 Neb. 432, 590 N.W.2d 360 (1999). Thus, the issue which was before the district court, and now before this court, is whether the county had a legal duty to reimburse Guenzel-Handlos, assuming all of her factual allegations to be true. The question of whether a duty exists is a question of law. See *Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch.*, 262 Neb. 66, 628 N.W.2d 697 (2001).

[3,4] To determine whether a duty exists in this case, we must examine each of the substantive statutory and common-law legal theories upon which Guenzel-Handlos relies. Before doing so, however, we note certain general principles which govern our consideration. A county is a political subdivision of the state and has only that power delegated to it by the Legislature. *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002); *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000). Any grant of power to a political subdivision is to be strictly construed, *Enterprise Partners v. County of Perkins, supra*, and *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996), and any reasonable doubt of the existence of a power is to be resolved against the county. *Shanahan v. Johnson*, 170 Neb. 399, 102 N.W.2d 858 (1960).

[5] Guenzel-Handlos first argues that the county had a duty to defend her under § 13-1801 and, having failed to do so, has a duty to reimburse her for the costs of her defense. Section 13-1801 provides in relevant part:

> If any legal action shall be brought against any municipal police officer, constable, county sheriff, deputy sheriff, firefighter, out-of-hospital emergency care provider, or other elected or appointed official of any political subdivision . . . based upon the negligent error or omission of such person while in the performance of his or her lawful duties, the political subdivision which employs, appoints, or otherwise designates such person an employee . . . shall defend him or her against such action, and if final judgment is rendered against such person, such political subdivision shall pay such judgment in his or her behalf and shall have no right to restitution from such person.
>
> . . . This section shall not be construed to permit a political subdivision to pay for a judgment obtained against a person as a result of illegal acts committed by such person.

We have not previously construed this statute. However, we have often stated that if the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002); *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002); *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002). That principle applies here. The clear language of § 13-1801 limits its scope to the defense of civil actions for damages based upon negligent error or omission on the part of certain public officials. The statute has no application to the defense of criminal charges. The district court did not err in determining that § 13-1801 does not create a duty on the part of the county to reimburse Guenzel-Handlos for the cost of her criminal defense.

Guenzel-Handlos also relies on § 23-1201(2) as the basis for her claim that the county has a duty to reimburse her defense costs. That statute provides in relevant part that "[i]t shall be the duty of the county attorney to prosecute or defend, on behalf of the state and county, all suits, applications, or motions, civil or criminal, arising under the laws of the state in which the state or the county is a party or interested." Guenzel-Handlos argues that this statute obligated the Lancaster County Attorney to defend her in the criminal case, that he "failed and neglected" to do so, and that the county was therefore liable to her under the Political Subdivisions Tort Claims Act.

Whether § 23-1201(2) affords any basis for the legal duty claimed in this case depends upon whether the county was "a party or interested" in the criminal proceedings against Guenzel-Handlos. The county was clearly not a party to the criminal action. Whether it was "interested" in the proceeding within the meaning of § 23-1201(2) presents a more complicated inquiry. Guenzel-Handlos contends that the county should be considered "interested" in the criminal action because if she had been convicted, she would have been subject to removal from office pursuant to Neb. Rev. Stat. § 23-2001(7) (Reissue 1997), which in turn would have disrupted the smooth operations of the Lancaster County District Court's office. This argument rests on the assumption that the Legislature intended any possible disruption in the operation of a state or county office to give rise to the requisite "interest" under § 23-1201(2), thereby imposing a duty on the county attorney to defend *every* criminal action brought against *any* county official. Guenzel-Handlos offers no authority for such an expansive interpretation.

[6] We decline to adopt this interpretation of the statutory language and conclude that a county is "interested" in a criminal action against a county official within the meaning of § 23-1201(2) when a conviction could expose the county to liability or substantially impair the performance of an essential governmental function. For example, in *City of Montgomery v. Collins*, 355 So. 2d 1111 (Ala. 1978), the Alabama Supreme Court considered whether a city could lawfully pay municipal funds to private counsel for defending police officers indicted on conspiracy charges. The court reasoned:

> Because a [criminal conviction] might provide a basis for a civil cause of action . . . and because a municipality may be made a party defendant in such an action . . . it would be within the reasonable scope of "proper corporate interest" for the municipality to attempt to protect itself and its officers against future civil litigation brought under agency principles by defending their agents against criminal charges arising out of the same general circumstances with the view of obtaining their acquittal. A judgment of conviction in a criminal case is admissible, as a general

> rule, in a civil case if the act in question is material in the civil action.

(Citations omitted.) *Id.* at 1114-15.

In this case, the criminal prosecution against Guenzel-Handlos carried no potential of exposing the county to civil liability to third parties; indeed, the county was the only purported victim of the alleged misuse of public funds. Likewise, a conviction would not have substantially impaired the performance of any essential governmental function. While it is indeed possible, as Guenzel-Handlos suggests, that upon criminal conviction, her removal from office would have disrupted the "smooth operations" of business until a successor was elected, brief for appellant at 15, the same would be true whenever an office is vacated due to death, illness, resignation, or a decision not to seek reelection. Accordingly, we find that the county was not "interested" in the criminal prosecution so as to give rise to a duty to defend under § 23-1201(2). Thus, the alleged "failure" to provide a defense under this statute affords no basis for the claim under the Political Subdivisions Tort Claims Act asserted in the petition as a separately designated "Cause of Action."

Guenzel-Handlos also argues that the county had a duty to reimburse her legal expenses based upon common-law principles of indemnification. This court has not specifically addressed the question of whether a governmental entity has a common-law duty to indemnify a public official for expenses incurred in the defense of a criminal prosecution. Guenzel-Handlos relies upon *Lomelo v. City of Sunrise*, 423 So. 2d 974 (Fla. App. 1982), in which the court determined that a municipal corporation or other public body has a nondiscretionary common-law duty "to furnish or pay fees for counsel to defend a public official subjected to attack either in civil or criminal proceedings where the conduct complained of arises out of or in connection with the performance of his official duties." *Id.* at 976. Other courts, however, have held that in the absence of a controlling statute, governmental entities have discretionary authority, but not a duty, to indemnify public officials for legal expenses incurred in defending various legal proceedings. See, e.g., *Hart v. County of*

Sagadahoc, 609 A.2d 282 (Me. 1992), and cases cited therein. See, also, Annot., 47 A.L.R. 5th 553 (1997).

[7,8] The issue presented in this case is not whether the county board *could have* agreed to indemnify Guenzel-Handlos for her legal expenses, but whether it had a duty which *required* it to do so. On the basis of the facts alleged by Guenzel-Handlos, which we take as true for the purpose of judgment on the pleadings, we conclude that no such common-law duty exists. The reimbursement sought in this action would necessarily involve public funds. Public funds cannot be expended for private purposes. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). What constitutes a public purpose, as opposed to a private purpose, is primarily for the Legislature to determine. *Id.*; *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979). Inasmuch as counties have only those powers as are granted to them by the Legislature, *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995), we conclude that rules governing when a county may expend public funds for the defense of a county official in a criminal action should be established by the Legislature, not by the courts.

We note that the Legislature has seen fit to impose a statutory duty upon the Attorney General or his or her designee to "defend all civil and criminal actions instituted against the superintendent or any subordinate officer or employee of the Nebraska State Patrol arising from their employment." Neb. Rev. Stat. § 81-2009 (Reissue 1999). We cannot ignore the fact that the Legislature has not established a similar unconditional obligation on the part of counties to defend elected officials in criminal prosecutions. The closest parallel is § 23-1201(2), which requires such a defense in some circumstances, but as discussed above, is not applicable in this case because the county was neither a party nor "interested." Accordingly, we agree with the district court that there is no statutory or common-law duty on the part of the county to indemnify Guenzel-Handlos.

CONCLUSION

Assuming all material facts alleged by Guenzel-Handlos to be true, we conclude, as a matter of law, that the county had no duty

to reimburse her for the legal expenses she incurred in the criminal prosecution. Therefore, the district court did not err in sustaining the county's motion for judgment on the pleadings and dismissing the action. The judgment of dismissal is affirmed.

AFFIRMED.

SPANISH OAKS, INC., AND ROBERT A. WEIGEL, APPELLANTS AND CROSS-APPELLEES, V. HY-VEE, INC., ET AL., APPELLEES AND CROSS-APPELLANTS.

655 N.W.2d 390

Filed January 17, 2003. No. S-02-012.

1. **Declaratory Judgments.** An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute.
2. **Contracts.** When a dispute sounds in contract, the action is to be treated as one at law.
3. ____. The question of a party's good faith in the performance of a contract is a question of fact.
4. **Declaratory Judgments: Appeal and Error.** Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong.
5. **Contracts.** The meaning of a contract, and whether a contract is ambiguous, are questions of law.
6. **Contracts: Public Policy.** The determination of whether a contract violates public policy is a question of law.
7. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
8. **Contracts: Parties.** The general rule is that only a party to a contract can challenge its validity.
9. **Landlord and Tenant: Restrictive Covenants: Public Policy.** The parties to a lease may, by express provisions, restrict the uses to which the demised premises may be put, so long as the restriction is reasonable and not contrary to public policy, and a covenant binding the lessee not to carry on a particular business on the leased premises is binding and enforceable.
10. **Restrictive Covenants: Words and Phrases.** A direct restraint on alienation is a provision in a deed, will, contract, or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation.
11. **Restrictive Covenants.** An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but

with the incidental result that the instrument, if valid, would restrain practical alienability.

12. ____. Indirect, practical restraints on alienation are generally upheld and enforced if they are found reasonably necessary to protect a justifiable or legitimate interest of the parties.
13. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
14. **Contracts.** The nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party.
15. ____. A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract.
16. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
17. **Contracts.** Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous.
18. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
19. **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.
20. **Contracts: Assignments.** An assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor.
21. **Leases: Assignments.** The assignment of a lease places the assignee in the same relationship toward the lessor as was occupied by the lessee.
22. **Contracts.** A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms.
23. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.
24. **Pleadings.** A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases.
25. ____. Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
26. ____. The issues in a given case will be limited to those which are pled.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Daniel E. Klaus and Carl. J. Sjulin, of Rembolt, Ludtke & Berger, L.L.P., for appellants.

Robert T. Grimit and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellees.

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

GERRARD, J.

I. NATURE OF CASE

Spanish Oaks, Inc., is the owner in fee simple of a 7-acre parcel of real property located in Lincoln, Nebraska. Hy-Vee, Inc., is the current lessee of the property. Spanish Oaks, Inc., and its sole stockholder, Robert A. Weigel (collectively Spanish Oaks) seek a declaratory judgment regarding (1) the terms of the lease between Spanish Oaks and Hy-Vee and (2) the validity of a restrictive covenant contained in a sublease from Hy-Vee to Ocho Properties, L.L.C. (Ocho).

II. BACKGROUND

1. FACTUAL BACKGROUND

The original ground lease of this 7-acre property was executed in 1978. Briar West, Inc., leased the property to Commerce Development Associates. The ground lease provided for a 25-year term, with fixed annual rental payments during the base term. When the base term expires, the lessee may extend the ground lease for six periods of 5 years each, with the annual rent to be adjusted at the beginning of each option period, generally based on the assessed value of the property.

The original tenant, Commerce Development Associates, assigned its interest in the ground lease to Safeway, which, in 1982, assigned that interest to Hy-Vee. Hy-Vee took possession of the then-undeveloped property and commenced construction of a building to operate as a supermarket. The fee simple estate was later purchased by Spanish Oaks, after construction of Hy-Vee's supermarket building had commenced. Weigel testified that he reviewed the ground lease prior to the purchase of the property. The Hy-Vee store opened in 1985. In 1986, Hy-Vee sublet a portion of the premises to the Lerner Company (Lerner); Lerner, in turn, sub-sublet those premises and is the landlord for other retail tenants.

Spanish Oaks is a real estate holding development corporation, and Weigel is its sole stockholder and president. Weigel practiced law for several years specializing in commercial real estate and then became involved in commercial real estate development;

Weigel (through different business entities) owns several shopping centers, and the tenants of these centers include grocery stores and other national stores.

Hy-Vee subsequently ceased to operate a supermarket on the premises, opening a new, larger supermarket nearby. In 1998, Hy-Vee subleased its former grocery store and parking lot to Ocho and sold its improvements on the property to Ocho. The Hy-Vee/Ocho sublease contains a use restriction that permits the sublet premises to be used for retail purposes so long as such purposes do not include a mass-merchandise or discount store operation similar to Wal-Mart, Kmart, Target, grocery stores, or stores engaged primarily in the consumer sale of pharmaceuticals. Ocho also sub-sublet its portion of the premises; at the time of trial, a World Gym was operated on the premises, as well as a Burger King.

2. Procedural Background

Spanish Oaks sought a declaratory judgment in the district court regarding the use restriction in the Hy-Vee/Ocho sublease and the rent adjustment provision of the ground lease. Spanish Oaks alleged that the use restriction should be voided because it violates the duty of good faith and fair dealing owed by Hy-Vee to Spanish Oaks, it violates Hy-Vee's duty to develop the property for the mutual benefit of both the landlord and tenant, and it is a restraint on alienation and violates public policy. Spanish Oaks also alleged that the ground lease, which caps the annual rent on the premises at $90,000 or "thirty percent (30%) of Tenant's annual gross rental receipts from Tenant's subleases, which ever is greater," should be construed to refer not to Hy-Vee's subleases to Ocho and Lerner, but to Ocho and Lerner's sub-subleases to their sub-sublessees.

The district court rejected Spanish Oaks' arguments. The district court concluded that the ground lease was unambiguous, that Hy-Vee was the "[t]enant" of the ground lease, and that the plain language of the contract capped the rent adjustment based only on Hy-Vee's subleases. The district court also determined that the ground lease provided Hy-Vee broad discretion to use the premises as it saw fit and that the use restriction of the Hy-Vee/Ocho sublease was a valid exercise of Hy-Vee's authority.

The district court also noted, in dicta, that there appeared to be a dispute among the parties about when the rent adjustments for the option periods of the ground lease were to go into effect. The district court stated that "[t]he parties have not requested in the pleadings that the court determine when the original lease expires or when the rent adjustments take effect. Therefore, the court does not resolve this dispute." An examination of the pleadings, pretrial memoranda, and pretrial order reveals no indication that the issue of the expiration date of the base term of the ground lease was ever presented to the district court.

III. ASSIGNMENTS OF ERROR

Spanish Oaks assigns, summarized and restated, that the district court erred in finding (1) that the use restriction of the Hy-Vee/Ocho sublease is valid and enforceable and (2) that the rent adjustment provision of the ground lease was unambiguous and that the term "subleases" does not refer to the subtenants actually occupying the property.

On cross-appeal, Hy-Vee assigns, as restated, that the district court erred in not determining the date of the first rent adjustment and the termination date of the ground lease.

Ocho and Lerner, as appellees, did not file briefs, but have filed statements concurring with the brief filed by Hy-Vee.

IV. STANDARD OF REVIEW

[1,2] An action for declaratory judgment is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. *Lake Arrowhead, Inc. v. Jolliffe*, 263 Neb. 354, 639 N.W.2d 905 (2002). When a dispute sounds in contract, the action is to be treated as one at law. *Nebraska Pub. Emp. v. City of Omaha*, 247 Neb. 468, 528 N.W.2d 297 (1995).

[3,4] The question of a party's good faith in the performance of a contract is a question of fact. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000). Determinations of factual issues in a declaratory judgment action treated as an action at law will not be disturbed on appeal unless they are clearly wrong. See *Woodmen of the World Life Ins. Soc. v. Yelich*, 250 Neb. 345, 549 N.W.2d 172 (1996).

[5-7] The meaning of a contract, and whether a contract is ambiguous, are questions of law. See, *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002). The determination of whether a contract violates public policy is a question of law. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002). In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court. *DLH, Inc. v. Lancaster Cty. Bd. of Comrs.*, 264 Neb. 358, 648 N.W.2d 277 (2002).

V. ANALYSIS

1. Exclusion Clause

(a) Standing

[8] We first note that there is some question whether Spanish Oaks has standing to challenge the use restriction in the Hy-Vee/Ocho sublease. The general rule is that only a party (actual or alleged) to a contract can challenge its validity. *In re Vic Supply Co., Inc.*, 227 F.3d 928 (7th Cir. 2000). "Obviously, the fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract." *Id.* at 931.

In this case, however, while Spanish Oaks is not a party to the Hy-Vee/Ocho sublease, Spanish Oaks has standing to challenge the use restriction in the sublease. Spanish Oaks argues that the use restriction constitutes a breach of the covenant of good faith and fair dealing implied by the ground lease; thus, Spanish Oaks is alleging a breach of the ground lease, to which it is a party. Spanish Oaks also claims that the sublease creates a restraint on alienation and that as the fee simple owner of the property, it has standing to raise this claim.

(b) Public Policy

[9] Spanish Oaks argues that the use restriction is a restraint on alienation that is void because it violates public policy. However, it is a well-established general rule that the parties to a lease may, by express provisions, restrict the uses to which the demised premises may be put, so long as the restriction is

reasonable and not contrary to public policy, and a covenant binding the lessee not to carry on a particular business on the leased premises is binding and enforceable. See, e.g., *Vermont Nat. Bank v. Chittenden Trust Co.*, 143 Vt. 257, 465 A.2d 284 (1983); *Brookings Mall, Inc. v. Cpt. Ahab's, Ltd.*, 300 N.W.2d 259 (S.D. 1980); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 390 N.E.2d 243 (1979); *Elida, Inc. v. Harmor Realty Corporation*, 177 Conn. 218, 413 A.2d 1226 (1979); *Tullier v. Tanson Enterprises, Inc.*, 367 So. 2d 773 (La. 1979); *Pitts v. Housing Auth.*, 160 Ohio St. 129, 113 N.E.2d 869 (1953); *Neiman-Marcus Company v. Hexter*, 412 S.W.2d 915 (Tex. Civ. App. 1967). See, generally, 42 Am. Jur. 2d *Landlord and Tenant* § 505 (1995 & Supp. 2002). This court so held in *Herpolsheimer v. Funke*, 1 Neb. (Unoff.) 304, 95 N.W. 687 (1901). Cf. *Wittenberg v. Mollyneaux*, 60 Neb. 583, 83 N.W. 842 (1900) (partial restraints upon exercise of business, trade, or profession are reasonable when ancillary to purchase of property, made in good faith, and necessary to afford fair protection to purchaser).

Spanish Oaks contends that the use restriction is against public policy because it is a restraint on alienation. Spanish Oaks adduced evidence generally indicating that the use restriction depressed the value of Spanish Oaks' fee simple estate by reducing the income-generating potential of the property to the fee simple owner. Spanish Oaks relies on this court's statement, first made in *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 391, 183 N.W.2d 485, 490 (1971), that " '[a]ny provision in a deed, will, contract, or other legal instrument which, if valid, would tend to impair the marketability of property, is a restraint on alienation.' " Accord, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified* 242 Neb. 97, 490 N.W.2d 461; *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988) (in dicta).

However, this court later criticized *Cast, supra*, in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980). In *Venco Partnership*, the appellant argued that a "due on sale" clause in a mortgage was void as an indirect restraint on alienation, because the possibility of acceleration of the mortgage might impair the owner from being able to sell the

property as he or she wished. We rejected the appellant's reliance on our holding in *Cast*, stating:

> Whatever an indirect restraint on alienation as envisioned by us in *Cast* may be, a "due on sale" clause in a mortgage does not fall within that category. We perhaps were overly generous in our statement in *Cast* that "[*a*]*ny provision* . . . which, if valid, would tend to impair the marketability of property, is a restraint on alienation." *Id.* . . . [S]ome covenants may impair the marketability of property and yet not be restraints on alienation, direct or indirect, as that concept is known in the law. *As an example, a covenant in a deed that requires the dedication of property solely to residential purposes is not a restraint on alienation even if the owner could sell the property at a higher price for commercial purposes.* The most that need be said about *Cast* is that the restriction in question affected the validity of title and totally precluded the fee title owner from transferring title for a period of 25 years. There is no similarity between the language of the will in the *Cast* case and a common "due on sale" clause in a mortgage.
>
> The difficulty in attempting to determine the validity of a contract based upon some notion of an indirect restraint on alienation and a concept of "practical inalienability" is that there is no framework within which a court may operate. Parties to a contract can never know, absent litigation, whether the contract is valid or not. Such a result is undesirable and should be avoided if possible.

(Emphasis supplied.) *Venco Partnership*, 206 Neb. at 474-75, 293 N.W.2d at 846. See, also, *Falls City v. Missouri Pacific Railroad Company*, 453 F.2d 771 (8th Cir. 1971) (interpreting *Cast, supra*, as precluding unreasonable limitations on number of persons to whom property can be sold, but not conditions on use of property). In *Venco Partnership, supra*, we criticized the broad language of our prior holding in *Cast, supra*, distinguished it factually, and clearly stated that "not every impediment to a sale is a restraint on alienation, let alone contrary to public policy." *Venco Partnership*, 206 Neb. at 473, 293 N.W.2d at 845.

[10,11] At worst, the use restriction in the Hy-Vee/Ocho sublease could be described as an indirect, practical restraint on

alienation, as opposed to a direct restraint. A direct restraint on alienation is a provision in a deed, will, contract, or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation. See, e.g., *Carma Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 826 P.2d 710, 6 Cal. Rptr. 2d 467 (1992); *Pritchett v. Turner*, 437 So. 2d 104 (Ala. 1983). See, generally, Michael D. Kirby, *Restraints on Alienation: Placing a 13th Century Doctrine in 21st Century Perspective*, 40 Baylor L. Rev. 413 (1988). An indirect restraint on alienation arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability. See, *Carma Developers, supra*; *Pritchett, supra*; *Redd v. Western Sav. & Loan Co.*, 646 P.2d 761 (Utah 1982); *Lipps v. First American Serv. Corp.*, 223 Va. 131, 286 S.E.2d 215 (1982); *Crockett v. Savings & Loan Assoc.*, 289 N.C. 620, 224 S.E.2d 580 (1976).

[12] Indirect restraints historically have been restricted by the rule against perpetuities and related rules and have not been as harshly struck down as the classical direct restraints. *Crockett, supra*. Courts generally have upheld and enforced such nonclassical restraints if they are found reasonably necessary to protect a justifiable or legitimate interest of the parties. See *Redd, supra*. Cf. Restatement (Third) of Property: Servitudes § 3.5 at 461 (2000) ("[a]n otherwise valid servitude is valid even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property . . .").

This court's decision in *Occidental Sav. & Loan Assn. v. Venco Partnership*, 206 Neb. 469, 293 N.W.2d 843 (1980), reflects application of the foregoing principles. In *Venco Partnership*, 206 Neb. at 477, 293 N.W.2d at 847, we specifically rejected the notion that an indirect, practical restraint on alienation is found simply because a "market hindrance" may make buyers less willing to purchase property at a premium. Despite this court's subsequent references to the disapproved language of *Cast v. National Bank of Commerce T. & S. Assn.*, 186 Neb. 385, 183 N.W.2d 485 (1971), see, *State v. Union Pacific RR. Co.*, 241 Neb. 675, 490 N.W.2d 461 (1992), *modified* 242 Neb. 97, 490 N.W.2d

461, and *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988) (in dicta), *Venco Partnership, supra*, correctly sets forth and applies the law regarding indirect restraints on alienation.

We now apply those principles to the instant case. Pursuant to *Venco Partnership*, the threshold question is not whether an indirect restraint on alienation is reasonable, but whether the challenged instrument is a restraint on alienation at all. We conclude that, even assuming that the use restriction at issue in this case creates a practical impairment to the marketability of the property, it is not an indirect restraint on alienation. Hy-Vee cannot restrict or prohibit the sale of Spanish Oaks' interest in the property, and Spanish Oaks is free to sell or hold the property as it sees fit. Despite a possible reduction in market price, Spanish Oaks still has both the legal and practical ability to alienate its interest in the property. This situation does not resemble a restraint on alienation of the kind that courts have generally refused to uphold and enforce. Compare *Rich, Rich & Nance v. Carolina Const. Corp.*, 355 N.C. 190, 558 S.E.2d 77 (2002).

Spanish Oaks complains not about a restriction on its ability to sell its property, but about the price it will receive because it is subject to the ground lease and subleases. Compare *Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837 (8th Cir. 1975). The difficulty with this complaint is that many transactions, instruments, and encumbrances can arguably reduce the market value of property. Were we to accept Spanish Oaks' argument, for instance, the ground lease might be voidable, as the marketability of the property would certainly be greater if Spanish Oaks' fee simple estate was unencumbered by Hy-Vee's leasehold. "Certainly courts should not get caught in that thicket." *Venco Partnership*, 206 Neb. at 478, 293 N.W.2d at 848.

Even assuming that the potential market value of Spanish Oaks' fee simple interest is in some way diminished by the presence of the use restriction, that does not make the use restriction an indirect restraint on alienation as that concept is understood in the law. The contention that the use restriction constitutes an unreasonable restraint on alienation is without merit.

(c) Good Faith and Fair Dealing

[13] Spanish Oaks also contends that the use restriction of the Hy-Vee/Ocho sublease breaches the implied duty of good faith and fair dealing owed by Hy-Vee to Spanish Oaks by virtue of the ground lease. The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). See, also, Restatement (Second) of Contracts § 205 (1981); Steven J. Burton & Eric G. Andersen, Contractual Good Faith (1995).

[14,15] However, the nature and extent of an implied covenant of good faith and fair dealing is measured in a particular contract by the justifiable expectations of the parties. Where one party acts arbitrarily, capriciously, or unreasonably, that conduct exceeds the justifiable expectations of the second party. *Dunfee v. Baskin-Robbins, Inc.*, 221 Mont. 447, 720 P.2d 1148 (1986), cited with approval, *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). A violation of the covenant of good faith and fair dealing occurs only when a party violates, nullifies, or significantly impairs any benefit of the contract. See *Idaho Power Co. v. Cogeneration, Inc.*, 134 Idaho 738, 9 P.3d 1204 (2000). The scope of conduct prohibited by the covenant of good faith is circumscribed by the purposes and express terms of the contract. *Carma Developers v. Marathon Dev. Cal.*, 2 Cal. 4th 342, 826 P.2d 710, 6 Cal. Rptr. 2d 467 (1992). The implied covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose. *Id.*

In this case, then, the appropriate inquiry is whether the existence of the use restriction in the Hy-Vee/Ocho sublease exceeds the justifiable expectations of the parties to the ground lease and violates, nullifies, or significantly impairs Spanish Oaks' benefit of the contract. As noted by the district court, the ground lease contains no restrictions on Hy-Vee's use of the premises and permits Hy-Vee to "sublet all or any portion of the Premises or the improvements thereon without obtaining the consent of the Landlord." The parties to the ground lease could have included

express provisions governing the tenant's use or subletting of the property, yet chose not to do so. The parties obviously contemplated that the tenant might sublet the premises, yet no provision was made for use restrictions in the subleases despite the commercial prevalence of such restrictions in shopping center leases. See, generally, Annot., 1 A.L.R.4th 942 (1980). Nor was there evidence to suggest that Hy-Vee acted in bad faith to deliberately interfere with Spanish Oaks' benefits under the ground lease; rather, it is apparent that Hy-Vee's inclusion of the use restriction in its subleases is intended to protect Hy-Vee's commercial interests, and any effect on Spanish Oaks is incidental.

The evidence also conflicts regarding the degree to which Spanish Oaks has been deprived of the benefit of the ground lease by the existence of the use restriction. Spanish Oaks does not contend that since acquiring the property, Spanish Oaks has not received the rent payments specified for the base term of the ground lease. Hy-Vee also adduced evidence that the structure on the property was not large enough to accommodate the retailers that Spanish Oaks contended would be ideal for the property, such as Kmart, Target, or ShopKo. Hy-Vee's vice president testified that Hy-Vee moved to its new location because it was unable to expand its previous store on the property to the size Hy-Vee felt was necessary to be competitive.

Spanish Oaks' expert witness also admitted that several other potential retail tenants for the property would not be precluded from locating there by the terms of the use restriction: restaurants, Hobby Lobby, office supply stores such as Office Max or Office Depot, hardware stores such as Westlake Hardware, clothing stores such as Kohl's, Best Buy, or large bookstores such as Barnes & Noble. The managing partner of Ocho testified that the use restriction had not negatively affected the income stream from the property. Thus, despite Spanish Oaks' contention that the use restriction "destroys" the shopping center, the evidence does not show that the use restriction completely deprives Spanish Oaks of the benefits of the ground lease.

Given these circumstances, we cannot say that the district court was clearly wrong in determining that Hy-Vee did not breach the implied covenant of good faith and fair dealing contained in the ground lease. The evidence supports the conclusions that the use

restriction does not violate the reasonable expectations of the original parties to the ground lease and that Hy-Vee has not violated, nullified, or significantly impaired any of Spanish Oaks' benefits under the ground lease. Spanish Oaks' dissatisfaction with the express terms of the ground lease is insufficient to prove that Hy-Vee has acted unfairly or in bad faith.

In arguing to the contrary, Spanish Oaks relies on *George v. Jones*, 168 Neb. 149, 95 N.W.2d 609 (1959). In that case, the lessor sought forfeiture of a mineral lease where the rent was based on the amount of gravel extracted from the property, but the lessee did not work the land with ordinary diligence. We held that where rent under a mineral or mining lease is based on a royalty on the product of the lease, there is an implied covenant on the lessee's part to work the mine with ordinary diligence, so that the lessor may secure the actual consideration for the lease. *Id.* While *George* was analyzed in the specific context of a mineral lease, it is evident that the principles at work in *George* make that case a specific example of the broader covenant of good faith and fair dealing discussed above. Spanish Oaks argues that *George* requires Hy-Vee to develop the premises devised by the ground lease for the mutual benefit of the tenant and landlord.

However, *George, supra*, is readily distinguishable, as noted by the district court, in that the rent under the ground lease in this case is not based on a percentage or royalty, as was the lease in *George*. Even in cases involving commercial percentage leases, it has generally been held that actions which reduce the actual rent received by the lessor do not violate the covenant of good faith and fair dealing where the lessee did not act to intentionally bring down gross receipts at the leased premises, but instead acted for reasonable commercial purposes. See, generally, Steven J. Burton & Eric G. Andersen, Contractual Good Faith § 2.3.3 (1995). The determinative factor in *George, supra*, was that the lessor in that case was wholly deprived of the consideration bargained for under the lease. As noted above, no such circumstance is presented in this case. *George* does not support the position advanced by Spanish Oaks.

Spanish Oaks also argues, briefly, that the use restriction violates the express terms of the ground lease because the ground lease contemplates the development of a " 'shopping center,' "

and "one cannot 'shop' for anything at a World Gym [or] Burger King." Brief for appellants at 22. Even assuming, for the sake of argument, that Spanish Oaks' interpretation of the term "shopping center" is correct, Spanish Oaks' argument has no relevance to the use restriction, which does not compel the presence of World Gym or Burger King. Rather, as demonstrated by the examples set forth above, the use restriction precludes certain particular kinds of retail activity, but does not bar all businesses at which a consumer could "shop" within Spanish Oaks' suggested understanding of the term.

[16] Spanish Oaks' arguments regarding the use restriction are without merit. The district court did not err in concluding that the use restriction in the Hy-Vee/Ocho sublease is not void for any of the reasons suggested by Spanish Oaks. The district court also concluded that Spanish Oaks was estopped from challenging the use restriction; given our resolution of the other issues presented, we do not reach Spanish Oaks' claims of error regarding the district court's estoppel determination. An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. *Rush v. Wilder*, 263 Neb. 910, 644 N.W.2d 151 (2002).

2. Rent Adjustment Provision

As noted previously, the ground lease provides for several extension periods and also provides for adjustment of the annual rent for each extension period based on a percentage of the fair market value of the premises. However, the ground lease also provides in relevant part:

> In no event shall the annual rent be adjusted below Sixty Thousand Dollars ($60,000.00) per year, and in no event shall the annual rent be adjusted above Ninety Thousand Dollars ($90,000.00) per year or *thirty per cent (30%) of Tenant's annual gross rental receipts from Tenant's subleases*, which ever is greater.

(Emphasis supplied.) Spanish Oaks argues that this provision is ambiguous and should be construed to refer to the sub-subleases between Hy-Vee's sublessees and the tenants who actually occupy the premises.

To this end, Spanish Oaks adduced evidence generally indicating that when the ground lease was executed, the original

parties to the ground lease expected there to be only one level of subleases, i.e., that the original lessee of the premises would sublease the premises to a retail occupant. Thus, argues Spanish Oaks, the above-quoted language of the rent adjustment provision was intended to limit the annual rent under the ground lease based on the rental receipts from the occupying tenants of the property, i.e., the businesses that have sublet the premises from Ocho and Lerner.

[17-19] The district court, however, did not consider Spanish Oaks' parol evidence, as the district court determined that the rent adjustment provision is unambiguous. Extrinsic evidence is not permitted to explain the terms of a contract that is not ambiguous. *McDonald's Corp. v. Goler*, 251 Neb. 934, 560 N.W.2d 458 (1997). When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Ruble v. Reich*, 259 Neb. 658, 611 N.W.2d 844 (2000). 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. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002).

[20,21] In this case, however, the contractual provision at issue is susceptible to only one reasonable meaning. It is well-established that an assignee stands in the shoes of the assignor and is bound by the terms of the contract to the same extent as the assignor. *Vowers & Sons, Inc. v. Strasheim*, 248 Neb. 699, 538 N.W.2d 756 (1995). The assignment of a lease places the assignee in the same relationship toward the lessor as was occupied by the lessee. See *Beltner v. Carlson*, 153 Neb. 797, 46 N.W.2d 153 (1951). Thus, the current parties to the lease, Spanish Oaks and Hy-Vee, are respectively the "Landlord" and "Tenant" described in the ground lease. The "Tenant's annual gross rental receipts from Tenant's subleases" can refer only to Hy-Vee's annual gross rental receipts from Hy-Vee's subleases, which are currently to Ocho and Lerner.

[22,23] A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. *Ruble, supra*. Spanish Oaks' extrinsic evidence cannot be used to create ambiguity where the terms of the contract are clear and unambiguous. Although a

party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed. *Reichert v. Rubloff Hammond, L.L.C.*, 264 Neb. 16, 645 N.W.2d 519 (2002). The district court correctly determined that the ground lease is unambiguous and that the "Tenant's annual gross rental receipts from Tenant's subleases" refer to Hy-Vee's subleases with its sublessees, Ocho and Lerner. Spanish Oaks' assignments of error to the contrary are without merit.

3. Cross-Appeal

As previously mentioned, in its order, the district court noted a dispute among the parties about when the original term of the ground lease was to expire and when the rent adjustments for the option periods of the ground lease were to go into effect, but the district court did not resolve that issue because it was not presented by the pleadings. On cross-appeal, Hy-Vee argues that the district court erred by abstaining on the issue.

Hy-Vee's basic argument is that the district court should have resolved this issue in order to avoid further litigation and promote judicial economy. Hy-Vee contends that "[i]t does little good for the Court to resolve the issue regarding calculating the rent adjustment without deciding when the first rent adjustment will occur." Brief for appellee on cross-appeal at 37.

However, Hy-Vee does not contest the district court's conclusion that this issue was not presented to the district court through the pleadings, and our examination of the record reveals no indication in the pleadings, pretrial memoranda, or pretrial order that this issue was ever presented to the district court for disposition. In fact, there is little indication that the parties were aware of the discrepancy in their positions until it was called to their attention by the district court.

[24-26] A pleading has two purposes: (1) to eliminate from consideration contentions which have no legal significance and (2) to guide the parties and the court in the conduct of cases. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996). Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Bakody Homes & Dev. v. City of Omaha*, 246 Neb. 1, 516 N.W.2d 244

(1994). The issues in a given case will be limited to those which are pled. *Wilcox v. City of McCook*, 262 Neb. 696, 634 N.W.2d 486 (2001).

While we recognize that judicial efficiency might be promoted if courts were to, sua sponte, determine questions raised by the facts but not presented in the pleadings, that efficiency would come at the expense of due process. Hy-Vee argues, in essence, that the district court erred by not deciding an issue of which the parties had no notice, and regarding which they did not have an opportunity to be heard. But see *In re Application No. C-1889*, 264 Neb. 167, 647 N.W.2d 45 (2002) (procedural due process requires that parties whose rights are to be affected are entitled to notice and opportunity to be heard). We conclude that the district court did not err by declining to address an issue that was not pled by the parties or presented to the district court for disposition.

VI. CONCLUSION

The district court did not err in determining that the use restriction was not a restraint on alienation and was not clearly wrong in finding that the use restriction did not constitute a breach of the covenant of good faith and fair dealing implied in the ground lease. The district court did not err in concluding that the rent adjustment provision was unambiguous or in declining to address the issue of when the rent adjustment provision becomes effective. For these reasons, we affirm the judgment of the district court.

AFFIRMED.

IN RE INTEREST OF TY M. AND DEVON M., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. SHAWN M., APPELLANT, AND HOLLY M., APPELLEE AND CROSS-APPELLANT.

655 N.W.2d 672

Filed January 17, 2003. No. S-02-056.

1. **Juvenile Courts: Parental Rights: Appeal and Error.** In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another.
2. **Juvenile Courts: Appeal and Error.** In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling.
3. **Constitutional Law: Due Process.** Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.
4. **Records: Appeal and Error.** It is the responsibility of the party appealing to provide a record which supports the claimed errors.
5. **Juvenile Courts: Appeal and Error.** A proceeding before a juvenile court is a "special proceeding" for appellate purposes.
6. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A judicial determination made following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order.
7. ____: ____: ____: ____. A dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order.
8. **Juvenile Courts: Parental Rights: Jurisdiction: Appeal and Error.** In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction.
9. **Parental Rights: Evidence: Proof.** In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1998) exists *and* that termination is in the children's best interests.
10. **Juvenile Courts: Parental Rights.** The purpose of Neb. Rev. Stat. § 43-292(6) (Reissue 1998) is to advance the best interests of the children by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the children within Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) have not been corrected.
11. ____: ____. Where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan

must be conducted under the direction of the juvenile court and must be reasonably related to the objective of reuniting parent with child.

12. **Parental Rights.** Once a plan of reunification has been ordered to correct the conditions underlying the adjudication under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998), the plan must be reasonably related to the objective of reuniting the parents with the children.
13. **Juvenile Courts: Parental Rights: Evidence.** A juvenile court is not limited to reviewing the efforts of a parent under the plan last ordered by the court; rather, the court looks at the entire reunification program and the parent's compliance with the various plans involved in the program, as well as any effort not contained within the program which would bring the parent closer to reunification.
14. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A detention order issued under Neb. Rev. Stat. §§ 43-247(3)(a) and 43-254 (Reissue 1998) 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.
15. **Parental Rights: Trial: Rules of Evidence.** Reports may not be received in evidence for the purpose of a termination proceeding, nor relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Evid. R. 803(23), Neb. Rev. Stat. § 27-803(23) (Cum. Supp. 2002), an exception to the hearsay rule.
16. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
17. **Evidence: Presumptions.** Absent a showing to the contrary, it is presumed that the trial court disregarded all incompetent and irrelevant evidence.
18. **Juvenile Courts: Parental Rights: Evidence: Appeal and Error.** The improper admission of evidence by a juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made.
19. **Parental Rights: Evidence: Appeal and Error.** Factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, and impermissible or improper evidence is not considered by the appellate court.
20. ____: ____: ____. In an appeal from a judgment or order terminating parental rights, an appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code.
21. **Records: Judicial Notice: Rules of Evidence.** As a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), Neb. Rev. Stat. § 27-201(2)(b) (Reissue 1995), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.
22. **Juvenile Courts: Judicial Notice: Records.** A juvenile court has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined.

23. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Affirmed.

Avis R. Andrews for appellant.

Pamela Lynn Hopkins for appellee Holly M.

Don Stenberg, Attorney General, and Stuart B. Mills, Special Prosecutor, for appellee State of Nebraska.

Leta F. Fornoff, guardian ad litem.

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

WRIGHT, J.

NATURE OF CASE

Shawn M. and Holly M. each appeal from a judgment of the county court for Dodge County, sitting as a juvenile court, which terminated their parental rights to Ty M., born March 23, 1997, and Devon M., born June 10, 1998.

SCOPE OF REVIEW

[1] In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002).

[2] In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002).

FACTS

Ty and Devon were placed in the care, custody, and control of the Nebraska Department of Health and Human Services (DHHS)

on November 20, 1998, after police were sent to the home to investigate a report that the children were in danger based on neglect. At the time, Ty was approximately 1½ years old and Devon was approximately 5 months old.

The children were with a babysitter when police arrived. The living room floor was nearly covered with toys, dirty clothing, food, cigarette butts, and garbage. Bottles found in the home contained spoiled formula or milk, and there were feces stains on the carpet. Holes had been punched through two doors. Soiled dishes were piled high in the kitchen, and no clean dishes were found. The children's room had a strong odor of urine and spoiled formula or milk. The sheets and pillowcases in the children's room had dried vomit and urine on them.

Although the parents had been counseled not to smoke because Devon has reactive airway disease, there was a strong odor of tobacco in the home. An apparatus for giving Devon breathing treatments was filthy and unusable, and there was no medication for the machine in the home.

The children were initially placed with Shawn's parents until December 7, 1998, when they were returned to the parental home. The children were again removed from the home on February 3, 1999, and placed with the grandparents until October 1, when they were placed in foster care.

The children were adjudicated under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998) on March 24, 1999, in relation to Holly, at which time she admitted the allegations in the petition. Following a hearing on April 14, the children were adjudicated in relation to Shawn.

Between April 20, 1999, and January 16, 2001, six case plans were received and reviewed by the juvenile court. The case plans spelled out a number of goals for both parents, including marital counseling, mental health counseling, anger management skills, domestic violence counseling, parenting skills, and finances.

A petition to terminate parental rights was filed on February 27, 2001. The petition alleged that grounds for termination existed under Neb. Rev. Stat. § 43-292(6) (Reissue 1998) because (1) the children had been determined to be children under § 43-247(3)(a) and (2) following that determination, reasonable efforts had been made to preserve and reunify the

family, and the efforts had failed to correct the conditions which led to that determination. The petition also alleged that grounds for termination existed under § 43-292(7) and that termination would be in the best interests of the children, who had been in out-of-home placement for 15 or more of the most recent 22 months.

An amended petition to terminate parental rights alleged that the parents failed to maintain adequate housing for themselves and their children from February 1999 to October 2000; the parents failed to demonstrate proper and consistent parenting skills during supervised visitations despite family support services, parenting classes, and supervised visitation; the parents failed to follow through with recommendations of mental health providers; and the parents failed to maintain a stable relationship.

On January 8, 2002, the juvenile court entered an order terminating parental rights. The court found that the adjudication under § 43-247(3)(a) "acknowledges that there are collective conditions which lead to a very filthy health hazard environment making conditions unsafe and unsanitary." The court further found that the State had maintained ongoing, continuing, and reasonable efforts to sustain and keep the family together, including ongoing visitation plans.

The juvenile court found an ongoing level of deterioration within the home, including lack of parenting skills, lack of awareness and sensitivity to the children and their needs, and marital strife and conflict. Holly had reported violence and a feeling of fear to her DHHS caseworker and other professionals. She stated that she was unable to meet the needs of her children and that she feared for her children's safety with Shawn. The court found that Holly's admissions of domestic violence to DHHS professionals were consistent with the evidence and that Holly had on many occasions indicated her intent to divorce Shawn.

The juvenile court noted that Shawn was in jail from October 1999 through October 2000, after which he reunited with Holly. At the time of the court order, they were living in a home provided by Shawn's parents. During Shawn's incarceration, he did not follow through with required levels of counseling and parenting classes. He sporadically participated in a men's group after his

release, but the court found that neither parent maintained involvement in individual counseling or fully utilized the available opportunities, despite the family support workers' efforts and DHHS resources.

During ongoing visitations, both parents demonstrated an inability to control the children. The juvenile court found that neither parent consistently recognized safety issues regarding the children. Holly failed to timely follow through with her psychological evaluations and to take her medication for depression.

The juvenile court concluded that the rehabilitation plans ordered by the court were designed to correct the unsafe conditions in the home and that these unsafe and unsanitary conditions reflected problems with parenting skills, with domestic violence, and with recognizing the needs of the children. The court found that the parents consistently failed to comply with reasonable steps for rehabilitation as ordered by the court by failing to attend individual counseling, address spousal violence, or demonstrate proper parenting skills during visitations. The evidence showed that DHHS provided multiple resources and services for both Shawn and Holly, but neither showed an ability or consistent commitment and willingness to succeed. The parents had been unable to make satisfactory progress toward reunification.

The juvenile court found that the evidence supported termination of parental rights under § 43-292(6) in that the parents had been provided many reasonable opportunities to rehabilitate and had failed to do so. Shawn and Holly willfully failed to comply in whole or in part with the material provisions of the rehabilitation plans, including failure to demonstrate proper parenting skills and failure to keep the children reasonably safe during visitations. The parents also demonstrated lack of followthrough with individual therapy and did not address domestic violence issues. The children had been in out-of-home placement for 15 or more of the most recent 22 months, specifically since February 3, 1999. The court found clear and convincing evidence that it is in the best interests of the children to terminate the parental rights. The court ordered custody of the children to remain with DHHS for appropriate placement with the objective of adoption.

ASSIGNMENTS OF ERROR

Shawn and Holly have each assigned numerous errors covering a variety of issues. However, because a number of the assigned errors are not argued in the parties' briefs, we will not address them. See *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). We will address only the alleged errors as summarized and restated here: (1) The juvenile court erred in "failing to enforce" the parties' due process rights and constitutional rights, (2) the court erred in finding that it is in the best interests of the children that the parents' rights be terminated, (3) the court erred in overruling Holly's motion to strike, (4) the court erred in overruling the motions for psychological and psychiatric evaluations of the children, (5) the court erred in admitting certified court documents, (6) the court erred in finding that reasonable efforts had been made to preserve and reunify the family, and (7) the court erred in failing to find § 43-292(7) unconstitutional.

ANALYSIS

In an appeal from an order terminating parental rights, an appellate court tries factual questions de novo on the record. Appellate review is independent of the juvenile court's findings. However, when the evidence is in conflict, an appellate court may give weight to the fact that the juvenile court observed the witnesses and accepted one version of facts over another. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). In reviewing questions of law arising under the Nebraska Juvenile Code, an appellate court reaches conclusions independent of the lower court's ruling. *In re Interest of Chad S.*, 263 Neb. 184, 639 N.W.2d 84 (2002). We find no merit to any of the assigned errors and hold that the juvenile court's order should be affirmed.

Due Process Rights

Both parents claim that their due process rights were violated at some point during the termination proceedings. In summary, Shawn claims that he was denied due process in that for 2 years following the adjudication, he had no procedural notice that the children were in custody for any other reason than the fact that the house was unsafe and unsanitary. The parties stipulated that the cleanliness of the home was no longer an issue after September

2000, and based upon the stipulation, Shawn claims that the condition of the house was not an issue for 1 full year prior to the hearing on termination. He claims that the termination proceeding exceeded the juvenile petition by adding that the parents had failed to maintain adequate housing for themselves, failed to demonstrate proper and consistent parenting skills during supervised visitation, failed to follow through with recommendations of mental health providers, and failed to maintain a stable relationship. He asserts there was no evidence to show that the parents were ever advised prior to the filing of the petition for termination of parental rights that their parental rights could in fact be terminated. He also claims that there was no adequate advisement of rights made by the juvenile court prior to the adjudication, as required by Neb. Rev. Stat. § 43-279.01 (Reissue 1998). In addition, he claims that his due process rights were violated because the court failed to properly advise the parents of their rights and possible consequences of the State's petition during the adjudication process. Finally, Shawn argues that his due process rights were violated when he was not given the opportunity to challenge the evidence, which included extensive hearsay and evidence which lacked foundation.

In summary, Holly asserts that since the adjudication was made on the basis that the house was dirty, evidence regarding termination as to any factor other than the improvement or lack of improvement in the cleanliness of the house was irrelevant for purposes of termination of parental rights. Holly claims that the parents repeatedly attempted to exercise their rights through motions to strike, motions in limine, and motions to bifurcate, and through relevancy and material objections, which were all overruled.

Holly further claims that the juvenile court failed to obtain original jurisdiction under the adjudication and that, therefore, the court had no jurisdiction to enter subsequent case plans or to proceed to a termination based on § 43-292(6) or (7). She asserts that the parents were not advised of their rights at the adjudication as required by § 43-279.01. She also argues that the adjudication was based on the condition of the house and that any case plans which addressed other issues are irrelevant and therefore cannot supply a basis for termination proceedings.

[3] In *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 459, 598 N.W.2d 729, 737 (1999), we addressed the due process rights of parents in termination proceedings and the importance of those rights: "[S]tate intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause." We have also stated:

> Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker.

In re Interest of Kelley D. & Heather D., 256 Neb. 465, 476-77, 590 N.W.2d 392, 401 (1999).

The initial termination petition, filed on February 27, 2001, alleged that the children were juveniles as defined in § 43-247(3)(a), which gives the juvenile court jurisdiction over, inter alia, any juvenile "who lacks proper parental care by reason of the fault or habits of his or her parent, guardian, or custodian." The petition was amended on May 31 to state that the children had been in out-of-home placement since February 3, 1999, that the parents failed to maintain adequate housing for themselves and the children from February 1999 to October 2000, that the parents failed to demonstrate consistent parenting skills, that the parents failed to follow through with recommendations of mental health providers, and that the parents failed to maintain a stable relationship.

The bill of exceptions from the adjudication hearing on March 24, 1999, shows that Holly was present with counsel and that Shawn appeared pro se. The State informed the juvenile court that an amended petition had been filed and asked the court if it wanted to "re-arraign" the parents on the amended petition. The court stated: "It wouldn't hurt to go ahead and do that since we will have to set this matter down for trial." The court then asked Holly's counsel if he wished to have the amended petition formally read, and the court asked Shawn if he had heard the additional sentence which was included in the

amended petition. Shawn responded: "I've looked it over, your Honor, but I'm not exactly sure. I'd have to look at the papers again." The court noted that one sentence had been added and then stated: "Everything else in the juvenile petition that was previously read to you is the same. That's the only — only additional piece." Shawn stated: "So, with this we would still be charged with — [.]" The court stated: "Everything is exactly the same. The State is just alleging specific issues, so that you are aware of." At that point, Holly's counsel stated that she understood the allegations, and she admitted the allegations.

The juvenile court informed Holly that it had jurisdiction and could require her to take necessary steps to meet the needs of the children, and she indicated that she understood. The court told her that if it accepted her admission and if the children were outside the parental home for more than 15 months of the next 22 months, the State could file a petition for the termination of her parental rights, and she indicated her understanding. Holly stated that no threats or promises had been made to her and that she was not under the influence of chemicals or drugs that would affect her thinking. The State offered a factual basis, stating that on November 18, 1998, police were dispatched to the parents' home, which was found to be in an unsafe and unsanitary condition that was dangerous to the welfare of the children. The children were taken into protective custody, and a juvenile petition was filed. Holly agreed that the statements were accurate as applied to her.

The juvenile court found that Holly had admitted the allegations, there was a factual basis for her admission, and the admission was voluntary, knowing, and intelligent. The court accepted the admission and found, as to Holly, that the children should be adjudicated as juveniles under § 43-247(3)(a).

Shawn was present during the above-described discussions. The juvenile court stated that Shawn had "exercised [his] rights" and that on April 14, 1999, the State would present evidence and Shawn could ask questions of the witnesses and present evidence of his own. Shawn requested a copy of the current charges, and the court asked if he had a copy of the amended petition. Shawn said he had a copy, and then asked: "Does that take care of the last one — of the allegations of child abuse?

That's what I didn't understand." The court explained that the single sentence that was read to Shawn from the amended petition was the only change. The court stated: "The last petition you received, you read and you understood. The amended petition, the only additional change to that is that sentence that I read to you, and you have a copy of this petition, which reflects that additional sentence." Shawn indicated that he understood.

At the April 14, 1999, hearing on the allegations as to Shawn, the juvenile court noted that Shawn had waived his right to an attorney and was representing himself. The court informed Shawn that it was the State's burden to present evidence and that he had the right to cross-examine witnesses and to present evidence.

As to Shawn, the juvenile court found that the State had met its burden of proof by a preponderance of the evidence that the juveniles were as described within § 43-247(3)(a) and again ordered custody to remain with DHHS.

We do not have a verbatim transcript of the hearing held on December 16, 1998, which was prior to the adjudication. However, the record presented to this court indicates that Shawn waived his rights and that Shawn and Holly were both represented by counsel at that hearing. The court order indicates that the court inquired as to their understanding of the contents of the petition, their rights, and the possible consequences if the allegations were admitted. This order was received as an exhibit without objection during a hearing on Shawn's motion to dismiss. Later in the hearing, the parties' objection to the exhibit was overruled.

[4] It is the responsibility of the party appealing to provide a record which supports the claimed errors. See *In re Estate of Krumwiede*, 264 Neb. 378, 647 N.W.2d 625 (2002). The parents have failed to provide a record which supports their assertion that they were not properly advised prior to the adjudication of their rights and the possible consequences of termination of their parental rights.

[5,6] The record does not indicate that any appeal was taken from the adjudication under § 43-247(3)(a). A proceeding before a juvenile court is a "special proceeding" for appellate purposes. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651

N.W.2d 231 (2002). A judicial determination made following an adjudication in a special proceeding which affects the substantial right of parents to raise their children is a final, appealable order. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

[7] More specifically, it has been held that a dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). See, also, *In re Interest of Clifford M. et al.*, 6 Neb. App. 754, 577 N.W.2d 547 (1998). In *In re Interest of Joshua M. et al.*, the rehabilitation plan challenged by the mother had been adopted by the juvenile court directly following the court's adjudication of the children as within § 43-247(3)(a). The mother agreed to the plan and did not appeal from the dispositional order. On appeal, we did not permit her to collaterally attack the plan adopted in the dispositional order. "Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter." *In re Interest of Joshua M. et al.*, 251 Neb. at 629, 558 N.W.2d at 559, citing *In re Interest of J.H.*, 242 Neb. 906, 497 N.W.2d 346 (1993).

[8] The record shows that there were a number of dispositional hearings held and case plans entered during the 2 years following the adjudications of March 24 and April 14, 1999. We conclude that the parents are not permitted to collaterally attack the adjudication or the case plans that were adopted pursuant to the adjudication. In the absence of a direct appeal from an adjudication order, a parent may not question the existence of facts upon which the juvenile court asserted jurisdiction. *In re Interest of Phyllisa B., ante* p. 53, 654 N.W.2d 738 (2002); *In re Interest of Brook P. et al.*, 10 Neb. App. 577, 634 N.W.2d 290 (2001). We find that the parents have not demonstrated they were denied due process with regard to the adjudication.

At the termination hearing on May 2, 2001, Shawn and Holly each waived the reading of the petition. The juvenile court informed the parents of the following rights: (1) the right to be represented by an attorney; (2) the right to remain silent, and if that right was waived, anything the parties said could be

used against them; (3) the right to admit or deny the allegations, and if denied, the State must prove the allegations by clear and convincing evidence; (4) the right to confront and cross-examine witnesses; (5) the right to call witnesses on their own behalf; (6) the right to a speedy adjudication; and (7) the right to appeal any final decision.

Attached to the petition to terminate parental rights is a summons which is addressed to Shawn, Holly, Ty, and Devon, and a notice entitled "Some Important Rights." The rights identified include the right to an attorney or court-appointed counsel; the right to remain silent; the right to admit or deny the allegations, and if the allegations are denied, that the State must prove them as provided by law; the right to confront and cross-examine witnesses; the right to summon witnesses; the right to a speedy adjudication; and the right to appeal any final decision.

At a hearing on September 9, 2001, the State noted that the parents had not entered a denial of the allegations, and the amended petition was then read. The juvenile court asked the parents if they understood. Shawn objected, asserting that the arraignment should have taken place at the adjudication. Shawn then stated that he understood the rights as read to him. Shawn's counsel argued that his motion to dismiss was based on the failure to arraign at the adjudication and that the State's action was too late. Counsel asked that Shawn's response be stricken as not made on advice of counsel. The court noted the objections and found that the parents were present when the amended petition was read, that they understood the English language, and that both had preserved their objections.

The juvenile court also found that the parents had been informed of their right to counsel and that each was represented by counsel, their right to remain silent, their right to confront and cross-examine witnesses, their right to testify and compel witnesses to attend and testify, their right to a speedy adjudication, and the right to appeal. Each responded that they understood the rights. The court then entered a denial of the allegations by both parents and explained that the standard of proof is clear and convincing evidence. We find that the assignments of error regarding an alleged denial of due process are without merit.

BEST INTERESTS OF CHILDREN

Holly argues that the juvenile court erred in finding that it is in the best interests of the children to terminate her parental rights. She asserts that none of the witnesses could identify anything other than minor negative events which occurred while the children were in the parents' care and that the children have sustained significant harm while in the care of the foster parents.

[9,10] In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists *and* that termination is in the children's best interests. *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). The purpose of § 43-292(6) is to advance the best interests of the children by giving the juvenile court power to terminate parental rights where the grounds for adjudicating the children within § 43-247(3)(a) have not been corrected. *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999).

The State alleged as one ground for termination of parental rights that following a determination that the juveniles are ones as described in § 43-247(3)(a), reasonable efforts to preserve and reunify the family have failed to correct the conditions leading to the § 43-247(3)(a) determination. See § 43-292(6).

The parents argue that because it was stipulated that the condition of their home was not an issue after October 2000, the State has not proved by clear and convincing evidence that reasonable efforts failed to correct the unsafe and unsanitary home which was the basis for the initial adjudication. Holly contends that even if the State can assert the failure to follow the specific details of the case plan as a basis to terminate parental rights, the details of the case plan must be material to addressing the § 43-247(3)(a) adjudication.

[11,12] Where the failure of a parent to comply with a rehabilitation plan is an independent ground for termination of parental rights, the rehabilitation plan must be conducted under the direction of the juvenile court and must be reasonably related to the objective of reuniting parent with child. *In re Interest of Joshua M.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of C.D.C.*, 235 Neb. 496, 455 N.W.2d 801 (1990). Once a plan of reunification has been ordered to correct the

conditions underlying the adjudication under § 43-247(3)(a), the plan must be reasonably related to the objective of reuniting the parents with the children. See *In re Interest of C.D.C., supra.*

We have found that there was a proper adjudication and that the juvenile court acquired jurisdiction of the parties. The parents cannot now collaterally attack the proceedings or the contents of the case plans that were implemented for the purpose of reuniting the parents with the children.

The children were initially removed from the home based upon the uncleanliness of the home. The home was filthy, and the conditions were inappropriate for children. Bottles contained spoiled formula or milk. Feces stains were seen on the carpet. The children's room had a strong odor of urine and spoiled formula or milk. The breathing treatment apparatus used by Devon was filthy and unusable, and no medication for the machine was found in the home.

The case plans that were implemented were not adopted merely to teach the parents how to clean a house. If cleanliness was the sole issue to be addressed prior to reuniting the family, it would not have been necessary for DHHS to expend more than $111,000 in resources trying to reunite the parents with the children. The conditions observed in the house were only a symptom of the problems which led to the adjudication and the subsequent plans for reunification. They did not represent a situation which could be remedied by simply hiring a cleaning service.

In its termination order, the juvenile court stated:

> The rehabilitation plan(s) fashioned, determined and ordered by the court . . . were designed to correct the conditions of the home previously adjudicated by the court. These unsafe and unsanitary home conditions reflect problems in parenting skills, domestic violence and recognizing the needs of their children. Examining the reasonable steps for rehabilitation directed by [the] Court ordered plans, the parents consistently fail[ed] to comply by not attending individual counseling, addressing spousal violence or demonstrating proper parenting skills during visitations. . . . The evidence shows that DHHS provided multiple resources and services for both the mother and the father but neither parent shows an ability or consistent commitment and willingness

> to succeed. Partial compliance with these plans is not enough. See [*In re Interest of L.H. et al.*,] 241 Neb. 232[, 487 N.W.2d 279 (1992)]. The parents have been unable to make satisfactory progress for reunification.

DHHS began working with Shawn and Holly immediately after the children were adjudicated. The children were first removed from the home and placed with Shawn's parents until December 7, 1998. The children returned to the parental home from December 7, 1998, to February 3, 1999. Between February 3 and October 1, 1999, they again lived with the grandparents. From October 1, 1999, to October 31, 2001, the children resided with foster parents. A number of issues other than cleanliness were identified as areas which Shawn and Holly needed to address.

The juvenile court agreed to a modified case plan received on April 21, 1999, which included goals for each parent. Holly was directed to attend domestic violence sessions and to learn appropriate money management. Shawn was directed to complete anger management classes. Both were directed to undergo psychological evaluation and comply with all recommendations, to refrain from the use of any form of physical discipline, to maintain adequate housing, to obtain and maintain employment, to attend marriage counseling, and to attend and complete parenting classes. The plan specified that there was to be no violence in the parents' home.

A "Court Report/Case Plan" was filed on August 3, 1999. The report indicates that the parents had demonstrated an ability to bring the home to a "minimal standard level" of cleanliness, but they were unable to maintain it. Holly had moved back in with Shawn after living at a crisis center for a period of time. She had not attended counseling sessions since she moved back in with Shawn, and she did not attend a followup visit with a psychologist. The parents continued to demonstrate inconsistency in interactions with and discipline of the children and needed to be prompted to change diapers, to clean the table after eating, and to exhibit other basic parenting skills. Neither parent demonstrated interest in learning financial management, reporting that they had insufficient money to purchase Holly's medication for depression, but they were able to support their smoking habits.

Shawn reported spending $800 to repair a car. The DHHS workers recommended that the parents continue marriage counseling and individual counseling, obtain skills needed to protect the children, maintain a clean and safe environment for the children, and attend family therapy. It was recommended that Shawn continue anger management classes and that Holly continue domestic violence sessions.

Additional case plans were filed and received by the juvenile court on April 20 and October 20, 1999, April 21 and August 31, 2000, and January 12, 2001. At a hearing on November 30, 2001, Mary Goodwin, a protection and safety worker for DHHS who had been the caseworker for the parents since April 2000, testified as to the goals outlined in the final case plan for reunification of the family.

The first goal was for Holly to acquire skills to provide a clean and safe environment for the children. While Shawn was incarcerated between October 1999 and October 2000, Holly lived in various places, but did not have a residence of her own. In September 2000, Holly had obtained her own residence, but she said she was not ready to have the children returned to her. Holly had requested that the children be removed from the home in February 1999 because she was afraid of Shawn, who had broken a car window and "thrown the other son, Nicki, around."

A second goal was for Holly to address her mental health issues and comply with all mental health recommendations. Holly dropped out of therapy between August and November 2000 and again in May 2001.

The third goal called for Holly to acquire the skills needed to protect her children from domestic violence by participating in a domestic violence support group and to demonstrate an ability to assert herself in a way that would protect her and the children. Holly attended three sessions on domestic violence in November and December 2000. She received a psychiatric evaluation on July 31, 2000, and was given medication for depression. Psychological evaluations were later scheduled, but neither Holly nor Shawn appeared, and they did not reschedule the appointments.

The fourth goal was for Holly to demonstrate the ability to manage her children's behavior at all times during visits.

Goodwin said the children's behavior was chaotic during visits, and Holly admitted that she could not control the children, who would be aggressive toward each other and would not listen to Holly. At times, she would "zone out" and would not notice that the children were "tearing up" the visitation room. On one occasion, they pulled down the drapes. They jumped off tables and climbed up on a file cabinet and jumped off. On another occasion, one boy jumped onto a pile of blankets, injuring another boy who was underneath the blankets. Goodwin stated that these problems were ongoing.

The fifth goal was for Holly to address her marital situation and determine whether it is in the best interests of her children to continue her relationship with Shawn. In September 2000, Holly reported that Shawn had threatened to break her hips, and in October 2000, she reported that she was hiding from Shawn because he was getting out of jail and she was afraid of him. However, the couple reunited when Shawn was released from jail.

The sixth goal was for Holly to learn to manage her finances to demonstrate that she can provide for the basic needs of her children and herself. Holly obtained her own home in September 2000.

The seventh goal was for Shawn to acquire the skills needed to provide a clean environment for his children. Goodwin said he was not able to work on the goal because he was incarcerated for a year.

The eighth goal was for Shawn to address mental health issues and to comply with mental health recommendations. Shawn completed a psychological evaluation in July 1999, which resulted in a finding that Shawn had an issue with anger management. It was recommended that Shawn receive counseling for anger management, parenting issues, and marital issues. After the parents missed appointments for counseling, they were referred to Susan Rippke, an in-home therapist. Shawn had several sessions with Rippke before Shawn was incarcerated. Holly missed approximately five appointments between August and November 1999. She was then scheduled to travel to Omaha for counseling, but dropped out after one appointment. Shawn received some therapy while in jail and was in therapy at the time of the November 2001 hearing.

The ninth goal was for Shawn to gain control over his temper and learn to manage his anger in appropriate ways. When he was released from jail in October 2000, he was referred to a men's group to address domestic violence, but he did not take part.

The 10th goal was for Shawn to increase his parenting knowledge and skills, demonstrate an understanding of child development, learn and utilize nonphysical ways to discipline, and respond to his children in a nurturing manner. Goodwin said the parents had taken advantage of parenting assistance on only a few occasions. Problems with managing the children's behavior during visits continued, and Goodwin reported occasions when Shawn yelled at Ty. Shawn countermanded consequences given by Holly and told the children they did not have to follow her directions. The parents continued to neglect safety issues by allowing the children to ride on the bottom of carts at stores, which resulted in injury to one of the children. The parents allowed Ty to ride a toy motorcycle into the street when a car was approaching.

Goodwin said two family support workers had been present at visitations since June 2001 because Holly had become agitated and upset and threatened to kill Goodwin. Goodwin said the visits had been less chaotic since the second family support worker was introduced. However, the parents continued to have arguments and disagreements during visitations.

The 11th goal was for Shawn to learn to manage his finances to demonstrate an ability to provide for his and the children's needs. Shawn worked at one job from December 2000 to June 2001. At the end of June, he began working at another job, where he reported earning about $1,500 every 2 weeks and working "a lot" of overtime. Holly worked part-time jobs between February 1999 and June 2000, when she began working a full-time job, where she worked until September. She was unemployed between September and November 2000. She worked at another job from November 2000 until September 2001, was unemployed for a while, and then began working again.

Goodwin's testimony indicates that the parents have continued to behave in ways which are not in the best interests of the children. They have received various forms of assistance from

DHHS staff, yet they have not been able to meet the goals set for them over a 2-year period.

While it appears that the parents have addressed some of the issues in the case plans, we have held that

> " 'participation in certain elements of the court-ordered plan does not necessarily prevent the court from entering an order of termination where the parent has made no progress toward rehabilitation. A parent is required not only to follow the plan of the court to rehabilitate herself but also to make reasonable efforts on her own to bring about rehabilitation.' "

In re Interest of L.H. et al., 241 Neb. 232, 246, 487 N.W.2d 279, 289 (1992), quoting *In re Interest of M.*, 235 Neb. 61, 453 N.W.2d 589 (1990). This court has also held that partial compliance with one provision of a rehabilitation plan does not prevent termination of parental rights.

[13] In addition, this court has held that the juvenile court

> is not limited to reviewing the efforts of the parent under the plan last ordered by the court; rather, the court looks at the entire reunification program and the parent's compliance with the various plans involved in the program, as well as any effort not contained within the program which would bring the parent closer to reunification.

In re Interest of L.J., M.J., and K.J., 238 Neb. 712, 719, 472 N.W.2d 205, 211 (1991). A court is not prohibited from considering prior events when determining whether to terminate parental rights, but the court may need to consider the reasonableness of a plan or its individual provisions. See *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989). "It is impossible to determine whether a plan to reunite a parent and child is reasonable without considering whether the plan is designed to correct problems which required the State's intervention in the first place. Review of prior events is essential to this determination." *Id.* at 617, 437 N.W.2d at 163.

In our de novo review, we conclude that the record shows by clear and convincing evidence that it is in the best interests of the children to terminate the parental rights of Shawn and Holly. The parents have been provided many reasonable opportunities to rehabilitate, and they have failed to do so. The condition of

the home was merely a manifestation of the parents' inability to properly care for their children. The evidence clearly and convincingly shows that the parents willfully failed to comply in whole or in part with the material provisions of the rehabilitation plans.

HOLLY'S MOTION TO STRIKE

Holly complains about the juvenile court's overruling of her motion to strike certain allegations of the amended petition. She argues that these allegations were not relevant, were vague and indefinite, and were not related to any material provision of the case plan.

In her brief, Holly argues only that the motion to strike attempted to address issues of due process. Holly has provided no authority for her allegation that the juvenile court erred in failing to grant her motion to strike. For the same reasons noted above related to due process rights, we do not find any merit to this assignment of error.

PARENTS' MOTIONS FOR PSYCHOLOGICAL AND PSYCHIATRIC EVALUATIONS

Both parents assert that the juvenile court erred in failing to order psychological and psychiatric evaluations of the children. Shawn suggests that the State objected to evaluation of the children because it might impinge on adoption proceedings which were already underway. Shawn apparently wanted the evaluations to demonstrate that the children were having emotional difficulties in the foster home. However, he provides no authority for his argument.

Holly suggests that the evaluations would have been appropriate pursuant to Neb. Rev. Stat. § 43-258 (Reissue 1998), which provides for *preadjudication* mental and physical examinations to aid the court in determining the juvenile's physical or mental condition, the juvenile's competence, the juvenile's responsibility for his or her acts, or the need for emergency medical treatment. At the time the parties requested the evaluations, the children had already been adjudicated as juveniles under § 43-247(3)(a). Section 43-258 is not relevant in this case.

The only reason to conduct psychological or psychiatric examinations would have been to determine whether the children

needed some form of psychological help. Such testing would not have been useful in determining whether the children should be returned to Shawn and Holly. The parents sought the evaluations to show that the children also had emotional problems while in foster care. Even if such a showing had been made, it would not necessarily require that the children be returned to the parental home. We find no authority requiring such evaluations and find no error on the part of the juvenile court for overruling the motions.

Admission of Certified Court Documents

Shawn assigns as error, as a part of his due process argument, that the juvenile court erred in receiving into evidence certified court documents from the underlying juvenile action without foundation and without a transcript of the proceedings. Holly also raises the issue as error and asserts that exhibits 3 through 44 were not based on adjudicated facts and that, as such, the court should not have taken judicial notice of the exhibits. She argues that many of the exhibits are dispositional orders, which are entered following dispositional hearings, at which the rules of evidence do not apply. In addition, she argues that the hearings are conducted based on a preponderance of the evidence standard, which is a lower standard of proof than that used in termination hearings.

[14] As noted earlier, neither Holly nor Shawn appealed from the dispositional orders which found their children to be juveniles under § 43-247(3)(a). This court has held that a detention order issued under § 43-247(3)(a) and Neb. Rev. Stat. § 43-254 (Reissue 1998) 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). Shawn and Holly waived this error by failing to appeal from the previous orders.

Holly's argument is also based on an assertion that the juvenile court could not take judicial notice of its earlier orders. We have held that the "concept of judicial notice of *disputed* allegations has no place in hearings to terminate parental rights." (Emphasis supplied.) *In re Interest of L.H. et al.*, 241 Neb. 232, 243, 487 N.W.2d 279, 287 (1992). However, Holly did not dispute the

allegations in the underlying action. In fact, at the hearing on March 24, 1999, she admitted the allegations.

[15-17] In addition, we have held that reports may not be received in evidence for the purpose of a termination proceeding, nor relied upon by the court, unless they have been admitted without objection or brought within the provisions of Neb. Evid. R. 803(23), Neb. Rev. Stat. § 27-803(23) (Cum. Supp. 2002), an exception to the hearsay rule. See *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987). While the parties objected to the admission of exhibits related to the underlying disposition, they did not object on the basis of judicial notice. The juvenile court was not asked to take judicial notice of the previous orders, but was asked to admit them into evidence. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *Claypool v. Hibberd*, 261 Neb. 818, 626 N.W.2d 539 (2001). Absent a showing to the contrary, it is presumed that the trial court disregarded all incompetent and irrelevant evidence. *In re Interest of L.H. et al., supra.*

[18-22] Even if the exhibits were not properly received, the improper admission of evidence by the juvenile court in a parental rights termination proceeding does not, in and of itself, constitute reversible error; a showing of prejudice must be made. *Id.* The parties must show that the inclusion of the exhibits in the evidence was prejudicial to their due process rights. *Id.* Factual questions concerning a judgment or order terminating parental rights are tried by an appellate court de novo on the record, and impermissible or improper evidence is not considered by the appellate court. *Id.* In an appeal from a judgment or order terminating parental rights, the appellate court, in a trial de novo on the record and disregarding impermissible or improper evidence, determines whether there is clear and convincing evidence to justify termination of parental rights under the Nebraska Juvenile Code. *In re Interest of L.H. et al., supra.*

> "[A]s a subject for judicial notice, existence of court records and certain judicial action reflected in a court's record are, in accordance with Neb. Evid. R. 201(2)(b), facts which are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

> . . . [I]n *State v. Norwood*, 203 Neb. 201, 204-05, 277 N.W.2d 709, 711 (1979)[, the court stated]: "[A juvenile court] has a right to examine its own records and take judicial notice of its own proceedings and judgment in an interwoven and dependent controversy where the same matters have already been considered and determined."

In re Interest of C.K., L.K., and G.K., 240 Neb. 700, 708-09, 484 N.W.2d 68, 73 (1992).

In the case at bar, the juvenile court admitted into evidence its own records and case plans in an interwoven and dependent controversy. The assignment of error concerning the admission of court orders has no merit.

REASONABLE EFFORTS

Shawn argues that the juvenile court erred in finding that reasonable efforts had been made to preserve and reunify the family in the juvenile action and in the termination proceedings. He asserts that the State did not meet its burden because it relied on certified copies of prior court orders and did not elicit testimony on the reasonable efforts which had been made. Shawn appealed from the juvenile court's overruling of his motion to show reasonable efforts, but the appeal was dismissed for lack of a final order. See *In re Interest of Nicholas H. et al.*, 10 Neb. App. xlvi (No. A-01-756, Aug. 30, 2001).

Holly argues that the State did not meet its burden to show that reasonable efforts would not result in reunification of the family. She suggests that the parents' opportunity to work toward reunification was thwarted by the actions of DHHS to decrease visitation.

We have held that the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. "Thus, only one ground for termination need be proved in order [to terminate] parental rights . . . ." *In re Interest of Michael B. et al.*, 258 Neb. 545, 557, 604 N.W.2d 405, 413 (2000).

Section 43-292 identifies the grounds for termination of parental rights. It provides that termination may be ordered when it is in the best interests of the children and another condition exists. Subsection (6) allows for termination after a determination

that the juveniles fall under § 43-247(3)(a) and reasonable efforts to preserve and reunify the family if required under Neb. Rev. Stat. § 43-283.01 (Reissue 1998), under the direction of the court, have failed to correct the conditions leading to the determination. Subsection (7) allows for termination after the juveniles have been in an out-of-home placement for 15 or more months of the most recent 22 months.

The parties stipulated to the dates of the children's out-of-home placement, which clearly showed that they had been out of the parental home for all but 2 of the approximately 36 months before the termination hearing. They were in foster care with nonrelatives for more than 24 months immediately preceding the hearing. Thus, § 43-292(7) applies to these children, and if it is in their best interests to be removed from the home on this basis, the juvenile court may so order.

[23] The record shows that DHHS worked with the family for almost 3 years before parental rights were terminated. The case plans in evidence and the court hearings and orders in the record support a finding that reasonable efforts were made to reunify the family. As we have held on numerous occasions, children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. See *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002). The assignment of error concerning reasonable efforts has no merit.

Unconstitutionality of § 43-292(7)

The parents assert that § 43-292(7) is unconstitutional because it uses an arbitrary and vague standard to terminate parental rights based solely on the length of time a child has been placed outside the home. The parents' arguments concerning the constitutionality of § 43-292(7) are stated in broad terms and suggest only that the statute violates due process because it provides an arbitrary standard.

We have frequently held that where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the children require termination of the parental rights. See *In re Interest of DeWayne G. & Devon G., supra*. As the State notes, subsection (7) merely provides a

guideline for the "reasonable time" given to the parents to rehabilitate themselves.

> The language of § 43-292 imposes two requirements before parental rights may be terminated. First, requisite evidence must establish the existence of one or more of the circumstances described in subsections (1) to (10) of § 43-292. Second, if a circumstance designated in subsections (1) to (10) is evidentially established, there must be the additional showing that termination of parental rights is in the best interests of the child, the primary consideration in any question concerning termination of parental rights. . . . Each of the requirements prescribed by § 43-292 must be proved by clear and convincing evidence.

In re Interest of Sunshine A. et al., 258 Neb. 148, 153, 602 N.W.2d 452, 457 (1999).

Section 43-292(7) is not unconstitutional. Adequate safeguards are provided to ensure that parental rights are not terminated based solely upon the length of time children are in an out-of-home placement.

CONCLUSION

The children in this case were initially removed from the home because it was filthy and unlivable. Although these conditions were apparently corrected at a later date, they were not the only basis upon which parental rights were terminated. The uncleanliness of the home was a manifestation of a lack of parenting skills on the part of Shawn and Holly. During a period of more than 2 years, the parents were unable to correct these deficiencies.

We find no error on the part of the juvenile court in its judgment terminating the parental rights of Shawn and Holly to Ty and Devon. The judgment is affirmed.

AFFIRMED.

TAUNIA FUHRMAN, APPELLEE, V. STATE OF NEBRASKA ET AL., APPELLANTS.

655 N.W.2d 866

Filed January 24, 2003. No. S-01-767.

1. **Pleadings.** A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court.
2. **Tort Claims Act: Appeal and Error.** In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.
3. **Tort Claims Act: Proof.** In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages.
4. **Negligence.** The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff.
5. ____. Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. In determining whether a legal duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk, (4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution.
6. ____. Foreseeability in the context of a legal duty is a question of law.
7. **Negligence: Evidence.** While violation of a regulation is not negligence per se, it is evidence of negligence.
8. **Negligence: Words and Phrases.** An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury.
9. **Negligence.** An efficient intervening cause must break the causal connection between the original wrong and the injury.
10. **Negligence: Tort-feasors: Liability.** The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable.
11. **Negligence: Proximate Cause.** Foreseeability that affects proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty.
12. **Negligence.** An action that was foreseeably within the scope of the risk occasioned by the defendant's negligence cannot be said to supersede that negligence.

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

Don Stenberg, Attorney General, Royce N. Harper, and Michelle M. Lewon, Senior Certified Law Student, for appellants.

Michael F. Coyle and Timothy J. Thalken, of Fraser, Stryker, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Taunia Fuhrman filed a petition under the State Tort Claims Act alleging the State of Nebraska; the Department of Health and Human Services, formerly known as the Department of Social Services (DHHS); and Pam Curry, a DHHS employee (collectively appellants), were liable to Fuhrman for damages she sustained on December 12, 1995, when a ward of the State assaulted Fuhrman at Immanuel Medical Center (Immanuel) in Omaha, Nebraska. Following a bench trial, the Douglas County District Court entered judgment in Fuhrman's favor in the amount of $171,829.59. Appellants filed this appeal. We affirm.

II. STATEMENT OF FACTS

Since November 23, 1988, DHHS has been the legal guardian of Jeffrey L., a minor born on December 4, 1981. After becoming a ward of the State, Jeffrey was placed in either foster care or a care facility. Prior to December 12, 1995, his placement had changed at least 36 times. The turnover was due in part to Jeffrey's physical violence against his caregivers and others. The record reflects that Jeffrey was large and strong for his age. On December 12, Jeffrey weighed approximately 200 pounds.

The history of Jeffrey's conduct was known to DHHS and documented in its records. Those records detailed 27 separate incidents in which Jeffrey assaulted a staff member or someone else at the location of his placement and which had occurred prior to October 1995, when he was transferred to Immanuel. These incidents included: (1) hitting a staff member who sustained injuries

necessitating crutches; (2) attacking a staff member with a croquet mallet; (3) biting a staff member so that the staff member required a tetanus shot; (4) assaulting two staff members, as a result of which one required crutches and the other needed stitches; and (5) choking, punching, and pulling the hair of a staff member. As a result of these and other incidents, Jeffrey had been arrested and convicted of criminal assault on three separate occasions. Many of the attacks involved female staff members, and in this connection, DHHS' records indicated that Jeffrey was "more likely to become angry and aggressive with female authority figures" and that he might target females "in particular."

In October 1995, Jeffrey's DHHS caseworker was Susan Hensler. Hensler was aware of Jeffrey's history of physical violence and his assaultive behavior. Hensler had taken over responsibility for Jeffrey's file in June 1995, at which time, she had been advised by another DHHS caseworker that she should use caution in dealing with Jeffrey because he was violent and that Hensler ought not to be alone with him.

On October 19, 1995, Hensler received a telephone call from the director of the Boys and Girls Home and Family Services in South Sioux City, Nebraska (Boys and Girls Home), where Jeffrey was a resident, seeking the removal of Jeffrey from the facility. In the week prior to his discharge from the Boys and Girls Home, Jeffrey had had 13 aggressive episodes. According to the discharge papers, "[o]n three different occasions, [Jeffrey] bit staff members during physical confrontations. These bites broke the skin and required the staff members to seek medical attention. [Jeffrey] also engaged in self harming behaviors during his explosive episodes . . . . [Jeffrey] repeatedly threatened to kill himself and/or to kill others." The director of the Boys and Girls Home advised Hensler that he wanted Jeffrey transferred immediately. Although Hensler was not given the details regarding Jeffrey's recent behavior, Hensler testified that the director threatened that Jeffrey would simply be "dropped on the street[s] of Omaha" if alternate placement arrangements were not made.

As a result of the director's telephone call, Hensler arranged to place Jeffrey at Immanuel on October 19, 1995. Immanuel is an acute care center, which treats psychiatric patients who cannot be

managed on an outpatient basis and who require immediate hospitalization for safety, diagnosis, and treatment. At no time did Hensler provide Immanuel with the details concerning why Jeffrey was being transferred from the Boys and Girls Home.

After making arrangements to place Jeffrey with Immanuel, pursuant to 474 Neb. Admin. Code, ch. 4, § 009.20E (1991), Hensler drove to the hospital to meet the Boys and Girls Home representative traveling with Jeffrey and to facilitate Jeffrey's admission into the hospital. Section 009.20E provides, in pertinent part, as follows:

> Placement: At the time of placement, the [case]worker shall -
>
> 1. Accompany the parent(s) and child to the foster home or placement facility, observing reactions and answering relevant questions . . . .
>
> . . . .
>
> 4. Give the . . . caregiver a copy of the Child's Health Record, and discuss the ward's medical needs with the . . . facility staff . . . .
>
> 5. Answer the . . . caregiver(s)' questions[.]

Further, pursuant to 474 Neb. Admin. Code, ch. 4, § 009.20B (1988), when preparing for the placement of a child under DHHS' authority, the caseworker is to gather certain information and provide it to the new caregiver. Included in the information to be provided to the receiving caregiver is information regarding "[t]he child's daily habits and behaviors, particularly any known or suspected tendencies which could be dangerous or detrimental to the child himself/herself, a foster or adoptive family member, facility staff, or other, including but not limited to . . . [v]iolence . . . ."

When Jeffrey had not arrived at Immanuel by 6:30 p.m. on October 19, 1995, and notwithstanding the requirements of § 009.20, Hensler left Immanuel. Later that evening, Hensler called the hospital and was told Jeffrey had arrived and had been admitted. That same evening, Hensler had a telephone conversation with someone at Immanuel's access center with respect to Jeffrey's admission. Hensler provided the hospital with Jeffrey's name, address, and insurance information. In this regard, Hensler testified that on October 19, she talked on the telephone

to someone at the access center named "Peg." Hensler testified that during this conversation, she informed Peg that Jeffrey was physically aggressive. Hensler admitted that she did not know where Peg was physically located. "Peg" was not identified by any witness at trial.

It is undisputed that Hensler did not tell anyone at Immanuel that Jeffrey had assaulted at least 27 people, that he had three separate convictions for assault, or that he was likely to target female staff members. It is also undisputed that Hensler did not knowingly talk with any members of the psychiatric staff at Immanuel who were responsible for caring for or treating Jeffrey regarding Jeffrey's propensity for violence and his previous assaults. Furthermore, it is undisputed that despite the wealth of records DHHS possessed regarding Jeffrey's history of violence and Hensler's knowledge of Jeffrey's assaultive behavior, neither Hensler nor any other DHHS representative gave Immanuel the documentation concerning Jeffrey's numerous placements and violent behavior.

Following his admission to Immanuel, it is undisputed that Jeffrey acted out on several occasions. On December 12, 1995, while a patient at Immanuel, Jeffrey became angry and left his group therapy session. Fuhrman, a psychiatric technician with Immanuel, followed Jeffrey and convinced him to go to a "quiet room." On the way to the quiet room, Jeffrey ran down the hall, tore the holiday decorations off the wall, and turned to Fuhrman and said he was going to kill her. He then proceeded to choke her, knee her, and pull large portions of her hair from her scalp, while stating, "I'm going to kill her" and "She's not dead yet." It took 12 adults to pull Jeffrey off of Fuhrman. At the time of the attack, Fuhrman was 24 years of age, stood 5 feet 1 inch tall, and weighed 105 pounds. At the time of the attack, the record reflects that Jeffrey was 14 years old and weighed approximately 200 pounds.

Fuhrman was seriously injured as a result of Jeffrey's attack and incurred medical expenses in excess of $16,800. She was not able to return to her former position as a psychiatric technician and has held a variety of jobs since the incident. At trial, Fuhrman testified that she was never informed regarding Jeffrey's previous assaults on caregivers, was never told that

Jeffrey would direct aggression at female caregivers, and did not know about his previous convictions for assault.

Fuhrman filed a claim pursuant to the State Tort Claims Act. See Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1996 & Cum. Supp. 2002). The State denied Fuhrman's claim, and thereafter, Fuhrman filed a lawsuit against appellants. In her amended and controlling petition, Fuhrman claimed that appellants were negligent in failing to disclose to Immanuel and its employees information regarding Jeffrey's "aggressive and uncontrollable assaultive behavior."

Fuhrman's case was tried to the district court on July 12 through 14, and 31, 2000. The record contains approximately 900 pages of testimony from 10 witnesses and 44 exhibits. Near the close of trial, appellants moved for leave to amend their answer to include the affirmative defenses of sovereign and qualified immunity, based on their understanding that Fuhrman was asserting that appellants had misrepresented Jeffrey's medical history. The district court denied appellants' motion.

In an order filed May 1, 2001, the district court made numerous findings of fact to the effect that DHHS possessed considerable information regarding Jeffrey's history of violent and dangerous behavior and propensities and that DHHS had failed to disclose such information to Immanuel. The district court concluded that appellants had a duty to disclose such information but had breached their duty to disclose such information to Immanuel and its employees. The district court further concluded that this breach was the proximate cause of Fuhrman's injuries and damages. The district court entered judgment in favor of Fuhrman. Fuhrman was awarded damages in the amount of $171,829.59. Appellants then filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, appellants allege two assignments of error. Appellants claim, restated and renumbered, that the district court erred (1) in denying appellants' motion to amend their answer to include the affirmative defenses of sovereign and qualified immunity and (2) in determining that appellants were negligent in failing to disclose the information regarding Jeffrey's violent and dangerous propensities.

IV. STANDARDS OF REVIEW

[1] A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *McDonald v. Myre*, 262 Neb. 171, 631 N.W.2d 125 (2001).

[2] In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence.

V. ANALYSIS

1. Amendment to Answer to Add Affirmative Defenses

Appellants claim that the district court erred in denying their motion to amend their answer during the course of the trial to assert the affirmative defenses of sovereign and qualified immunity. Appellants argue that although pleaded as a failure-to-disclose-information case, Fuhrman's case against appellants at trial was fundamentally based on misrepresentation, and that the State Tort Claims Act does not provide a remedy for actions arising from misrepresentation. See § 81-8,219(4). Appellants acknowledge that sovereign and qualified immunity are affirmative defenses which should be affirmatively pleaded or are considered waived. *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998) (exceptions found in § 81-8,219 are matters of defense which must be pleaded and proved by State). See, also, *Jameson v. Liquid Controls Corp.*, 260 Neb. 489, 618 N.W.2d 637 (2000) (affirmative defense must be successfully pleaded to be considered). Appellants nevertheless assert that they should have been allowed to amend their answer to conform to the proof at trial.

In her amended petition, Fuhrman alleged that appellants had failed to disclose information. At trial, Fuhrman offered evidence for the purpose of establishing that appellants had totally failed to disclose the lengthy and recent history pertaining to

Jeffrey's violent propensities. Neither Fuhrman's theory of the case nor her evidence was based on misrepresentation, but, rather, on a complete failure to convey the critical information, without an inference that this was deliberately done.

A decision to grant or deny an amendment to a pleading rests in the discretion of the trial court. *McDonald, supra.* The district court did not abuse its discretion in this case. The district court's order of May 1, 2001, states that the action "arises" out of appellants' failure to inform Immanuel and its employees of Jeffrey's propensities. In the same order, the district court concluded that appellants were "negligent in failing to . . . inform Immanuel and its employees of [Jeffrey's] violent and dangerous propensities . . . when he was admitted to Immanuel." The district court's decision in favor of Fuhrman was based on failure to disclose information.

Given the pleadings, the record in this case, and the district court's order, we conclude that the district court did not abuse its discretion in denying appellants' motion for leave to amend their answer. This assignment of error is without merit.

2. Negligence

(a) Duty to Disclose Information

Appellants contend generally that they met their duty in connection with the placement of Jeffrey at Immanuel and that in any event, because Jeffrey's aggressive behavior was apparent, the district court erred in concluding that appellants were negligent.

[3,4] In order to recover in a negligence action brought pursuant to the State Tort Claims Act, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). The threshold issue in any negligence action is whether the defendant owes a legal duty to the plaintiff. *Id.* If there is no legal duty, there is no actionable negligence. *Id.*

[5,6] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* In determining whether a legal duty exists, this court employs a risk-utility test, considering (1) the magnitude of the risk, (2) the relationship of the parties, (3) the nature of the attendant risk,

(4) the opportunity and ability to exercise care, (5) the foreseeability of the harm, and (6) the policy interest in the proposed solution. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000). We have stated:

> " 'Foreseeability as it impacts duty determinations refers to " 'the knowledge of the risk of injury to be apprehended. The risk reasonably to be perceived defines the duty to be obeyed; it is the risk reasonably within the range of apprehension, of injury to another person, that is taken into account in determining the existence of the duty to exercise care.' " . . .' "
>
> . . . .
>
> . . . "[T]he law does not require precision in foreseeing the exact hazard or consequence which happens; it is sufficient if what occurs is one of the kinds of consequences which might reasonably be foreseen."

Id. at 179, 181, 615 N.W.2d at 900-01 (quoting *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999)). Foreseeability in the context of a legal duty is a question of law. *Fu, supra.*

Based on the facts of the case, we have previously recognized that when DHHS had "ample information that [a State ward] had a history of violent and abusive behavior" and was faced with questions regarding the potential risk posed to children who were exposed to the ward, DHHS "had a duty . . . to answer truthfully as to any knowledge it had or later acquired as to [the ward's] violent propensities and any danger that [other children] might encounter by being left alone with [the ward]." *Anderson/Couvillon v. Nebraska Dept. of Social Servs.*, 248 Neb. 651, 658, 538 N.W.2d 732, 738 (1995). See, generally, *Johnson v. State of California*, 69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968) (discussing that when state placed violent youth with caregivers, state was obligated to inform caregivers regarding youth's latent, dangerous qualities and that state owed duty to such persons to inform them of peril).

[7] The evidence in this case shows that pursuant to § 009.20B, when preparing for the placement of a child under DHHS' authority, a DHHS caseworker is to gather certain information and provide that information to the caregiver, including information regarding the child's tendency to be violent. The

record reflects that one of the purposes behind providing this information is to protect those persons providing care to the child. DHHS regulations also require that the caseworker be present when a child is being placed with the caregiver, to provide necessary information to the caregiver and to answer any questions. Contrary to the regulations, it is undisputed that Hensler was not present when Jeffrey was admitted to Immanuel and that at best, Hensler gave Immanuel generalized information regarding Jeffrey's tendency to be aggressive. It is undisputed that Hensler did not inform Immanuel that Jeffrey had previously assaulted at least 27 people, that he had three separate convictions for assault, or that he was likely to target female staff members. Curry testified that if such information was not provided to Immanuel, DHHS violated its own guidelines. We have previously stated that while violation of a regulation is not negligence per se, it is evidence of negligence. *Goodenow v. State*, 259 Neb. 375, 610 N.W.2d 19 (2000).

The evidence reflects that Immanuel places historical information regarding a patient in the patient's chart, so that individual staff members will have access to that information. Immanuel staff members testified that they rely upon such historical information's being included in the record when treating patients. It is undisputed that Jeffrey's chart at Immanuel did not contain information regarding his numerous placements, his assault convictions, or his propensity to target female staff members. Fuhrman testified that she was not informed that Jeffrey had assaulted 27 individuals, had been convicted of three assaults on caregivers, or would direct his aggression at female staff members, and that had she known this information, she would have handled Jeffrey differently. Given appellants' failure to disclose critical information, what occurred to Fuhrman was a consequence which might reasonably be foreseen. *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000); *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999).

We conclude that under the facts of this case, appellants owed a duty to disclose to Immanuel for the benefit of its employees the critical information appellants possessed regarding Jeffrey's violent and dangerous propensities when Jeffrey was admitted

to Immanuel. DHHS' own regulations required the agency to disclose information regarding Jeffrey's history of violence to his caregivers in order to protect those individuals who were treating him. Additionally, it was reasonably foreseeable that Immanuel staff members, such as Fuhrman, who were in direct contact with Jeffrey, would be and were in fact at significant risk of injury because the information upon which caregivers would rely was not present in Jeffrey's file.

(b) Breach of Duty to Disclose

Appellants claim that the district court erred in determining that they breached their duty to disclose Jeffrey's violent propensities. Referring to the record, appellants assert that Hensler informed Immanuel that Jeffrey had a history of physical aggression and that such declaration satisfied appellants' duty to disclose information.

In a lengthy order, the district court recounted in detail the evidence that was adduced during trial. The district court included in its order a recitation of those facts which favored Fuhrman's case and those facts which favored appellants' defense. In so doing, the district court specifically found that "Hensler did not tell anyone of authority at Immanuel about [Jeffrey]'s history of violence, although she knew he was violent," and that DHHS "had a copy of all of [Jeffrey]'s records . . . but . . . never provided any of the information about [Jeffrey]'s assaults to anybody at Immanuel."

In actions brought pursuant to the State Tort Claims Act, the factual findings of the trial court will not be disturbed on appeal unless they are clearly wrong, and when determining the sufficiency of the evidence to sustain the verdict, it must be considered in the light most favorable to the successful party. Every controverted fact must be resolved in favor of such party, and it is entitled to the benefit of every inference that can reasonably be deduced from the evidence. *Fu v. State*, 263 Neb. 848, 643 N.W.2d 659 (2002). Given the record in this case, we determine that the district court's factual findings regarding breach are not clearly wrong and that the district court did not err in determining that appellants had breached their duty to disclose information regarding Jeffrey's history of violence.

(c) Efficient Intervening Cause

Appellants claim that even if they did breach their duty to disclose information, their breach was not the proximate cause of Fuhrman's injuries. Instead, appellants claim that Immanuel's familiarity with Jeffrey since his admission to Immanuel and Immanuel's failure to warn and train Fuhrman were efficient intervening causes, and thus appellants' conduct did not proximately cause Fuhrman's injuries.

[8,9] An efficient intervening cause is a new, independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury. An efficient intervening cause must break the causal connection between the original wrong and the injury. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

[10-12] The doctrine that an intervening act cuts off a tort-feasor's liability comes into play only when the intervening cause is not foreseeable. *Id.*; *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). Foreseeability that affects proximate cause relates to the question of whether the specific act or omission of the defendant was such that the ultimate injury to the plaintiff reasonably flowed from the defendant's alleged breach of duty. See *Sacco, supra*. We have previously stated that

> a defendant cannot be relieved from liability for his or her negligence by the fact that the very harm from which the defendant has failed to protect the plaintiff has occurred. An action that was foreseeably within the scope of the risk occasioned by the defendant's negligence cannot be said to supersede that negligence.

Id. at 15, 567 N.W.2d at 304 (citing W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44 (5th ed. 1984)).

In the instant case, appellants claim that Immanuel's familiarity with Jeffrey's behavior following his admission to Immanuel and Immanuel's purported failure to warn Fuhrman concerning Jeffrey's assaultive behavior and its purported failure to train Fuhrman in a method to respond to an assault by Jeffrey are efficient intervening causes superseding appellants'

negligent conduct. The error with this argument, however, is that without appellants' disclosure of information regarding Jeffrey's severe and extensive history of attacking his caregivers, his three criminal convictions for assault, and his tendency to target female caregivers, and despite Immanuel's familiarity with Jeffrey's acting out since his admission, Immanuel had insufficient knowledge of its purported need in this case to warn and train Fuhrman to respond to an assault by Jeffrey. Given appellants' failure to disclose Jeffrey's history to his caregivers, Immanuel's alleged failure to warn and train Fuhrman cannot be said to be an independent act that would break the causal connection between appellants' negligence and Fuhrman's injuries.

Based on the foregoing, we conclude that the district court did not err in determining that appellants had breached their duty to disclose information and that such breach was the proximate cause of Fuhrman's injuries and damages. Accordingly, we determine that there is no merit to this assignment of error.

VI. CONCLUSION

For the foregoing reasons, we affirm the district court's judgment in favor of Fuhrman.

AFFIRMED.

MARIA ZAVALA, APPELLANT, V.
CONAGRA BEEF COMPANY, APPELLEE.
655 N.W.2d 692

Filed January 24, 2003. No. S-01-1083.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court 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. **Workers' Compensation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.

4. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
5. **Workers' Compensation.** As the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony.
6. **Workers' Compensation: Jurisdiction.** The Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute.
7. **Statutes: Appeal and Error.** As an aid to statutory interpretation, appellate courts must look to a statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
8. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.
9. **Workers' Compensation.** An employee's disability as a basis for compensation under Neb. Rev. Stat. § 48-121(1) and (2) (Cum. Supp. 2002) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function.
10. **Workers' Compensation: Words and Phrases.** Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 2002), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted.
11. **Workers' Compensation.** Impairments to the body as a whole are compensated in terms of loss of earning power or capacity.
12. ____. When a worker sustains a scheduled member injury and a whole body injury in the same accident, the Nebraska Workers' Compensation Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, CARLSON, and MOORE, Judges, on appeal thereto from the Nebraska Workers' Compensation Court. Judgment of Court of Appeals affirmed in part, and in part reversed.

Lee S. Loudon, of Law Office of Lee S. Loudon, P.C., L.L.O., for appellant.

Shirley K. Williams and Joseph A. Wilkins, of Knudsen, Berkheimer, Richardson & Endacott, L.L.P., for appellee.

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

WRIGHT, J.

NATURE OF CASE

Maria Zavala petitioned for workers' compensation benefits for injuries she sustained while working for ConAgra Beef Company (ConAgra). The Nebraska Workers' Compensation Court trial judge found that Zavala had sustained a 50-percent loss of earning capacity and awarded her a 2-percent permanent partial impairment status for her right upper extremity as well as vocational rehabilitation benefits. A review panel of the compensation court affirmed the trial judge's decision but eliminated the award of vocational rehabilitation. The Nebraska Court of Appeals reversed the judgment of the review panel and remanded the cause with directions. See *Zavala v. ConAgra Beef Co.*, 11 Neb. App. 235, 647 N.W.2d 656 (2002). We granted ConAgra's petition for further review.

SCOPE OF REVIEW

[1] 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. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002).

[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. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002).

[3] The meaning of a statute is a question of law, *Vega v. Iowa Beef Processors, supra*, and an appellate court is obligated in workers' compensation cases to make its own determinations as

to questions of law, *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002).

FACTS

On October 18, 1999, Zavala was employed as a "head trimmer" at ConAgra's Monfort plant in Grand Island. She was injured when she picked up a cow's head and threw it into the garbage. Following the accident, Zavala complained of right shoulder and neck pain and was examined by Dr. Frank Lesiak. Lesiak determined that Zavala had sustained injuries to her cervical spine and right upper extremity as a result of the single accident. Lesiak stated that Zavala's condition was not directly caused by her employment but was aggravated by the October 1999 accident. Lesiak opined that Zavala received a "7% whole person impairment," which he stated was the result of a 5-percent impairment to the cervical spine and a 2-percent impairment to the right upper extremity. Lesiak imposed work restrictions and prescribed medication and specialized physical therapy.

In December 1999, Zavala returned to work as a steam vacuum operator. Zavala complained that this job required too much reaching and that as a result, she was experiencing problems in and around her neck and shoulders. In January 2000, Zavala was moved to another job, where she spent 4 hours each day hanging tails and hearts and 4 hours scraping tongues. Zavala and a coworker were subsequently discharged following an incident in which she sliced the coworker's arm twice.

In April 2000, Zavala petitioned for workers' compensation benefits for the injuries she sustained in October 1999. Gayle Hope, a vocational counselor, was assigned by the compensation court to provide a loss-of-earning-capacity report for Zavala. Taking into consideration a number of factors, including a 7-percent whole body impairment, Hope concluded that upon obtaining minimal skills in English and vocational services, Zavala would experience a loss of earning capacity of approximately 60 percent. Hope also concluded that if Zavala did not receive vocational services and did not learn to speak minimal English, she would be an odd-lot worker because it was unlikely that she would be able to find employment in Grand Island.

Deborah Determan, a vocational rehabilitation counselor, testified by deposition for ConAgra. Determan opined that Hope's earning-capacity determination was too high because Hope failed to consider that Zavala lost her job with ConAgra because of her wrongful conduct, not her reported injury or inability to perform the job. Determan claimed that Hope's analysis utilized an incorrect average wage of $12.12 per hour when Zavala's actual base pay at the time of the injury was $9.25 per hour. She further testified that Hope's analysis was inaccurate to the extent that it was based upon the combination of a scheduled member injury and a whole body injury. It was Determan's opinion that only restrictions related to a whole body injury should be considered in a loss-of-earning-capacity analysis and that such analysis should not include consideration of the effect of a scheduled member injury.

The trial judge concluded that Zavala had sustained a 50-percent loss of earning capacity and a 2-percent permanent partial disability to her right upper extremity as a result of the work-related accident. Zavala was awarded $161.77 per week for 300 weeks for the 50-percent loss of earning capacity and an additional $323.53 per week for 4.5 weeks for the 2-percent permanent partial disability to her right upper extremity. Zavala was also awarded vocational rehabilitation benefits.

The trial judge stated that but for Zavala's termination, she could have continued to perform the last position she held. The judge therefore found that Hope's determination that Zavala was an odd-lot worker had been rebutted.

On appeal to the review panel, Zavala argued that the trial judge erred in failing to combine her scheduled member injury and her whole body injury to find her permanently and totally disabled. The review panel found that absent specific statutory authority, such injuries could not be combined to determine permanent and total disability. It affirmed the trial judge's award but eliminated the vocational rehabilitation benefits.

Zavala appealed to the Court of Appeals, which stated:

> The trial judge rejected the contention that Zavala was permanently and totally disabled, citing the basic opinions of both Hope and Determan and finding that Hope's opinion that Zavala was limited to being an odd-lot worker had been

rebutted. At least by implication, the trial judge was critical of the fact that Hope had "considered both [Zavala's] restrictions to the body as a whole and right upper extremity in formulating her opinion that [Zavala] is an odd-lot worker." For convenience, we shall refer to the combining of member and nonmember impairments to determine loss of earning capacity as "stacking."

The trial judge does not specifically opine whether stacking of injuries is legally permissible. However, the implication, including the reliance upon Determan's report criticizing Hope's methodology, suggests that the trial judge's position is that such stacking is improper. Nonetheless, the trial judge specifically found, in determining whether Hope's opinion had been rebutted, that the fact that Zavala "successfully worked for four months in a light duty position with [ConAgra] in and of itself shows that she is not an odd-lot worker." The trial judge concluded that Zavala had sustained a 50-percent loss of earning capacity, but she ordered vocational rehabilitation, specifically an "English as a Second Language" program.

Zavala v. ConAgra Beef Co., 11 Neb. App. 235, 240, 647 N.W.2d 656, 661 (2002).

The Court of Appeals stated that the trial judge had apparently concluded that Hope had considered both Zavala's restrictions to the body as a whole and the right upper extremity in formulating her opinion that Zavala was an odd-lot worker. The Court of Appeals concluded that this could be read as a rejection of "stacking" but that it was not clear whether the trial judge's decision rested on a rejection of "stacking," a factual finding that Zavala was not an odd-lot worker, or both.

The Court of Appeals resolved the issue by concluding that

> [b]ecause the trial judge's view that stacking is impermissible under Nebraska law appears to have been part of the basis for her finding that Hope's opinion that Zavala was an odd-lot worker had been rebutted, this matter must be reversed for consideration anew on the record already made of Hope's opinion in light of our holding that stacking of a member impairment with a whole body injury is permissible. This action is further necessitated because the trial

> judge's finding that Hope's opinion had been rebutted is not explained with a clear and concise rationale as required by rule 11.
>
> Moreover, because in our view, the findings of both the trial judge and the review panel concerning Zavala's entitlement to vocational rehabilitation are inextricably intertwined with their positions that stacking is impermissible under Nebraska law, we reverse the decision of the review panel which eliminated the award of vocational rehabilitation and direct that the question of vocational rehabilitation be reconsidered by the trial judge on the record already made in light of our holding about stacking.

Id. at 249-50, 647 N.W.2d at 667-68. We granted ConAgra's petition for further review.

ASSIGNMENTS OF ERROR

In its petition for further review, ConAgra assigns the following errors: The Court of Appeals erred (1) in concluding that a scheduled member injury may be considered with a whole body injury to determine loss of earning capacity and (2) in failing to affirm the trial judge's decision that Zavala was not an odd-lot worker for the reason that the trial judge's opinion clearly stated that "the fact that [Zavala] successfully worked for four months in a light duty position with [ConAgra] in and of itself shows that she is not an odd-lot worker."

ANALYSIS

We first address whether there was sufficient evidence for the trial judge to find that Zavala was not an odd-lot worker. The trial judge concluded that the court-appointed vocational counselor's opinion that Zavala was an odd-lot worker had been rebutted. The trial judge stated that the fact that Zavala successfully worked for 4 months in a light-duty position with ConAgra in and of itself showed that she was not an odd-lot worker.

The Court of Appeals concluded: "Because the trial judge's view that stacking is impermissible under Nebraska law appears to have been part of the basis for her finding that Hope's opinion that Zavala was an odd-lot worker had been rebutted, this matter must be reversed for consideration anew on the record . . . ." *Zavala v. ConAgra Beef Co.*, 11 Neb. App. 235, 249-50,

647 N.W.2d 656, 667 (2002). It also determined that the trial judge had not explained her finding with a clear and concise rationale as required by Workers' Comp. Ct. R. of Proc. 11 (2000). We disagree.

[4,5] 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. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002). 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. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). In testing the sufficiency of the evidence to support the findings of fact, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Id.* Moreover, as the trier of fact, the compensation court is the sole judge of the credibility of witnesses and the weight to be given their testimony. *Id.*

An odd-lot worker, while not altogether incapacitated for work, is one who is so handicapped that he or she will not be employed regularly in any well-known branch of the labor market. See *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). While Zavala was working in her new position, she never missed work due to injury and she never saw a doctor. During that time, Zavala did not report having any trouble performing her job, nor did she request a job change. After 4 months in her new position, Zavala was fired following an incident in which she sliced a coworker's arm twice after the coworker rubbed a cow's tongue on Zavala's posterior.

The trial judge made a factual finding that based on her successful return to work after her injuries, Zavala was not an odd-lot worker. We conclude that the record contains sufficient evidence to support the trial judge's factual finding that Zavala

was not an odd-lot worker, and therefore, the judge's finding was not clearly wrong. The trial judge's rationale was that Zavala had successfully worked for 4 months in the light-duty position with ConAgra. This was a clear and concise statement that complied with rule 11.

We now proceed to determine whether a scheduled member injury should be considered with a whole body injury in calculating loss of earning capacity when both injuries resulted from the same accident. The Court of Appeals determined that the trial judge's apparent rejection of what it referred to as "stacking" and the review panel's outright rejection of "stacking" were so inextricably intertwined with the award that the cause must be remanded for reconsideration on the record already made.

The Court of Appeals held that "Nebraska law does not prohibit consideration of the effect of a member injury when loss of earning capacity is assessed for a worker who also has sustained a whole body injury." *Zavala v. ConAgra Beef Co.*, 11 Neb. App. 235, 249, 647 N.W.2d 656, 667 (2002). In emphasizing that Zavala had two separate areas of injury, arm and cervical spine, which could be considered together to determine the extent of loss of earning capacity, the court explained:

> If the combination of the two injuries produces permanent total disability, see *Benish Kaufman v. Control Data*, 237 Neb. 224, 465 N.W.2d 727 (1991), then the Nebraska Workers' Compensation Act does not preclude such an award as a matter of law. And, if the member impairment adversely affects the worker such that loss of earning capacity from the unscheduled injury cannot be fairly and accurately assessed without considering the impact of a scheduled injury on the worker's employability, then stacking is permissible.

Zavala v. ConAgra Beef Co., 11 Neb. App. at 249, 647 N.W.2d at 667.

In its petition for further review, ConAgra argues that the Court of Appeals erred in concluding that a scheduled member injury may be considered with a whole body injury to determine loss of earning capacity. ConAgra asserts that a compensation court cannot award industrial disability benefits that are not explicitly provided for by statute and that no statute confers authority to the

compensation court to award industrial benefits for a scheduled member injury when an employee suffers a whole body injury in the same accident.

[6] The Workers' Compensation Court, as a statutory tribunal, is a court of limited and special jurisdiction and possesses only such authority as is delineated by statute. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). Neb. Rev. Stat. § 48-152 (Reissue 1998) provides in part that the compensation court "shall have authority to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act, and any amendments thereof, except such as are committed to the courts of appellate jurisdiction."

[7] The meaning of a statute is a question of law, *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002), and an appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law, *Larsen v. D B Feedyards*, 264 Neb. 483, 648 N.W.2d 306 (2002). As an aid to statutory interpretation, appellate courts 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. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

[8] The Legislature enacted the Nebraska Workers' Compensation Act (Act) in order to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). It is in light of this beneficent purpose that we have consistently given the Act a liberal construction to carry out justly the spirit of the Act. See *id.*

We stated in *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 384-85, 253 N.W.2d 30, 33-34 (1977):

> Section 48-121 . . . provides for compensation for three categories of job-related disabilities. Subdivision (1) sets the amount of compensation for total disability; subdivision (2) sets the amount of compensation for disability partial in character, except in cases covered by subdivision (3); and subdivision (3) sets out "schedule" injuries to specified parts of the body with compensation established therefore. Disability under subdivisions (1) and (2) refers

> to loss of employability and earning capacity, and not to functional or medical loss alone. . . . Thus losses in bodily function, so far as subdivisions (1) and (2) are concerned, are important only insofar as they relate to earning capacity and employability. . . .
>
> For claims falling under subdivision (3), however, it is immaterial whether an industrial disability is present or not. . . . There is, however, an exception to this rule. Where "an employee has suffered a schedule injury to some particular member or members, and some unusual or extraordinary condition as to other members or any other part of the body has developed," he may be compensated under subdivision (1) or (2) of section 48-121.

(Citations omitted.)

Neb. Rev. Stat. § 48-121 (Cum. Supp. 2002) does not specifically address how compensation is to be established when a worker suffers both a scheduled member injury under subsection (3) and a whole body injury under subsection (2) as a result of a single accident. ConAgra argues that if the Legislature had intended that the compensation court award industrial disability benefits under § 48-121(2) for a scheduled member injury when a worker suffers a whole body injury in the same accident, it would have done so by statute. ConAgra asserts that the absence of a statutory provision specifically granting the compensation court the requisite authority to award such benefits precludes the court from doing so.

We point out that the Act falls short of encompassing all potential factual situations that may occur under the Act. When the Act does not specifically cover a particular event, we have interpreted it in a way that best accomplishes the legislative purpose. See *Foote v. O'Neill Packing, supra.* In *Kraft v. Paul Reed Constr. & Supply*, 239 Neb. 257, 475 N.W.2d 513 (1991), we stated that an exception to § 48-121(3) occurs when an injury to a scheduled member results in an unusual or extraordinary condition as to other members or other parts of the body. Under such circumstances, the claimant is entitled to compensation based on lost earning capacity as provided under § 48-121(1) or (2).

Where a statute has been judicially construed and that construction has not evoked an amendment, it is presumed that the

Legislature has acquiesced in the court's determination of the Legislature's intent. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001). Since the Legislature has not amended § 48-121, we presume that it is in agreement with the court's interpretation of the statute as set forth in *Kraft*.

[9,10] An employee's disability as a basis for compensation under § 48-121(1) and (2) is determined by the employee's diminution of employability or impairment of earning power or earning capacity and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function. *Frauendorfer v. Lindsay Mfg. Co.*, 263 Neb. 237, 639 N.W.2d 125 (2002). Earning power, as used in § 48-121(2), is not synonymous with wages, but includes eligibility to procure employment generally, ability to hold a job obtained, and capacity to perform the tasks of the work, as well as the ability of the worker to earn wages in the employment in which he or she is engaged or for which he or she is fitted. *Frauendorfer v. Lindsay Mfg. Co., supra.*

[11] In the case at bar, Zavala's back injury is considered to be a whole body injury. Impairments to the body as a whole are compensated in terms of loss of earning power or capacity. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). In order to determine the amount of compensation for Zavala's whole body injury under § 48-121(2), her loss of earning capacity must be assessed.

[12] We conclude that when a worker sustains a scheduled member injury and a whole body injury in the same accident, the Act does not prohibit the court from considering the impact of both injuries in assessing the loss of earning capacity. In making such an assessment, the court must determine whether the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without considering the impact of the scheduled member injury upon the worker's employability. If the loss of earning capacity cannot be fairly and accurately assessed without such consideration, then the court is permitted to do so.

For example, when assessing the loss of earning capacity for a back injury, it may not be reasonable to ignore the impact that the loss of a leg would have upon the loss of earning capacity when

both injuries occurred in the same accident. The back injury does not increase the disability to the scheduled member, but the impact of the scheduled member injury should be considered when assessing the loss of earning capacity of the employee. The failure to do so would ignore the realities of the situation.

The Court of Appeals correctly held that when one work accident produces two injuries, one of which is scheduled and the other is unscheduled, it is permissible to consider the impact of the scheduled member injury when assessing loss of earning capacity if the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without such consideration.

Zavala sustained a whole body injury to her back and a scheduled member injury to her right upper extremity in the same accident, and therefore, the compensation court may consider her right upper extremity injury in determining the loss of earning capacity that occurred as a result of the single accident. Since we are unable to determine the effect of the trial judge's apparent failure to consider the impact of the scheduled member injury upon the loss of earning capacity assessment in her calculation of the awards of disability and vocational rehabilitation, we remand the cause for further consideration upon the record already made. We do not address the issue of whether a separate award for the scheduled member injury is permitted when considering the scheduled member injury with the whole body injury in the assessment of the loss of earning capacity.

CONCLUSION

For the reasons set forth herein, we conclude that the trial judge was correct in her determination that the vocational counselor's opinion that Zavala was an odd-lot worker had been rebutted. Therefore, we reverse the decision of the Court of Appeals as to that issue.

We affirm that portion of the Court of Appeals' decision which concluded that in a work accident which produces two injuries (one scheduled and one unscheduled), it is permissible under the Act to consider the impact of the scheduled member injury when assessing loss of earning capacity if the scheduled member injury adversely affects the worker such that loss of

earning capacity cannot be fairly and accurately assessed without such consideration. We also affirm the Court of Appeals' decision that the question of vocational rehabilitation shall be reconsidered by the trial judge on the record made in light of the Court of Appeals' determination regarding "stacking."

AFFIRMED IN PART, AND IN PART REVERSED.

STEPHAN, J., not participating.

JAMES MOYER AND SHARON MOYER, APPELLEES, V. NEBRASKA CITY AIRPORT AUTHORITY, APPELLANT.

655 N.W.2d 855

Filed January 24, 2003. No. S-01-1131.

1. **Summary Judgment: Final Orders: Appeal and Error.** A denial of a motion for summary judgment is not a final order and therefore is not appealable.
2. **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.
3. **Judgments: Verdicts.** To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
4. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
5. **Summary Judgment: Moot Question.** Whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits.
6. **Summary Judgment: Appeal and Error.** After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.
7. **Judgments: Collateral Estoppel: Res Judicata.** The applicability of the doctrines of collateral estoppel and res judicata is a question of law.
8. **Eminent Domain: Damages.** A final condemnation award is conclusive both on questions actually litigated and on questions necessarily within the issues. It is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding.
9. ____: ____. In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits.

10. ____: ____. Damages recoverable in a condemnation case are determined by the extent of the taking and a condemnor's rights actually acquired, not by a condemnor's use resulting from less than full exercise of a right acquired by eminent domain.
11. ____: ____. A condemnee cannot recover uncertain, conjectural, or speculative damages.
12. **Res Judicata: Eminent Domain: Damages.** Res judicata bars a subsequent inverse condemnation action which seeks to recover for damages to remainder property which would not have been speculative in the original condemnation action.
13. **Eminent Domain: Damages.** When remainder property actually suffers damages that would have been too speculative to recover in the original condemnation proceedings, the condemnee is not barred from recovering for them in a later inverse condemnation action.
14. **Eminent Domain: Waters: Damages.** A condemnee is required to anticipate in condemnation proceedings that the condemnor's contemplated use will alter drainage patterns. Thus, any damages that the condemnee will suffer as a result of a properly constructed and operated drainage scheme are not too speculative to recover in the original condemnation proceedings.
15. ____: ____: ____. If a design flaw exists in the drainage scheme planned by the condemnor at the time of the original condemnation proceedings, the flaw is not too speculative to litigate. As a result, the condemnee is charged with any damages that result from a design flaw existing in the drainage scheme at the time of the original condemnation proceedings.
16. ____: ____: ____. In condemnation proceedings, the possibility that the condemnor will not use the proper level of skill in building a well-designed drainage scheme is too speculative to allow recovery. As a result, once damage occurs, recovery can be had in a subsequent action.
17. ____: ____: ____. The possibility that after condemnation proceedings, the condemnor will abandon its planned drainage scheme and adopt a new, flawed one is too remote to allow recovery in the original proceedings. Thus, if after the condemnation proceedings, the condemnor adopts a new drainage scheme which negligently endangers the condemnee's property, the condemnee is not barred from seeking damages.
18. **Appeal and Error.** A party cannot complain of error which the party has invited the court to commit.
19. **Trial: Appeal and Error.** When a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness.
20. **Eminent Domain: Juries: Damages.** Where the condemnee in a condemnation action subsequently brings an action alleging its remainder property suffered damage as result of the condemnor's improper construction or operation, the question of improper construction or operation is a factual one to be determined by the jury.
21. **Juries: Evidence.** It is for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Affirmed.

Richard H. Hoch and Jeffrey J. Funke, of Hoch, Funke & Kelch, for appellant.

John W. Voelker for appellees.

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

CONNOLLY, J.

In 1991, as part of a plan to build a new airport, the Nebraska City Airport Authority (Airport Authority) condemned a portion of farmland owned by James Moyer and Sharon Moyer. A jury awarded the Moyers $82,748. In 1999, the Moyers brought this inverse condemnation action, alleging that in both the initial construction and the subsequent construction of a runway extension, the Airport Authority obstructed and altered existing drainways. The Moyers alleged that improper construction and operation resulted in significant erosion damage to their remaining property. A jury awarded the Moyers $16,400 in damages, and the Airport Authority appealed.

In this appeal, we determine if the present inverse condemnation action is barred by res judicata because of the prior condemnation. Because we determine that the Moyers are seeking to recover for damages caused by improper construction or operation not contemplated in the prior condemnation, res judicata does not apply. We also determine that the Moyers presented sufficient evidence to establish improper construction or operation. We affirm.

BACKGROUND

The Airport Authority condemned a portion of a quarter section of farmland owned by the Moyers. The Airport Authority sought 23.1 acres in fee and an aviation easement. A jury entered an award in the amount of $82,748, including severance damages. The land condemned lies to the north of the remaining Moyer property.

After taking the Moyer property, the Airport Authority began construction on the new airport. The engineers devised a drainage scheme to remove diffused surface water from the airport property. The original design called for drainage channels to be constructed. These channels were to take water to two diversion terraces which would in turn take the water to a natural drainway. This natural drainway cuts across both the Airport Authority property and the Moyer property. After the drainway enters the Moyer property from the north, it carries water diagonally from the northwest to the southeast.

In the original plan, one diversion terrace was to wrap around the southeast end of the runway and take water to the north where it was to be deposited into the natural drainway just before the drainway entered the Moyer property. The other diversion terrace was to carry water to the east and deposit it into the drainway just before the drainway left the Moyer property.

After construction began, James Moyer expressed concern to the Airport Authority that the drainage design would result in damage to his property, but he denied requesting any specific design changes. At some point after this discussion, the drainage scheme was altered. Instead of using the two-diversion terrace design, the Airport Authority implemented a one-diversion terrace design. After draining from the airport, water was taken to the diversion terrace. The diversion terrace began on the east side of the airport. It then wrapped around the south side of the runway, directing water back to the northwest. After it turned to the northwest, the diversion terrace ran between the Moyer property and the runway. Eventually, the diversion terrace emptied into the natural drainway.

As built in the original construction, the diversion terrace meets the natural drainway about 150 feet north of the Moyer property line. In total, 248 acres drain into the natural drainway. Of this total, 36.8 acres drain into the drainway as a result of the diversion terrace.

In 1999, the Airport Authority extended the airport runway. As part of the project, the Airport Authority made the diversion terrace longer, raised its height from 1½ to 3 feet, and widened its bottom.

In October 1999, the Moyers filed an inverse condemnation action under Neb. Rev. Stat. § 76-706 (Reissue 1996) for the appointment of appraisers with the Otoe County Court. The appraisers determined that the Moyers had suffered no damages, and the Moyers appealed to the district court. In their petition on appeal, they claimed that construction at the airport had obstructed and altered existing drainways, resulting in damage to their property. At the pretrial conference, the Moyers were allowed to amend their petition to claim damages that resulted from both the original construction and the construction of the extended runway.

The Airport Authority filed a motion for summary judgment, asserting that as a result of the previous condemnation proceeding, the inverse condemnation action was barred by res judicata. The district court denied the motion, reasoning that the initial condemnation action "did not include possible damage to the remainder as a result of claimed additional damage resulting from the use of the property that had been condemned by the Airport Authority."

At trial, the Moyers claimed that because of the Airport Authority's construction and operation of the airport, they had suffered two distinct types of damages. First, the Moyers argued that the drainage scheme dumps too much water at too high of a rate into the natural drainway that runs through their property, causing erosion to the drainway. The civil engineer called by the Moyers, Ronald E. Ross, described how the airport has changed the manner in which surface water reaches the natural drainway. Ross testified that the airport construction increased the number of acres draining into the natural drainway by a net of only 2 acres. But, because the airport runways, parking lots, and drainage systems accelerate the velocity at which diffused surface water drains, twice as much water reaches the drainway as previously did. Ross also testified that the diversion terrace has changed where diffused surface water enters into the drainway. As a result, the number of acres that drain into the drainway *before* it reaches the Moyer property has doubled, increasing the volume of water flowing through the drainway as it crosses the Moyer property. Ross also testified that the drainage scheme

used by the airport increased the velocity at which water enters into and flows through the natural drainway.

Ross opined that the increased volume and velocity of water entering into the natural drainway is eroding the drainway. He described cost-efficient methods that the airport could have used to reduce both the volume and the velocity of the surface water entering into the natural drainway.

James Moyer and his son testified that since the construction of the airport, the natural drainway has eroded and that the amount of water in the drainway has increased. Before the airport was constructed, they were able to cross the natural drainway with farming equipment, but now that is impossible. The record shows that the erosion of the natural drainway has worsened since the extension project and will continue to worsen. The Moyers' appraiser testified that the inability to cross the natural drainway has devalued the Moyer property.

The Moyers' second argument, that the airport construction has damaged their property, focused on erosion damage that their fields have suffered since the airport's construction. According to the Moyers, the redesigned diversion terrace does not operate as planned. As a result, water breaches and overflows the terrace during moderate and heavy rainfalls. This water then flows onto the Moyer property, eroding fields that lie south of the airport. Evidence showed that this erosion has worsened since the runway extension project and that it will continue to worsen.

To support their contention about the diversion terrace, the Moyers presented evidence from both Ross and Brian D. Dorsey, a construction manager. Dorsey testified that erosion was present on the diversion terrace itself and on the Moyer fields south of the diversion terrace. He opined that the erosion on the Moyer property resulted from diffused surface water draining from the airport, but the court refused to allow Dorsey to testify whether he believed the construction and design of the drainage scheme were negligently done. Ross testified that the diversion terrace is eroding and that it has breached during heavy rains. He opined that the erosion of both the terrace and the fields will continue.

Both Charles E. Swanson, the engineer who planned the drainage scheme for the initial construction, and Alois Hotovy,

the engineer who planned the runway extension, testified for the Airport Authority. Both claimed that the drainage system they had developed was properly designed and constructed. Contradicting Swanson's testimony, however, Hotovy testified that the original diversion terrace suffered from problems—in particular, an inability to handle large rainfall—resulting in minor erosion to the Moyer property. Moreover, Swanson admitted that if the diversion terrace was operating as designed, it would not be eroded to the extent suggested by the evidence presented by the Moyers.

The Airport Authority moved for directed verdict both at the close of the Moyers' case in chief and at the end of all the evidence. In both motions, it asserted that res judicata barred the Moyers' action. It also argued that because of the earlier condemnation action, the Moyers were required to show improper construction or operation of the airport, and that they had failed to do so. The court overruled both motions.

At the jury instruction hearing, the Moyers requested that the jury be given an instruction concerning whether the Airport Authority had violated water laws. The Airport Authority objected, and the trial judge refused to give the instruction. The jury returned a $16,400 verdict for the Moyers. The court overruled the Airport Authority's motions for a new trial and for judgment notwithstanding the verdict. The Airport Authority appealed.

ASSIGNMENTS OF ERROR

The Airport Authority assigns, restated, that the district court erred in not (1) sustaining the motion for summary judgment and directed verdict because the Moyers' inverse condemnation action was barred by res judicata, (2) directing a verdict because the Moyers failed to show improper construction or operation of the airport, and (3) sustaining the motions for a new trial and for judgment notwithstanding the verdict because the verdict was not sustained by the law or the evidence.

STANDARD OF REVIEW

[1] A denial of a motion for summary judgment is not a final order and therefore is not appealable. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000).

[2] 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. *Jay v. Moog Automotive*, 264 Neb. 875, 652 N.W.2d 872 (2002).

[3] To sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

[4] 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. *Bowley v. W.S.A., Inc.*, 264 Neb. 6, 645 N.W.2d 512 (2002).

ANALYSIS

Motion for Summary Judgment

[5,6] The Airport Authority assigns as error the district court's denial of its motion for summary judgment.

> A denial of a motion for summary judgment is an interlocutory order, not a final order, and therefore not appealable. . . .
>
> The denial of a summary judgment motion is neither appealable nor reviewable. Whether a denial of summary judgment should have been granted generally becomes moot after a full trial on the merits. . . . The overruling of a motion for summary judgment does not decide any issue of fact or proposition of law affecting the subject matter of the litigation, but merely indicates that the court was not convinced by the record that there was not a genuine issue as to any material fact or that the party offering the motion was entitled to a judgment as a matter of law. . . . After trial, the merits should be judged in relation to the fully developed record, not whether a different judgment may have been warranted on the record at summary judgment.

(Citation omitted.) *McLain v. Ortmeier*, 259 Neb. at 754-55, 612 N.W.2d at 222. Accordingly, we do not consider whether

the court erred in not granting the Airport Authority summary judgment.

RES JUDICATA

[7,8] Initially, we must determine if res judicata bars the Moyers' current action. The applicability of the doctrines of collateral estoppel and res judicata is a question of law. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). On several occasions, we have addressed the preclusive effects of a condemnation award on a subsequent eminent domain action that seeks to recover for damages done to the remainder property by the original condemnor. See, e.g., *Hansen v. County of Cass*, 185 Neb. 565, 177 N.W.2d 568 (1970); *Clary v. State*, 171 Neb. 691, 107 N.W.2d 429 (1961); *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 2 N.W.2d 327 (1942); *Psota v. Sherman County*, 124 Neb. 154, 245 N.W. 405 (1932); *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N.W. 1028 (1916). In *Hansen v. County of Cass*, 185 Neb. at 567, 177 N.W.2d at 569, we explained:

> In an eminent domain proceeding the principle of just compensation for damage to the remainder excludes conjectural items. Yet for all damage to the remainder on account of proper construction or operation the landowner must obtain compensation in the first proceeding. . . . The final condemnation award is conclusive both on questions actually litigated and on questions necessarily within the issues. It is not conclusive in a subsequent action as to remainder damage that was caused by improper construction or operation and that was not actually litigated in the first proceeding. Liability rests upon the original taking or damaging for public use. Recovery is permitted because the new element was not contemplated or determined at the time of the taking or damaging.

(Citations omitted.) Here, the Moyers claim that as a result of improper construction or operation at the airport, they have suffered erosion damage. The Airport Authority argues that the erosion damage suffered by the Moyers could have been contemplated and determined at the time of the original taking. We disagree.

[9-13] In a condemnation action, there are two elements of damage: (1) market value of the land taken or appropriated and (2) diminution in value of the land remaining, less special benefits. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985) (superseded by statute on other grounds). Damages recoverable in a condemnation case are determined by the extent of the taking and a condemnor's rights actually acquired, not by a condemnor's use resulting from less than full exercise of a right acquired by eminent domain. *Id.* A condemnee, however, cannot recover uncertain, conjectural, or speculative damages. *Enterprise Co., Inc. v. Sanitary Dist. No. One*, 176 Neb. 271, 125 N.W.2d 712 (1964). Thus, res judicata bars a subsequent inverse condemnation action which seeks to recover for damages to remainder property which would not have been speculative in the original condemnation action. But when the remainder property actually suffers damages that would have been too speculative to recover in the original condemnation proceedings, the condemnee is not barred from recovering for them in a later inverse condemnation action.

[14,15] In the past, we have been clear that a condemnee is required to anticipate in the original proceedings that the condemnor's contemplated use will alter drainage patterns. See *Snyder v. Platte Valley Public Power and Irrigation District, supra.* Thus, any damages that the condemnee will suffer as a result of a properly constructed and operated drainage scheme are not too speculative to recover in the original condemnation proceedings. *Psota v. Sherman County*, 124 Neb. at 157, 245 N.W. at 406 (holding that in original proceeding, condemnee is entitled to all damages which would result from "proper construction, improvement, and maintenance . . . taking into consideration such embankments, cuts, bridges, culverts, and ditches as shall be required . . . for the purpose of a proper construction and maintenance"). Moreover, if a design flaw exists in the drainage scheme planned at the time of the original condemnation proceedings, the flaw is not too speculative to litigate. As a result, the condemnee is charged with any damages that result from a design flaw existing in the drainage scheme at the time of the original condemnation proceedings. See *Snyder v. Platte Valley Public Power and Irrigation District*, 140 Neb. 897, 2 N.W.2d 327 (1942).

[16,17] But, in the original condemnation proceedings, the possibility that the condemnor will not use the proper level of skill in building a well-designed drainage scheme is too speculative to allow recovery. As a result, once damage occurs, recovery can be had in a subsequent action. *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N.W. 1028 (1916). Similarly, the possibility that the condemnor will abandon its planned drainage scheme and adopt a new, flawed one is too remote to allow recovery in the original proceedings. Thus, if after the condemnation proceedings, the condemnor adopts a new drainage scheme which negligently endangers the condemnee's property, the condemnee is not barred from seeking damages.

Here, the Moyers sought two types of damages. First, they claimed that the drainage scheme used by the airport dumps too much water at too great a velocity into the drainway that crosses their land. The record shows that the Airport Authority changed its drainage scheme after construction began on the project. The Moyers complain that this new scheme was negligently designed. In the original condemnation hearing, the Moyers could not have recovered damages for the mere possibility that the Airport Authority would not use the drainage scheme it had and adopt a new, flawed one. Res judicata did not bar the Moyers from attempting to prove that the improper design of the new drainage scheme caused them damage.

For their second category of damages, the Moyers complain that the diversion terrace does not operate as designed. Once again, it would have been too speculative at the time of the original proceedings to allow the Moyers to recover for the possibility that the Airport Authority would not build its drainage scheme in a skillful manner. Res judicata does not prevent the Moyers from attempting to show that the diversion terrace was improperly constructed.

Improper Construction or Operation

Even though res judicata does not bar the Moyers' inverse condemnation action, the Moyers were still required to prove that their damages resulted from the Airport Authority's improper construction or operation of the airport. See *Clary v. State*, 171 Neb. 691, 107 N.W.2d 429 (1961). The Airport Authority argues

that because the Moyers failed to present any evidence of improper construction or operation, the court erred when it denied the Airport Authority's motions for directed verdict, judgment notwithstanding the verdict, and a new trial.

Initially, the Airport Authority argues that to show improper construction or operation of the airport, the Moyers had to show that the Airport Authority violated the law governing diffused surface water. However, the Airport Authority's theory is inconsistent with the position it took at trial. When the Moyers requested a jury instruction on the law governing diffused surface waters, the Airport Authority objected that the instruction was irrelevant. The trial court agreed with the Airport Authority, and no instruction on diffused surface water was given.

[18,19] Generally, a party cannot complain of error which the party has invited the court to commit. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). Moreover, " '[w]hen a theory on any issue is relied upon by a party at the trial as the proper one, it will be adhered to on appeal without regard to its correctness.' " *Ballantyne v. Parriott*, 172 Neb. 215, 217, 109 N.W.2d 164, 165 (1961). Accordingly, in determining whether the Airport Authority improperly constructed or operated the airport's drainage scheme, we do not consider the law governing diffused surface water.

On the redesign of the drainage scheme, it is undisputed that the Airport Authority used the diversion terrace to redirect where diffused surface water entered the drainway. The Moyers' expert testified that the original airport construction and the subsequent runway extension substantially increased the velocity and volume of water flowing through the drainway as it crossed the Moyers' property. This caused erosion to the drainway. According to the Moyer's expert, cost-efficient engineering techniques were available which would have reduced both the volume and velocity of water entering into the natural drainway and thereby reducing the erosion damage to the drainway. The Airport Authority, however, failed to implement these techniques.

For the construction of the diversion terrace, the record shows that the diversion terrace could not adequately handle all the water it was designed to carry. Evidence suggested that the diversion terrace was not as high as designed in places and that

during heavy rainfalls, the terrace would breach. Moreover, the Moyers presented extensive evidence showing the diversion terrace itself was eroding, and the engineer who redesigned the drainage scheme during the initial construction admitted that if the diversion terrace was operating as designed, this erosion would not be present.

[20,21] The question of improper construction or operation is a factual one to be determined by the jury. See *Robinson v. Central Neb. Public Power & Irrigation District*, 146 Neb. 534, 20 N.W.2d 509 (1945). We would not characterize the evidence of improper construction and operation offered by the Moyers as overwhelming, and we recognize that the Airport Authority presented conflicting evidence. But it was for the jury, as trier of the facts, to resolve conflicts in the evidence and to determine the weight and credibility to be given to the testimony of the witnesses. *Beauford v. Father Flanagan's Boys' Home*, 241 Neb. 16, 486 N.W.2d 854 (1992). Based on the totality of the evidence presented at trial, reasonable minds could have reached the conclusion that the erosion damage suffered by the Moyers resulted from improper construction or operation. Accordingly, the Airport Authority was not entitled to a directed verdict or to judgment notwithstanding the verdict.

Moreover, we cannot say the jury's determination was "so clearly against the weight and reasonableness of the evidence and so disproportionate to the injury proved as to demonstrate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law." See *id.* at 20, 486 N.W.2d at 857. The district court did not abuse its discretion in denying the Airport Authority a new trial.

CONCLUSION

The Moyers' inverse condemnation action was not barred by res judicata, and the Moyers presented sufficient evidence of improper construction or operation by the Airport Authority to withstand the Airport Authority's motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAVID A. BROUILLETTE, APPELLANT.

655 N.W.2d 876

Filed January 24, 2003. No. S-02-014.

1. **Judgments: Pleadings: Appeal and Error.** Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent of the determinations reached by the trial court.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
3. **Rules of Evidence: Appeal and Error.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
4. **Judges: Appeal and Error.** The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion.
5. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
6. **Criminal Law.** Certain crimes are single crimes that can be proved under different theories, and because each alternative theory is not a separate crime, the alternative theories do not require that the crime be charged as separate alternative counts.
7. **Statutes.** The legal principle of expressio unius est exclusio alterius recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute.
8. **Homicide: Motor Vehicles: Blood, Breath, and Urine Tests.** The admission of evidence of blood test results in a criminal prosecution for manslaughter under Neb. Rev. Stat. § 28-305 (Reissue 1995) is not authorized under Neb. Rev. Stat. § 60-6,210 (Reissue 1998).
9. **Criminal Law: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant.
10. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that

occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.

11. **Constitutional Law: Arrests: Miranda Rights: Words and Phrases.** *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest.
12. **Evidence: Words and Phrases.** Evidence is relevant when it has 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. If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Matthew Graff, Senior Certified Law Student, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

David A. Brouillette was convicted in the district court for Lancaster County of two counts of manslaughter. Brouillette was sentenced to 1 to 2 years' imprisonment on the first count and 5 years' probation on the second count and was ordered to pay restitution on both counts. Brouillette appeals his convictions. We affirm.

II. STATEMENT OF FACTS

On the morning of October 23, 1999, on U.S. Highway 77 north of Lincoln, a vehicle driven by Brouillette collided head on with another vehicle, killing the driver and passenger in the other vehicle. Highway 77 is a divided four-lane highway. At the location of the accident, Highway 77 is composed of two lanes northbound and two lanes southbound separated by a grassy median. Brouillette was driving southbound in the westernmost northbound lane when the vehicles collided.

On the night before the accident, Brouillette had gone to a bar in Lincoln where he had had a "couple" of beers. Brouillette met Angela Richards at the bar, and when the bar closed at 1 a.m., Brouillette followed Richards to a party where he drank another beer. At approximately 3 or 3:30 a.m., Brouillette and Richards left the party and drove separately to Richards' home, which was located on the east side of Highway 77 north of Lincoln. Brouillette did not consume any alcohol at Richards' home, and he left her home sometime around 5:30 a.m. In order to leave Richards' home, located to the east side of Highway 77, and go south toward Lincoln, one needed to proceed west and cross over the two northbound lanes and the median before turning left to the south into the southbound lanes.

Laura Boone testified at trial that on the morning of October 23, 1999, she was driving in the southbound lanes of Highway 77 and observed a silver Grand Am driving south in the westernmost lane of the northbound lanes of the divided highway. The driver of the silver Grand Am was later identified as Brouillette. Boone observed a near miss between Brouillette's southbound vehicle and a northbound vehicle. Boone then witnessed a collision on the northbound portion of the divided highway between Brouillette's vehicle and a red Volkswagen. The driver of the red Volkswagen, Daniel Barrett, and the passenger, Jason Reese, were killed as a result of the collision.

Certain rescue workers who came to the scene of the accident testified at trial. A volunteer for the Raymond Fire Department testified that she heard Brouillette tell medical personnel that he had consumed four or five drinks on the previous evening. However, the volunteer did not detect the odor of alcohol on Brouillette's person. Stewart Danburg, a Lancaster County sheriff's deputy, testified that he engaged Brouillette in conversation regarding how the accident happened. Brouillette told Danburg that he did not realize that he was on a four-lane divided highway and instead thought that he was driving south in the correct lane of a two-lane highway. Danburg asked Brouillette if he had consumed any alcohol, and Brouillette responded that he had been drinking the prior evening but had not had anything to drink since midnight. Danburg did not notice the odor of alcohol on Brouillette and did not ask Brouillette to perform any

field sobriety tests. Joseph Gehr, a Lancaster County sheriff's deputy who was trained in accident reconstruction, investigated the scene of the accident. Gehr testified at trial that as a result of his investigation, he determined that the silver Grand Am driven by Brouillette was southbound in the westernmost lane of the northbound lanes at the time of the collision.

Brouillette was taken by helicopter to a hospital in Lincoln. Derek Horalek, another Lancaster County sheriff's deputy, spoke with Brouillette in the emergency room. Horalek testified at trial that he detected an odor of alcohol on Brouillette but did not ask Brouillette to perform any sobriety tests. When Horalek arrived at the emergency room, a laboratory technician was preparing to take a blood sample from Brouillette for medical purposes. Horalek asked the technician to take an additional blood sample for him. Horalek told Brouillette a sample was being taken but did not ask Brouillette's permission. The laboratory technician took both samples at roughly the same time. The sample taken for medical purposes was analyzed to determine blood alcohol content. During its investigation of the present case, the State, asserting its authority under Neb. Rev. Stat. § 60-6,210 (Reissue 1998), obtained the results of the test of the blood sample taken for medical purposes from the hospital.

On January 7, 2000, the State filed an information charging Brouillette with two counts of motor vehicle homicide in violation of Neb. Rev. Stat. § 28-306 (Cum. Supp. 2000). On April 21, the State filed an amended information charging Brouillette with two counts of manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1995). In each count, the State alleged that Brouillette had caused the death of one of the victims "unintentionally while in the commission of an unlawful act, to-wit: Assault in the Third Degree or Careless Driving or Reckless Driving or Driving While Under Influence of Alcohol or Liquor, or Wrong Way on a One Way."

Brouillette filed a motion to quash the amended information on the basis that it was improper for the State to allege in one count alternative unlawful acts to support a charge of manslaughter. The district court overruled Brouillette's motion to quash.

Brouillette also filed a motion to suppress certain evidence and statements. Among the evidence Brouillette sought to suppress

were his statements made to Danburg at the accident scene, his statements to Horalek in the emergency room, and the results of the tests of both the blood sample taken at Horalek's request and the blood sample taken for medical purposes. The district court sustained Brouillette's motion to suppress as to statements made to Horalek in the emergency room and as to the test results of the blood sample taken at Horalek's direction. The district court overruled the motion to suppress as to statements made to Danburg at the accident scene and as to the test results of the blood sample taken for medical purposes. Regarding the test results of the blood sample taken for medical purposes, the district court limited the use of such evidence to proving the underlying unlawful act of driving under the influence of alcohol and sustained the motion to suppress as to any other use of the evidence, and the jury was advised accordingly.

A jury trial was held beginning September 11, 2001. At trial, Brouillette renewed his objections to admission of his statements to Danburg and to the admission of the test results on the blood sample taken for medical purposes. The district court overruled Brouillette's objections and instructed the jury that it was to consider the blood test evidence only with regard to the allegation of the unlawful act of driving while under the influence of alcohol and not with regard to any other alleged unlawful act. A toxicologist testified regarding the blood test. The toxicologist testified that at the time the blood sample was taken, Brouillette's blood alcohol level was .091 and estimated that the level would have been approximately .106 at the time of the accident, which had occurred about an hour before the blood sample was taken.

In his defense, Brouillette made an offer of proof of certain testimony by the doctor who performed the autopsies on Barrett and Reese, the accident victims. In the offer of proof, the doctor stated that he found marijuana in the pocket of Reese, who was the passenger, and that the urine of Barrett, the driver, tested positive for marijuana and amphetamine. The State objected to Brouillette's proposed evidence on the basis of relevance. The district court sustained the State's objection and disallowed the evidence offered by Brouillette.

In the course of the trial, the State struck "Assault in the Third Degree" from the list of alternative unlawful acts alleged as the predicate for the charges of manslaughter. The district court therefore instructed the jury on the remaining alleged unlawful acts. Brouillette proposed a jury instruction that consisted of the text of Neb. Rev. Stat. § 60-6,131 (Reissue 1998), which provides rules of the road for driving on the right half of roadways. The State objected to Brouillette's proposed instruction, and the district court refused the instruction. The district court gave an instruction based on Neb. Rev. Stat. § 60-6,141(1) (Reissue 1998), which specifically provides rules of the road for driving on the right-hand roadway of divided highways.

The case was submitted to the jury on September 14, 2001, and the jury returned verdicts of guilty on both counts of manslaughter. The district court sentenced Brouillette on November 27. On the first count, the district court sentenced Brouillette to 1 to 2 years' imprisonment and ordered him to pay restitution of $7,290 to Barrett's parents. On the second count, the district court sentenced Brouillette to 5 years' probation after serving the sentence on the first count and ordered him to pay restitution of $1,207.48 to Reese's mother. Brouillette appeals.

III. ASSIGNMENTS OF ERROR

Brouillette asserts that the district court erred in (1) failing to grant his motion to quash the amended information and allowing the State to charge alternative unlawful acts as the predicate to charges of manslaughter, (2) overruling his motion to suppress evidence of the test results of the blood sample taken for medical purposes and admitting such evidence at trial, (3) overruling his motion to suppress evidence of statements he made to Danburg at the scene of the accident and admitting such evidence at trial, (4) sustaining the State's objection and refusing to admit evidence of drugs found on Barrett and Reese, and (5) failing to give his proposed jury instruction based on § 60-6,131.

IV. STANDARDS OF REVIEW

[1] Regarding questions of law presented by a motion to quash, an appellate court is obligated to reach a conclusion independent

of the determinations reached by the trial court. *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

[2] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002).

[3] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make such discretion a factor in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Harris*, 263 Neb. 331, 640 N.W.2d 24 (2002).

[4] The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002).

[5] To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002).

V. ANALYSIS

1. Denial of Motion to Quash: Alternative Unlawful Acts to Support Manslaughter Charges

In his first assignment of error, Brouillette contends that the district court erred in denying his motion to quash the amended information. Brouillette was charged with two counts of manslaughter under § 28-305, which defines manslaughter as killing another unintentionally "while in the commission of an unlawful act." The amended information sets forth predicate unlawful acts as to each count in the alternative. Brouillette asserts that Nebraska law does not allow the State to allege

alternative unlawful acts as the predicate to a single count in an information charging manslaughter. He argues that § 28-305 requires that a defendant be charged in separate counts, each based on a separate unlawful act such that the jury is required to return a separate verdict on each count. Brouillette further argues that various prior opinions of this court which tend to contradict the arguments he asserts are distinguishable.

[6] The State does not agree with Brouillette's contention. The State argues that the amended information was proper under § 28-305 and that the issue raised by Brouillette is controlled by *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950), and other cases, such as *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984), and *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001). The State notes that in *West* and *Brunzo*, this court has made clear that certain crimes are single crimes that can be proved under different theories, and that because each alternative theory is not a separate crime, the alternative theories do not require that the crime be charged as separate alternative counts. We agree with the State's analysis and reject Brouillette's argument.

Schluter, supra, involved a challenge to the jury instructions in a manslaughter case. In analyzing the primary issue on appeal in *Schluter*, this court observed that the State was not required to specify in the information upon what particular unlawful act a count of manslaughter was based or, if specified, to thereafter elect upon which of several alleged unlawful acts a prosecution for manslaughter was based. We stated that because the State was not required to specify the particular unlawful act, such specification in the information was mere "surplusage" which did not render the information defective. *Id.* at 324, 44 N.W.2d at 593. Brouillette attempts to distinguish *Schluter* by noting that *Schluter* was based on an earlier version of the manslaughter statute, Neb. Rev. Stat. § 28-403 (Reissue 1975), which defined "manslaughter" as killing another unintentionally "while the slayer is in the commission of *some* unlawful act," whereas the current manslaughter statute, § 28-305, defines "manslaughter" as killing another unintentionally "while in the commission of *an* unlawful act." (Emphasis supplied.) Brouillette asserts that although "some" in the old statute may be read to encompass a number of unlawful

acts, the Legislature's abandonment of the phrase "some unlawful act" in favor of "an unlawful act" exhibits an intent to define manslaughter as an unintentional death that results during the commission of a single identified unlawful act. Brouillette further argues that under the current manslaughter statute, § 28-305, each alleged unlawful predicate act supports a distinct count of manslaughter and that a proper information should allege each unlawful act as supporting a separate count of manslaughter.

West, supra, involved motor vehicle homicide and a challenge to the form of verdict. In *West*, the defendant was convicted of motor vehicle homicide in violation of § 28-306, which made it a crime to cause "the death of another unintentionally while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska." The defendant contended on appeal that the verdict returned by the jury which did not specify the underlying "violation of the law" was unclear and ambiguous and that he was therefore entitled to a new trial. In rejecting the defendant's argument, this court noted that based on the charges in the information and the evidence presented at trial, the jury could have found that the defendant operated a motor vehicle in violation of the law in one of three ways: (1) while under the influence of alcoholic liquor, or (2) when he had more than the legal limit of alcohol in his body fluids, or (3) in a reckless manner. We recognized that each of the three acts recited above which were mentioned in the information constituted a distinct violation of the law but determined that only the single offense of motor vehicle homicide was charged against the defendant and that the offense of motor vehicle homicide was a single crime which may be committed in a number of ways. In *West*, we concluded that "[w]here one is charged with the commission of a crime which may be committed in a number of ways, a general verdict finding the defendant guilty of the crime charged is sufficient and is not ambiguous." 217 Neb. at 398, 350 N.W.2d at 519. Implicit in the reasoning in *West* is the acknowledgment that the information charging the single offense of motor vehicle homicide was not improper.

In *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001), the defendant had been convicted of first degree murder in violation of Neb. Rev. Stat. § 28-303 (Reissue 1989). In a motion for postconviction relief, the defendant alleged that the information charging him was legally defective and that his counsel was ineffective for having failed to move to quash the information. The district court denied postconviction relief, and we affirmed. The information charging Brunzo with first degree murder recited the language of § 28-303 and specified the felonies of robbery, kidnapping, and/or criminal attempt as the basis for felony murder. The information did not set out the elements of the underlying felonies. We concluded that the information charging the defendant gave him "fair notice of the charges he would face and the crime he was later convicted of." 262 Neb. at 606, 634 N.W.2d at 774. The crime of first degree murder under § 28-303 constitutes one offense even though there may be alternative theories by which criminal liability for first degree murder may be charged and prosecuted. *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). One such theory is felony murder. *Id.* The felony which serves as the predicate for felony murder in turn may be based on allegations of alternative facts. Explicit in *Brunzo* is the approval of the information charging the single offense of first degree murder under the theory of felony murder, where the predicate felonies are alleged in the alternative.

The logic of *Schluter v. State*, 153 Neb. 317, 44 N.W.2d 588 (1950); *State v. West*, 217 Neb. 389, 350 N.W.2d 512 (1984); and *Brunzo, supra*, applies to the instant case. In this regard, we conclude that the change in the language of the statutory definition of "manslaughter" from "some unlawful act" to "an unlawful act" did not vitiate the holding in *Schluter*. We further observe that manslaughter under § 28-305, similar to the crime of motor vehicle homicide in *West*, is a single crime which may be committed in a number of ways. Finally, as in *Brunzo*, the information in the present case which pled the predicate acts in the alternative gave Brouillette "fair notice of the charges he would face and the crime[s] he was later convicted of," see 262 Neb. at 606, 634 N.W.2d at 774, and was not defective. The district court therefore did not err in overruling Brouillette's motion to quash

the information, and we reject Brouillette's first assignment of error.

2. Denial of Motions to Suppress Evidence

In his second assignment of error, Brouillette asserts that the district court erred in denying his motion to suppress and in admitting at trial evidence of the test results from the blood sample that was taken for medical purposes. We note that the blood sample taken at Horalek's direction, having been suppressed, is not at issue on appeal. In his third assignment of error, Brouillette asserts that the district court erred in denying his motion to suppress and in admitting at trial evidence of statements that he made to Danburg at the accident scene. We analyze these two assignments of error separately.

(a) Admission of Results of Blood Test

With respect to the admission of the results from the blood sample taken for medical purposes, Brouillette argues that the evidence was not admissible pursuant to § 60-6,210 because that statute allows for admission of such evidence only in a criminal prosecution for driving under the influence under Neb. Rev. Stat. § 60-6,196 (Supp. 1999). Section 60-6,210(1) generally provides that the test results of a blood sample taken for medical purposes "shall be admissible in a criminal prosecution under section 60-6,196 [driving under the influence] to show the alcoholic content of or the presence of drugs or both in the blood at the time of the accident." Brouillette argues that § 60-6,210 does not provide for the use of such evidence in a criminal prosecution for manslaughter under § 28-305, such as in the present case. The State argues in response that the evidence is admissible under § 60-6,210 in a prosecution for manslaughter in order to prove the underlying unlawful act of driving under the influence, which is a violation of § 60-6,196. We reject the State's analysis of § 60-6,210(1).

[7,8] The substance of § 60-6,210(1) relates to the admission of the results of "a chemical" test where the sample has been obtained for the purpose of medical treatment. The blood test results at issue on the appeal of this case were obtained from a sample taken for medical purposes. The terms of § 60-6,210(1) provide for the admissibility of such test results "in a criminal

prosecution under section 60-6,196 [driving under the influence] to show the alcoholic content of or the presence of drugs or both in blood." The plain language of § 60-6,210(1) limits the use of the test results obtained for medical purposes to a prosecution for driving under the influence. The legal principle of expressio unius est exclusio alterius recognizes the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute. See, *Pfizer v. Lancaster Cty. Bd. of Equal.*, 260 Neb. 265, 616 N.W.2d 326 (2000). Pursuant to the statute and this principle, the admission of the evidence of the blood test results in the instant criminal prosecution for manslaughter under § 28-305 was not authorized under § 60-6,210 and was error.

[9,10] An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). In a jury trial of a criminal case, harmless error exists when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in reaching a verdict adverse to a substantial right of the defendant. *State v. Kula*, 260 Neb. 183, 616 N.W.2d 313 (2000). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Trotter*, 262 Neb. 443, 632 N.W.2d 325 (2001).

In the present case, the State alleged that Brouillette caused the death of another unintentionally while in the commission of any one or more of the unlawful acts of driving under the influence, careless driving, reckless driving, or driving in the wrong direction. Guilt of manslaughter must be supported by an underlying unlawful predicate act. The jury need find but one predicate act established by the evidence. While the trial court limited the use of the blood test result and instructed the jury to limit its use, the undisputed evidence established that Brouillette was driving in the wrong direction. Therefore, we conclude that the verdict was surely unattributable to the erroneous admission of the blood test.

The testimony of the witness Boone and of the accident reconstructionist, Gehr, established without contradiction that Brouillette was driving southbound in the northbound lanes of the divided Highway 77. Although Brouillette stated he was unaware that he was proceeding in the wrong direction, he does not dispute the fact that he was driving southbound in the northbound lane. The evidence clearly supports a finding that Brouillette was committing the unlawful predicate act of driving in the wrong direction by proceeding south in the northbound lanes of a divided highway. There was no evidence upon which the jury could have found that Brouillette was not driving in the wrong direction.

In view of the record and facts of this case, we conclude that the guilty verdict rendered in this trial was surely unattributable to the erroneous admission of the blood test. See *Trotter, supra*. We therefore conclude that the error in admitting the blood test evidence was harmless error.

(b) Admission of Statements at Accident Scene

With respect to the admission of Brouillette's statements made to Danburg at the accident scene, Brouillette argues such evidence was obtained in violation of his constitutional rights because he was in custody and was subjected to interrogation without first being advised of his *Miranda* rights. Among the statements Brouillette made to Danburg was an admission that he had been drinking the night before the accident. The State argues in response that Brouillette was not yet in custody at the time he made the statements. We agree with the State.

[11] It is well settled that *Miranda* warnings are required only where there has been such a restriction on one's freedom as to render one "in custody." One is in custody for *Miranda* purposes when there is a formal arrest or a restraint on one's freedom of movement of the degree associated with such an arrest. *State v. Burdette*, 259 Neb. 679, 611 N.W.2d 615 (2000). Brouillette was not in custody when Danburg questioned him at the accident scene. See *State v. Melton*, 239 Neb. 506, 476 N.W.2d 842 (1991) (defendant was not in custody when he was not under formal arrest and was questioned by officers during routine course of accident investigation). Brouillette's second and third assignments of error are without merit.

3. Exclusion of Evidence of Drugs on Barrett and Reese

In his fourth assignment of error, Brouillette asserts that the district court erred in refusing to admit evidence he offered to establish that marijuana was found in the pocket of Reese, the passenger, and that marijuana and amphetamine were found in the urine of Barrett, the driver. Citing to various cases not repeated here, Brouillette argues that the excluded evidence would show that Barrett was driving under the influence of drugs and that the excluded evidence was relevant to establish that Barrett was negligent and that such negligence contributed to the accident. The State objected to such evidence on the basis of relevance, and the district court sustained the State's objection. The district court did not abuse its discretion in so ruling.

[12] Evidence is relevant when it has 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. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). If evidence fails to alter the probabilities of the existence or nonexistence of a fact in issue, the evidence is irrelevant. *Id.* The exercise of judicial discretion is implicit in determinations of relevancy, and a trial court's decision regarding it will not be reversed absent an abuse of discretion. *Id.*

The uncontradicted evidence in the present case established that Brouillette was driving in the wrong direction and that proceeding in such a manner caused the accident. Given the evidence, it was not an abuse of discretion for the district court to conclude that the proffered evidence that Reese had drugs on his person and that Barrett had drugs in his urine was not relevant. The proposed evidence does not negate evidence that Brouillette's actions caused the deaths of Barrett and Reese. The presence of drugs on Barrett and Reese could not be the sole proximate cause of the accident where the record establishes without dispute that Brouillette was driving in the wrong direction on the divided highway. See *State v. Brown*, 258 Neb. 330, 603 N.W.2d 419 (1999).

We conclude that the district court did not abuse its discretion by excluding the evidence offered by Brouillette on the basis of

relevance. We therefore reject Brouillette's fourth assignment of error.

4. Refusal of Jury Instruction Based on § 60-6,131

In his final assignment of error, Brouillette asserts that the district court erred in refusing his proposed instruction based on § 60-6,131. The statute and the proposed instruction read:

> (1) Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:
>
> (a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
>
> (b) When an obstruction exists making it necessary to drive to the left of the center of the highway, except that any person so doing shall yield the right-of-way to all vehicles traveling in the proper direction upon the unobstructed portion of the highway within such distance as to constitute an immediate hazard;
>
> (c) Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
>
> (d) Upon a roadway restricted to one-way traffic.
>
> (2) Upon all roadways, any vehicle proceeding at less than the normal speed of traffic at the time and place and under the conditions then existing shall be driven in the right-hand lane then available for traffic, or as close as practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway.
>
> (3) Upon any roadway having four or more lanes for moving traffic and providing for two-way movement of traffic, no vehicle shall be driven to the left of the centerline of the roadway except when authorized by official traffic control devices designating certain lanes to the left side of the center of the roadway for use by traffic not otherwise permitted to use such lanes or except as permitted under subdivision (1)(b) of this section. This subsection

> shall not be construed to prohibit the crossing of the centerline in making a left turn into or from an alley, private road, or driveway unless such movement is otherwise prohibited by signs.

To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction. *State v. Nesbitt*, 264 Neb. 612, 650 N.W.2d 766 (2002). Brouillette argues that an instruction based on § 60-6,131 was warranted by the evidence in this case because, he asserts, the evidence establishes that Barrett was driving in the left or westernmost lane of the northbound lanes of divided Highway 77 in violation of § 60-6,131(3). Although the evidence establishes that Barrett was driving in the left or westernmost lane of the northbound lanes, driving in such a manner is not a violation of § 60-6,131(3), and therefore the rule of the road enunciated in § 60-6,131(3) has no application to this case.

The evidence established that Highway 77 at the site of the collision was a four-lane divided highway. Section 60-6,141, rather than § 60-6,131, was applicable to the highway at the site of the accident and to the issues in the present case. Section 60-6,141(1) states, "Whenever any highway has been divided into two or more roadways by a median, a driver shall drive only upon the right-hand roadway unless directed or permitted to use another roadway by traffic control devices or competent authority." The jury was given an instruction based on § 60-6,141(1).

Because Brouillette's proposed instruction was not warranted by the evidence, the district court did not err in refusing to give the proposed instruction. We therefore reject Brouillette's final assignment of error.

VI. CONCLUSION

We conclude that the amended information in the present case was not defective in listing alternative unlawful acts to support manslaughter charges and that the district court therefore did not err in denying Brouillette's motion to quash the information. We conclude that admission of evidence of the test results of the

blood sample taken for medical purposes was harmless error. We conclude that admission of evidence of Brouillette's statements to Danburg was not error. We further conclude that the district court did not err in sustaining the State's relevance objection to Brouillette's evidence of drugs found on Barrett and Reese and that the district court did not err in refusing Brouillette's proposed instruction based on § 60-6,131. Having rejected each of Brouillette's assignments of error, we affirm.

AFFIRMED.

STEPHAN, J., concurring.

In my opinion, the results of the blood test would have been admissible under Neb. Rev. Stat. § 60-6,210(1) (Reissue 1998) if Brouillette had been tried for felony motor vehicle homicide as defined in Neb. Rev. Stat. § 28-306(3)(b) or (c) (Cum. Supp. 2000), because both of those sections require proof of the operation of a motor vehicle in violation of Neb. Rev. Stat. § 60-6,196 (Supp. 1999). However, because the State amended the charges from motor vehicle homicide to manslaughter, which does not specifically require proof of violation of § 60-6,196, I agree with the majority that the blood tests were not admissible under § 60-6,210(1).

The amendment of the charges prior to trial also affects the harmless error analysis. In *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), *disapproved on other grounds, State v. Wright*, 261 Neb. 277, 622 N.W.2d 676 (2001), this court held that where death results from the unlawful operation of a motor vehicle, a prosecutor has discretion to charge the operator with either motor vehicle homicide in violation of § 28-306 or manslaughter in violation of Neb. Rev. Stat. § 28-305 (Reissue 1995). The harmless error analysis in this case demonstrates the breadth of that discretion.

As the majority notes, there was undisputed evidence that Brouillette was proceeding south in the northbound lanes of a divided highway at the time of the fatal accident. This was a violation of the Nebraska Rules of the Road, specifically Neb. Rev. Stat. § 60-6,141(1) (Reissue 1998). In the absence of a fatality, this conduct would have constituted a "traffic infraction" punishable by a fine. Neb. Rev. Stat. §§ 60-672, 60-682, and 60-689 (Reissue 1998).

But, tragically, fatalities did result from Brouillette's traffic infraction. Had he been tried under the motor vehicle homicide statute, as originally charged, proof that he violated § 60-6,141(1) could have supported only the conviction of two Class I misdemeanors, each punishable by not more than 1 year's imprisonment, a $1,000 fine, or both. Neb. Rev. Stat. §§ 28-106 (Cum. Supp. 2000) and 28-306(1) and (2). Motor vehicle homicide is a Class I misdemeanor unless it results from reckless driving, willful reckless driving, or first-offense driving under the influence, in which case it is a Class IIIA felony punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2002); § 28-306(3)(a) and (b). If death results from a second or subsequent offense of driving under the influence, motor vehicle homicide constitutes a Class III felony punishable by 20 years' imprisonment, a $25,000 fine, or both. §§ 28-105 and 28-306(3)(c). Thus, the Legislature designed the offense of motor vehicle homicide to increase in severity from a Class I misdemeanor to a Class III felony, depending upon the seriousness of the predicate offense involving the operation of a motor vehicle. But manslaughter, a Class III felony, can be established by proof that the defendant, acting without malice, "causes the death of another unintentionally while in the commission of an unlawful act." § 28-305. Brouillette's traffic infraction, driving the wrong way on a divided highway, was unquestionably an "unlawful act," even if it resulted from an error as to the nature of the roadway, as he contended. While it would not be sufficient to support a charge of felony motor vehicle homicide, it is sufficient to support a charge of manslaughter.

This seems anomalous. If the Legislature intended to make motor vehicle homicide a felony only in the circumstance where death results from what are arguably the three most serious offenses involving the operation of a motor vehicle, why would a less serious traffic infraction resulting in death be sufficient to establish manslaughter, a felony equivalent in degree to the most serious variant of felony motor vehicle homicide? We need not and indeed cannot answer this question, because regardless of whether predicating manslaughter on a traffic infraction seems logical or just, it is permissible under current law. If the language of a statute is clear, the words of such statute are the end of any

judicial inquiry. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001). Generally, where a statute has been judicially construed and that construction has not evoked an amendment, it will be presumed that the Legislature has acquiesced in the court's determination of the Legislature's intent. *State v. Neiss*, 260 Neb. 691, 619 N.W.2d 222 (2000). In the nearly 17 years since *State v. Roth*, 222 Neb. 119, 382 N.W.2d 348 (1986), was decided, the Legislature has not amended § 28-305 to exclude traffic infractions from the universe of "unlawful acts" which can be the basis of a manslaughter conviction. Moreover, the Legislature repealed former Neb. Rev. Stat. § 39-669.20 (Reissue 1984), which this court applied in *Roth* to impose a limitation on the permissible sentence for manslaughter resulting from the operation of a motor vehicle. 1986 Neb. Laws, L.B. 153; *State v. Roth, supra.* Accordingly, the majority's harmless error analysis is a correct application of the law, in which I must concur.

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

STATE OF NEBRASKA, APPELLANT, V.
MICHAEL W. LOYD, APPELLEE.
655 N.W.2d 703

Filed January 24, 2003. No. S-02-305.

1. **Statutes.** The meaning of a statute is a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Municipal Corporations: Ordinances: Statutes.** The power of a municipality to enact and enforce any ordinance must be authorized by state statute.
4. ____: ____: ____. A city may not pass legislation which conflicts, or is inconsistent, with state law.
5. **Statutes: Ordinances.** An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa.
6. ____: ____. Where there is a direct conflict between an ordinance and a state statute, the statute is superior law.
7. ____: ____. A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist.
8. ____: ____. When an ordinance is inconsistent with statutory law, it is unenforceable.

Appeal from the District Court for Douglas County, GREGORY M. SCHATZ, Judge, on appeal thereto from the County Court for Douglas County, LYN V. WHITE, Judge. Exception overruled.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and David F. Smalheiser for appellant.

David W. Jorgensen, of Nye, Hervert, Jorgensen & Watson, P.C., for appellee.

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

CONNOLLY, J.

The State takes exception under Neb. Rev. Stat. § 29-2319(3) (Reissue 1995) to the district court's order affirming the county court's granting of a motion to quash. The county court determined that the penalty provisions of the Omaha Mun. Code, ch. 36, art. III, § 36-115 (1998), were inconsistent with the penalty provisions of Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000). We agree that the provisions are inconsistent and overrule the State's exception.

BACKGROUND

The appellee, Michael W. Loyd, was charged in county court with second-offense driving under the influence (DUI) under § 36-115 of the Omaha Municipal Code. Loyd moved to quash the complaint because § 36-115 was inconsistent with § 60-6,196. A person convicted under § 36-115 of the code and placed on probation must serve 48 hours in county jail. A person convicted under § 60-6,196, however, must pay a $500 fine and either be confined for 5 days or perform at least 240 hours of community service. The county court determined that the ordinance was not in conformity with the statute and granted the motion to quash. The district court affirmed.

ASSIGNMENT OF ERROR

The State assigns, rephrased, that the district court erred by affirming the county court's granting of the motion to quash.

STANDARD OF REVIEW

[1,2] The meaning of a statute is a question of law. *Vega v. Iowa Beef Processors*, 264 Neb. 282, 646 N.W.2d 643 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

ANALYSIS

The State contends that the city had the authority to enact an ordinance requiring a period of confinement different than the punishment enacted in § 60-6,196. The State argues that § 36-115 of the code is in conformance with § 60-6,196 because although the Legislature intended that the element of the crimes be the same, it did not require that the punishments be the same.

Under § 60-6,196, second-offense DUI is a Class W misdemeanor, which carries a maximum penalty of 90 days' imprisonment and a $500 fine and a mandatory minimum of 30 days' imprisonment and a $500 fine. Section 60-6,196(2)(b) further provides:

> If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of one year from the date of the order unless otherwise authorized by an order issued pursuant to section 60-6,211.05 and shall issue an order pursuant to section 60-6,197.01 with respect to all motor vehicles owned by such person, and such order of probation shall also include, as conditions, the payment of a five-hundred-dollar fine and either confinement in the city or county jail for five days or the imposition of not less than two hundred forty hours of community service.

Neb. Rev. Stat. § 60-6,197(8) (Cum. Supp. 2000) provides:

> Any city or village may enact ordinances in conformance with this section. Upon conviction of any person of a violation of such city or village ordinance, the provisions of this section with respect to the operator's license of such person shall be applicable the same as though it were a violation of this section.

In addition, Neb. Rev. Stat. § 14-102.01 (Reissue 1997) authorizes cities to enact ordinances for a variety of purposes that are not inconsistent with the general laws.

Under § 36-115 of the Omaha Municipal Code, a person convicted of second-offense DUI must be sentenced to 30 to 90 days in jail and pay a $500 fine. Section 36-115(b) further provides:

> If the court places such person on probation or suspends the sentence for any reason, the court shall, as one of the conditions of probation or sentence suspension, order such person not to drive any motor vehicle in the State of Nebraska for any purpose for a period of six months from the date of the order. One of the probation's conditions shall be confinement in the county jail for 48 hours.

[3-8] The power of a municipality to enact and enforce any ordinance must be authorized by state statute. *Jacobson v. Solid Waste Agency of Northwest Neb.*, 264 Neb. 961, 653 N.W.2d 482 (2002). Thus, a city may not pass legislation which conflicts, or is inconsistent, with state law. *State v. Salisbury*, 7 Neb. App. 86, 579 N.W.2d 570 (1998). An ordinance may not permit or license that which a statute forbids or prohibits, and vice versa. *Id.* Where there is a direct conflict between an ordinance and a state statute, the statute is superior law. *Jacobson, supra.* A city ordinance is inconsistent with a statute if it is contradictory in the sense that the two legislative provisions cannot coexist. *Arrow Club, Inc. v. Nebraska Liquor Control Commission*, 177 Neb. 686, 131 N.W.2d 134 (1964). When an ordinance is inconsistent with statutory law, it is unenforceable. See, *id.*; *State v. Kubik*, 159 Neb. 509, 67 N.W.2d 755 (1954).

Here, § 36-115 of the code is inconsistent with § 60-6,196 because it requires a different punishment for a defendant charged with second-offense DUI who is placed on probation. Under § 60-6,196, a defendant placed on probation must pay a $500 fine and either be confined for 5 days or serve 240 hours of community service. The defendant must also be ordered not to drive for a period of 1 year. Section 36-115 does not mandate a fine for a defendant placed on probation, but does require 48 hours of confinement. It also requires that the defendant be ordered not to drive for a period of only 6 months. Thus, each provision mandates a different sentence. When two provisions

require the trial court to impose different sentences, the provisions cannot coexist and the ordinance is unenforceable.

The State argues that the Legislature intended that the term "conformance" in § 60-6,196(7) applies only to the elements of the crime. But § 60-6,196(7) plainly refers to "this section" which encompasses all of § 60-6,196. It does not contain the limitation suggested by the State and does not give municipalities the power to enact ordinances with penalties that differ from the statute.

The State also argues that the ordinance is enforceable because it is less punitive than the statute. The question, however, is not whether one provision is more punitive than the other. Instead, we look only to whether the provisions are inconsistent. Further, whether one provision is more punitive than the other would vary based on the subjective view of any given defendant. Some people could find the prospect of any amount of jail time so distasteful that any punishment that did not include it would be less punitive. Others might view 48 hours in jail as less punitive than 240 hours of community service.

We determine that the provisions of § 60-6,196 of the Nebraska Revised Statutes and § 36-115 of the Omaha Municipal Code, as they apply to charges of second-offense DUI, are inconsistent and cannot coexist. Thus, § 36-115 of the Omaha Municipal Code is unenforceable.

EXCEPTION OVERRULED.

BRENDA L. KELLER, APPELLANT, V.
THOMAS N. TAVARONE, M.D., APPELLEE.
655 N.W.2d 899

Filed January 31, 2003. No. S-01-1052.

1. **Demurrer: Pleadings: Judicial Notice: Records.** While a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer, a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question 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 court below.

3. **Political Subdivisions Tort Claims Act.** The Political Subdivisions Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees.
4. **Political Subdivisions Tort Claims Act: Jurisdiction.** While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Political Subdivisions Tort Claims Act.
5. **Political Subdivisions Tort Claims Act: Public Purpose.** The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved, and the taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims.
6. **Political Subdivisions Tort Claims Act: Municipal Corporations: Notice.** The primary purpose of notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest.
7. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.
8. ____. Effect must be given, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided.
9. **Statutes: Legislature: Intent.** An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal meaning that would have the effect of defeating the legislative intent.

Appeal from the District Court for Cherry County: WILLIAM B. CASSEL, Judge. Affirmed.

Richard A. DeWitt and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellant.

Robert W. Wagoner for appellee.

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

PER CURIAM.

NATURE OF CASE

Appellant, Brenda L. Keller, filed a medical malpractice petition against appellee, Thomas N. Tavarone, M.D., under the Political Subdivisions Tort Claims Act (Tort Claims Act),

expressly relying on the "savings clause" of Neb. Rev. Stat. § 13-919(2) (Reissue 1997). The district court found the savings clause inapplicable and dismissed the action. We removed the appeal to our docket on our own motion pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995). As explained below, we affirm the September 4, 2001, order of the district court.

BACKGROUND

Keller originally sued Tavarone for alleged medical malpractice utilizing the provisions under the Nebraska Hospital-Medical Liability Act (NHMLA). See, Neb. Rev. Stat. ch. 44, art. 28 (Reissue 1993 & Cum. Supp. 1996); *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). This prior action shall hereinafter be referred to as the "first suit."

In the first suit, Keller filed a petition in district court on December 31, 1998. The petition alleged Tavarone had performed an abdominal hysterectomy on Keller on May 27, 1997, at Cherry County Hospital and that complications had ensued, including a fistula and an obstructed ureter. The petition waived review of the claim by a medical review panel pursuant to the NHMLA. See Neb. Rev. Stat. § 44-2840(4) (Reissue 1998). The petition did not allege compliance with the Tort Claims Act. See Neb. Rev. Stat. § 13-920(1) (Reissue 1997).

The district court dismissed the first suit on January 12, 2000. The court determined that Tavarone was an employee of a county hospital which, as a governmental entity, is exclusively subject to the provisions of the Tort Claims Act. The court further found that Keller had not complied with the claim requirements of the Tort Claims Act. This court affirmed. *Keller v. Tavarone, supra.*

Shortly thereafter, Keller submitted a written claim to the political subdivision on January 27, 2000, pursuant to Neb. Rev. Stat. § 13-905 (Reissue 1997) of the Tort Claims Act. After waiting the required 6 months, Keller withdrew the tort claim and commenced this suit on August 14, 2000, pursuant to § 13-920(2). On November 27, 2000, Keller filed an amended petition. This second action will hereinafter be referred to as the "second suit."

Keller's cause of action in the second suit expressly relies on the "savings clause" of the Tort Claims Act. See § 13-919(2). In

district court, Keller argued that § 13-919(2) of the Tort Claims Act extended the filing period in which a claim must be made under § 13-920(1). Keller alleged that the savings clause extended the filing period for 6 months from the date the first suit was dismissed. She further alleged that the filing requirements were satisfied and that her claim was timely.

Tavarone filed a demurrer. Tavarone argued that Keller had not satisfied the condition precedent of § 13-920(1) requiring a claim to be submitted to the political subdivision within 1 year after such claim accrued. Therefore, Keller's cause of action was time barred.

Neither the district court nor this court considered the applicability of the savings clause in the first suit, finding the argument premature. However, in the second suit, the district court ruled (1) that the savings clause did not apply to political subdivision employee negligence cases filed under § 13-920 and (2) that even if § 13-919(2) applies to claims filed under § 13-920, its application would not save the second suit because the time to file Keller's claim had expired. The district court reasoned that the language "otherwise expire" found in the savings clause meant that the time to make a claim under the Tort Claims Act expires 1 year after such claim accrued, or in Keller's case, on May 27, 1998. Since the first suit was filed on December 31, 1998, the court concluded that Keller's petition in the second suit was time barred. For these two reasons, the district court dismissed Keller's cause of action in the second suit.

ASSIGNMENTS OF ERROR

Keller assigns that the district court erred (1) in concluding that the savings clause found in § 13-919(2) does not apply to political subdivision employee negligence cases and (2) in the court's interpretation that even if the savings clause is applicable to political subdivision employees, its application is improper because the time to make a claim under the Tort Claims Act had already expired.

STANDARD OF REVIEW

[1] While a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it, in ruling on a demurrer,

a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated. *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001).

[2] Statutory interpretation presents a question 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 court below. *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (2002).

ANALYSIS

[3,4] The Tort Claims Act is the exclusive means by which a tort claim may be maintained against a political subdivision or its employees. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001). While not a jurisdictional prerequisite, the filing or presentment of a claim to the appropriate political subdivision is a condition precedent to commencement of a suit under the Tort Claims Act. *Id.* Section 13-920(1) provides, in relevant part, that

> [n]o suit shall be commenced against any employee of a political subdivision for money on account of damage to or loss of property or personal injury to or the death of any person caused by any negligent or wrongful act or omission of the employee while acting in the scope of his or her office or employment . . . unless a claim has been submitted in writing to the governing body of the political subdivision within one year after such claim accrued . . . .

Keller's claim for medical malpractice accrued on May 27, 1997, but Keller did not file a claim with the political subdivision until January 27, 2000. It is, therefore, undisputed that Keller did not comply with the 1-year filing deadline set forth by § 13-920(1). We stated in the first suit, *Keller v. Tavarone*, 262 Neb. at 15, 628 N.W.2d at 232, that

> the procedure the statutes required Keller to follow was, first, to file a claim with the appropriate officer of the political subdivision, pursuant to § 13-905, within 1 year of the accrual of her claim. After the claim was disposed of or withdrawn, pursuant to § 13-906, Keller would have been permitted to either submit a proposed petition to a review panel, or waive such review, pursuant to § 44-2840(3) and

(4). If she had presented the petition to a review panel, she would have had an extra 90 days, after the issuance of the opinion of the review panel, to file suit under the Tort Claims Act. See § 13-919(4). If she had waived the panel review, the action under the Tort Claims Act would have been filed directly in the district court. See, § 44-2840(4); § 13-907.

The operation of the NHMLA, however, did not excuse Keller from compliance with the requirement under the Tort Claims Act that the claim be presented to the political subdivision prior to filing suit. As Keller concedes that no claim was filed with the political subdivision prior to filing suit, her petition was properly dismissed pursuant to § 13-920(1).

Keller argues that the claim which provides the basis for the instant case was timely filed with the political subdivision pursuant to § 13-919(2), which provides, in relevant part, that

> [i]f a claim is made or filed under any other law of this state and a determination is made by a political subdivision or court that the act provides the exclusive remedy for the claim, the time to make a claim and to begin suit under the act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by the political subdivision if the time to make the claim and to begin suit under the act would otherwise expire before the end of such period.

Keller argues that her first suit, pursuant to the NHMLA, was a claim "made . . . under any other law of this state" and that she had an additional 6 months from the dismissal of the first lawsuit to file a claim with the political subdivision. Even assuming that a medical malpractice lawsuit is a claim "made . . . under any other law of this state"—a matter we need not decide—the problem with Keller's argument is that such an expansive reading of § 13-919(2) would result in the functional abrogation of §§ 13-919(1) and 13-920(1).

If Keller's argument were correct, then any potential claimant who had allowed the 1-year filing deadline of the Tort Claims Act to pass could revive that claim by filing a lawsuit in district court. When that lawsuit was dismissed, the claimant could then

file a claim with a political subdivision. Clearly, Keller's broad reading of § 13-919(2) is inconsistent with the legislative purpose expressed by the 1-year filing deadlines of §§ 13-919(1) and 13-920(1).

[5,6] The taxpaying public has an interest in seeing that prompt and thorough investigation of claims is made where a political subdivision is involved, and the taxpayers who provide the public treasury with funds have an interest in protecting that treasury from stale claims. See *Campbell v. City of Lincoln*, 195 Neb. 703, 240 N.W.2d 339 (1976). The primary purpose of notice provisions in connection with actions against political subdivisions is to afford municipal authorities prompt notice of the accident and injury in order that an investigation may be made while the occurrence is still fresh and the municipal authorities are in a position to intelligently consider the claim and to allow it if deemed just or, in the alternative, to adequately protect and defend the public interest. *Id.*

[7,8] Keller's suggested interpretation of § 13-919(2) would frustrate the purpose of the notice provisions. However, a court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *A-1 Metro Movers v. Egr*, 264 Neb. 291, 647 N.W.2d 593 (2002). Keller's reading of § 13-919(2) would also open a loophole in the notice provisions of the Tort Claims Act that would effectively extend the filing deadline for a tort claim against a political subdivision until no timely claim could be brought under *any* other state law. This would, as a practical matter, render §§ 13-919(1) and 13-920(1) meaningless. However, effect must be given, if possible, to all the several parts of a statute, and no sentence, clause, or word should be rejected as meaningless or superfluous if it can be avoided. *Omaha Pub. Power Dist. v. Nebraska Dept. of Revenue*, 248 Neb. 518, 537 N.W.2d 312 (1995).

[9] We recognize that Keller's interpretation of § 13-919(2) is not necessarily inconsistent with the statutory language. It is, however, inconsistent with the statutory purpose reflected in the notice provisions of §§ 13-919(1) and 13-920(1). An appellate court will place a sensible construction upon a statute to effectuate the object of the legislation, as opposed to a literal

meaning that would have the effect of defeating the legislative intent. *A-1 Metro Movers v. Egr, supra.* The evident purpose of the 6-month extension of the filing deadline set forth in § 13-919(2) is to provide claimants who filed timely claims, but filed those claims with the wrong tribunal or pursuant to the wrong statute, enough time to present their claims to the proper political subdivision. This requires, however, that those claimants still act promptly in order to satisfy the public purpose reflected in the notice requirements.

We conclude, therefore, that a claim "made or filed under any other law of this state," within the meaning of § 13-919(2), must still be filed within the 1-year time limit imposed by the appropriate notice provision of either § 13-919(1) or § 13-920(1). If a claimant files a claim within 1 year of the accrual of the claim, but files that claim with the wrong tribunal or pursuant to the wrong statute, then § 13-919(2) provides the claimant with an additional 6 months, from the determination that the Tort Claims Act provides the exclusive remedy, to file a claim with the appropriate political subdivision as provided in § 13-905.

In this case, it is not disputed that Keller's first lawsuit under the NHMLA was not filed within 1 year of the accrual of the claim. Therefore, Keller did not comply with the notice provision of § 13-920(1), and her subsequent claim to the political subdivision was untimely. Consequently, the district court correctly dismissed Keller's petition, and the judgment of the district court must be affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
DANIEL G. JAMES, APPELLANT.
655 N.W.2d 891

Filed January 31, 2003. No. S-02-420.

1. **Convictions: Appeal and Error.** A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

2. **Trial: Lesser-Included Offenses: Appeal and Error.** In a bench trial, the defendant must timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review.
3. **Criminal Law: Lesser-Included Offenses: Directed Verdict.** Where the State fails to demonstrate a prima facie case on the crime charged but does so on a lesser-included offense, a trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense.
4. **Lesser-Included Offenses: Jury Instructions: Notice.** A trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses.
5. **Criminal Law: Lesser-Included Offenses.** Where a crime is capable of being attempted, such crime is a lesser-included offense of the crime charged.
6. **Indictments and Informations: Lesser-Included Offenses: Notice.** The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face a lesser-included offense charge.
7. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Patrick J. Boylan, of Hascall, Jungers & Garvey, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

WRIGHT, J.

NATURE OF CASE

Daniel G. James appeals from his conviction for attempted first degree sexual assault on a child.

SCOPE OF REVIEW

[1] A trial court's findings in a criminal case have the effect of a jury verdict, and a conviction in a bench trial will be sustained if the properly admitted trial evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Abbink*, 260 Neb. 211, 616 N.W.2d 8 (2000).

FACTS

James was charged by information with first degree sexual assault on a child, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1995). The information charged that

> [d]uring the period of July 15, 2001 through August 4, 2001 . . . in Sarpy County, Nebraska, said Daniel G. James, being a person of nineteen years of age or older, did then and there subject a person of less than sixteen years of age . . . to sexual penetration, in violation of Section 28-319 (1)(c), R.R.S. Nebraska. (Class II Felony)[.]

James waived his right to a jury trial, and following a bench trial, he was found guilty of attempted first degree sexual assault on a child, a Class III felony.

The victim testified that while she was talking with James on the telephone on July 16, 2001, he said he was going to come to her house. He arrived around midnight or 12:30 a.m., and they went outside to talk.

The victim stated that at the time of the first incident, she was sitting on a cement step located near the side of her house and that she was wearing boxer shorts and a shirt, with underwear and a bra underneath. As they were talking, James asked the victim if she would have sex with him, and she refused. The victim testified that James then tried to penetrate her and that she continued to say "no." The victim said James attempted to penetrate her for approximately 5 minutes. When he was unsuccessful, James became angry and left. After he left, the victim went inside and went to bed without telling anyone about the incident.

The victim testified that on July 23, 2001, James called and asked if he could come to her house, and she told him it was too late. Nevertheless, James appeared at the victim's home with one of her friends. About 10 minutes later, James took the friend home and returned around midnight or 12:30 a.m. James and the victim then went outside to the same location they had a week earlier. The victim said James again asked her to have sex. She said that when she refused, James tried to penetrate her. She said that he was partially successful, but she did not respond, so James became angry and left. The victim said she went inside and went to bed, again without telling anyone.

On August 2, 2001, James came to the victim's house around 10 or 10:30 p.m., and they went to her sister's bedroom after the victim introduced James to her mother. The victim and James sat on the bed and watched television. After about an hour, James asked the victim to have sex with him. The victim said that James tried to penetrate her and again was only partially successful. When she did not respond, James became angry and left.

On August 4, 2001, the victim's pastor learned of the incidents and called the police, who interviewed the victim.

At trial, the victim testified that she was born on February 23, 1986; that she was a freshman in high school; that she met James through her church during the summer of 2001; and that James told her he was 20 years old. The victim admitted she originally told the police that the first two incidents occurred on the lawn rather than on the cement step outside her home. She also admitted that she had previously accused someone else of sexual assault.

Det. Ivan Crespo of the Bellevue Police Department testified that he contacted James on August 22, 2001, in the course of investigating an alleged sexual assault. Crespo said James presented a Nebraska driver's license which indicated his date of birth as October 19, 1980.

After the State rested, James moved for a directed verdict, which motion was overruled. We note that the proper motion would have been a motion to dismiss, and we treat the motion accordingly. The trial court subsequently found James guilty of attempted first degree sexual assault on a child, which it determined was a lesser-included offense of the charge set forth in the information.

James moved for a new trial, alleging that the State had failed to prove his age, which is an element of the offense of first degree sexual assault on a child. In overruling the motion, the trial court concluded there was sufficient evidence to demonstrate that James was over the age of 19 at the time of the alleged offense, as required by § 28-319(1)(c). The victim testified that James had told her he was 20, and Crespo testified that James' driver's license indicated his date of birth was October 19, 1980.

The trial court also concluded that attempted first degree sexual assault on a child is a lesser-included offense of first degree

sexual assault on a child and that the lesser charge was properly submitted for the court's consideration even in the absence of a request by James. The court noted that certain testimony and circumstances precluded a finding beyond a reasonable doubt that penetration had occurred. However, the court found that the evidence was more than sufficient to find beyond a reasonable doubt that James intended to have sex with the victim and made at least one overt act, if not more, toward that end.

James was sentenced to 2 years of intensive supervised probation, and he timely appealed.

ASSIGNMENTS OF ERROR

James makes the following assignments of error: (1) The trial court erred in finding that attempted first degree sexual assault on a child is a lesser-included offense of first degree sexual assault on a child and (2) the court erred in overruling his motion for new trial.

ANALYSIS

James was charged by information with first degree sexual assault on a child, in violation of § 28-319(1), which prohibits "sexual penetration . . . (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age." He was convicted of attempted first degree sexual assault on a child. Neb. Rev. Stat. § 28-201(1) (Cum. Supp. 2002) provides that a person is guilty of an attempt to commit a crime if he or she:

> (a) [i]ntentionally engages in conduct which would constitute the crime if the attendant circumstances were as he or she believes them to be; or
>
> (b) [i]ntentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

James asserts that the trial court erred in finding that attempted first degree sexual assault on a child is a lesser-included offense of first degree sexual assault on a child. He claims that attempted first degree sexual assault on a child is not a crime in Nebraska.

James relies upon *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002), a case in which this court denied postconviction relief. On direct appeal, the Nebraska Court of Appeals reversed

a conviction for attempted manslaughter. The Court of Appeals stated: "A person cannot perform the same act intentionally and unintentionally at the same time." *State v. George*, 3 Neb. App. 354, 358, 527 N.W.2d 638, 642 (1995). James argues that a person cannot intentionally take a substantial step toward the commission of an unintentional crime and that, therefore, attempted first degree sexual assault on a child is not a crime. We disagree.

To obtain a conviction for first degree sexual assault on a child, the State must prove only that the defendant subjected the victim to sexual penetration at a time when the defendant was over the age of 19 and the victim was under the age of 16. Pursuant to § 28-201(1)(b), a person is guilty of criminal attempt if he "[i]ntentionally engages in conduct which . . . constitutes a substantial step in a course of conduct intended to culminate in his . . . commission of the crime."

As the trial court correctly noted, a person can intentionally attempt an act that does not require criminal intent to complete. The evidence clearly shows that James demonstrated an intent to attempt to commit the crime of first degree sexual assault on a child. The victim described three occasions during which James demonstrated an intent to sexually penetrate her, and he took substantial steps to accomplish penetration. The trial court did not err in finding James guilty of attempted first degree sexual assault on a child as a lesser-included offense.

James also assigns as error that the trial court abused its discretion by not sustaining his motion for new trial. He claims that he was convicted of a crime that does not exist in Nebraska. We find this argument to be without merit. In *State v. Shockley*, 231 Neb. 247, 435 N.W.2d 903 (1989), this court affirmed a criminal conviction for attempted first degree sexual assault on a child, which is a crime in Nebraska.

James also seems to argue that the trial court, which served as the finder of fact in this case, should not have found him guilty of the lesser-included offense of attempted first degree sexual assault on a child when James did not request such a finding. This argument has no merit, but we address it because it was considered by the court in ruling on the motion for new trial.

[2] Normally, the defendant must raise the issue of lesser-included offenses at trial. In a bench trial, the defendant must

timely object to the trial court's consideration of lesser-included offenses in order to preserve that issue for appellate review. *State v. Keup, ante* p. 96, 655 N.W.2d 25 (2003). However, the defendant does not need to raise the issue in order for the trial court to consider lesser-included offenses. If the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses, the trial court may consider the lesser-included offense.

In *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988), the defendant was charged with one count of first degree assault. Following a bench trial, the court concluded that the evidence was insufficient to sustain the charge of first degree assault because reasonable minds could not conclude that there was a serious bodily injury, and it sustained the defendant's motion to dismiss the crime charged. However, the court found the defendant guilty of the lesser-included offense of attempted first degree assault.

[3] On appeal, the defendant claimed the trial court erred in considering and convicting him of attempted first degree assault as a lesser-included offense of first degree assault. This court held that where the State fails to demonstrate a prima facie case on the crime charged but does so on a lesser-included offense, the trial court in its discretion may direct a verdict on the crime charged and submit the evidence to the trier of fact for consideration on the lesser-included offense. *Id.*

[4] In *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), the defendant was charged with first degree assault. At the close of the evidence, the court, on its own motion, instructed the jury on first degree, attempted first degree, and third degree assault. The defendant objected to the instructions insofar as they submitted the lesser-included offenses of attempted first degree assault and third degree assault to the jury. We considered whether it was proper for the trial court to instruct the jury on a lesser-included offense of attempted first degree assault and third degree assault when the defendant objected to those instructions. We held that a trial court is not required to sua sponte instruct on lesser-included offenses, but the trial court may do so if the evidence adduced at trial would warrant conviction of the lesser charge and the defendant has been afforded a fair notice of those lesser-included offenses. Either the State

or the defendant may request a lesser-included offense instruction where it is supported by the pleadings and the evidence. We held it was not error for a trial court to instruct the jury, over the defendant's objection, on any lesser-included offenses supported by the evidence and the pleadings.

In determining whether under a charge of a completed offense the accused may be convicted of attempting to commit the offense charged, some states have by statute made the attempt a lesser-included offense of the completed offense. See, *People v. Shreve*, 167 A.D.2d 698, 563 N.Y.S.2d 851 (1990) (attempted first degree rape was lesser-included offense of first degree rape and could be charged as such by trial court, even if attempted rape required intent not essential for completed crime of rape); *Moore v. State*, 969 S.W.2d 4 (Tex. Crim. App. 1998); *State v. Young*, 139 Vt. 535, 433 A.2d 254 (1981); *State v. Gallegos*, 65 Wash. App. 230, 828 P.2d 37 (1992). New Jersey has held that attempt is a lesser-included offense which need not be separately charged in the indictment. See, *State v. Mann*, 244 N.J. Super. 622, 583 A.2d 372 (1990); *State v. LeFurge*, 101 N.J. 404, 502 A.2d 35 (1986). In *Crawford v. State*, 107 Nev. 345, 811 P.2d 67 (1991), the Supreme Court of Nevada held that an attempted crime was not a lesser-included offense of a completed crime, since an element of the crime of attempt is the failure to accomplish the completed crime. However, the court stated that the state may charge the defendant with a completed crime and obtain a conviction for the attempted crime, since every consummated crime is necessarily preceded by an attempt to commit that crime. Nevada's statute provided that a defendant could be found guilty of an attempt to commit the offense charged. See *id.*

In other states, courts have held that attempt is a lesser-included offense even when no statute specifically provides as such. In *Com. v. Capone*, 39 Mass. App. 606, 659 N.E.2d 1196 (1996), the defendant was indicted for statutory rape and for indecent assault and battery. At the close of the commonwealth's case, the defendant moved for a directed verdict on the statutory rape indictment on the ground that there was insufficient proof of penetration. The court initially allowed the motion in its entirety, but on reflection ordered that the case be submitted to the jury on

assault with intent to commit statutory rape. The defendant was so convicted.

On appeal, the defendant argued that it was error to instruct the jury on assault with intent to commit statutory rape, because that crime was not a lesser-included offense of statutory rape, the offense for which the defendant was indicted. The court stated that a charge of a completed crime logically includes a charge of an attempt to commit it, citing *Commonwealth v. Gosselin*, 365 Mass. 116, 309 N.E.2d 884 (1974). See, also, *Com. v. Banner*, 13 Mass. App. 1065, 1066, 434 N.E.2d 1304, 1305 (1982) ("attempt to commit a crime is a lesser included offense within the completed offense").

In *State v. Lutheran*, 76 S.D. 561, 82 N.W.2d 507 (1957), the defendant was prosecuted on an information which charged him with incest, adultery, and rape of his 9-year-old daughter. The jury convicted him of attempt to commit each of the crimes charged. The defendant claimed error in instructing the jury that it could find him guilty of attempt to commit the particular crimes charged in the information. The court stated:

> "It is a general rule that every completed crime necessarily includes an attempt to commit it, so that, under a charge of a completed offense, accused may be convicted of the lesser offense of attempting to commit the crime charged, as under statutes in terms providing for conviction of an attempt . . . ." 42 C.J.S., Indictments and Informations, § 285, p. 1305.

Lutheran, 76 S.D. at 562, 82 N.W.2d at 508.

South Dakota law permitted the jury to convict the defendant of the charge contained in the information or of an attempt to commit the offense charged. See *id.* The law also provided that " '[e]very person who attempts to commit any crime and in such attempt does any act toward the commission of such crime . . .' is punishable as therein provided." (Emphasis omitted.) *Id.* at 562-63, 82 N.W.2d at 508. The court held that such statutes did not infringe upon the constitutional right of an accused to be informed of the nature and cause of the accusation against him. See, also, *State v. Cross*, 144 Kan. 368, 59 P.2d 35 (1936) (on statutory rape charge, accused may be convicted of attempt to commit such crime); *State v. Winslow*, 30 Utah 403, 85 P. 433

(1906) (person charged with incest may properly be convicted of attempt to commit that crime).

[5] We adopt the holding of *Com. v. Capone*, 39 Mass. App. 606, 659 N.E.2d 1196 (1996), in which the court stated that a charge of a completed crime logically includes a charge of an attempt to commit it. See, also, *Commonwealth v. Gosselin, supra*. This result is consistent with our decisions in *State v. Foster*, 230 Neb. 607, 433 N.W.2d 167 (1988), and *State v. Pribil*, 224 Neb. 28, 395 N.W.2d 543 (1986), in which we considered whether it was proper to instruct on the lesser-included offenses of attempted first degree assault and third degree assault when the defendant objected to the instructions (*Pribil*) and whether the court may instruct on lesser-included offenses when the State fails to make a prima facie case for the principal crime charged (*Foster*). The test for determining whether a crime is a lesser-included offense is whether the offense in question cannot be committed without committing the lesser offense. See *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Where a crime is capable of being attempted, we hold that an attempt to commit such a crime is a lesser-included offense of the crime charged. It is not necessary to charge a criminal defendant with the lesser-included offense of which the defendant may be found guilty because by charging the greater offense, the defendant is by implication charged with the lesser offense. Every completed crime necessarily includes an attempt to commit it. See *State v. Lutheran*, 76 S.D. 561, 82 N.W.2d 507 (1957).

In the case at bar, the State sought to prove that James, who was over the age of 19 years, subjected the victim, who was under the age of 16 years, to sexual penetration. The trial court found that the act of penetration was not proved beyond a reasonable doubt. Therefore, James was not convicted of the crime charged. However, the court found that James had intentionally engaged in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in first degree sexual assault.

[6] The nature of the crime charged in the information must be such as to give the defendant notice that he or she could at the same time face a lesser-included offense charge. The nature of the crime charged was sufficient to give James notice that he

could be convicted of the crime of attempted first degree sexual assault on a child.

In this case, the trial court found that James had attempted to sexually penetrate a person who was less than 16 years of age and that James was over 19 years of age. We conclude that the court did not err in considering the evidence which would support a conviction of the lesser-included offense of attempted first degree sexual assault on a child and in finding James guilty of the lesser-included offense.

[7] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). We find no abuse of discretion in the trial court's refusal to grant a new trial.

CONCLUSION

The judgment of the trial court was correct and is therefore affirmed.

AFFIRMED.

IN RE INTEREST OF J.K., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DOUGLAS R. SWITZER AND JESSICA A. KERKHOFS, GUARDIANS AD LITEM, APPELLANTS, AND WILLIAM K. AND CONSTANCE K., ADOPTIVE PARENTS OF CHILD, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLEES.

656 N.W.2d 253

Filed January 31, 2003. No. S-02-438.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Minors: Parental Rights.** The dual purpose of proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) is to protect the welfare of the minor and to safeguard the parents' right to properly raise their child.
3. **Minors: Guardians Ad Litem: Attorneys at Law.** When an attorney is appointed under Neb. Rev. Stat. § 43-272(2) and (3) (Cum. Supp. 2002) for the juvenile in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), the attorney serves as both guardian ad litem and as counsel for the child.

4. **Juvenile Courts: Guardians Ad Litem.** A guardian ad litem determines the best interests of the juvenile and reports that determination to the court.
5. ____: ____. In proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), a guardian ad litem not only determines and reports to the court what is in the juvenile's best legal and social interests, but also advocates that position. Neb. Rev. Stat. § 43-272.01 (Reissue 1998).
6. **Juvenile Courts: Attorneys at Law: Rules of the Supreme Court.** In proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002), counsel for the juvenile is required to zealously advocate the wishes of the juvenile, as long as those wishes are within the bounds of the law. Canon 7, EC 7-1, of the Code of Professional Responsibility.
7. **Juvenile Courts: Guardians Ad Litem: Attorneys at Law.** The Nebraska Juvenile Code recognizes that generally, the role of guardian ad litem and counsel can be carried out by the same attorney. But the code requires that the roles be split when there are "special reasons in a particular case." Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).
8. **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.
9. **Juvenile Courts: Constitutional Law: Words and Phrases.** The phrase "special reasons in a particular case" as used in Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002) grants juvenile courts broad power to safeguard the interests of the juvenile and to ensure that the juvenile's statutory and constitutional rights are respected.
10. **Juvenile Courts: Minors: Right to Counsel.** The determination whether "special reasons" exist for appointing a juvenile separate counsel in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) must be based on a case-by-case basis, taking into consideration the totality of circumstances. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).
11. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings.
12. **Juvenile Courts: Guardians Ad Litem: Attorneys at Law: Legislature: Appeal and Error.** Given the broad power granted by the Legislature to juvenile courts to determine whether in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002) the guardian ad litem role and the role of counsel for the juvenile should be split, an appellate court reviews the decision to use or not to use that power de novo on the record for an abuse of discretion. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).
13. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result.
14. **Minors: Guardians Ad Litem: Attorneys at Law: Conflict of Interest.** A conflict of interest can develop between the roles of counsel for the juvenile and guardian ad litem if the juvenile expresses interests that are adverse to what the attorney considers to be in the juvenile's best interests. Usually, when an actual

conflict of interest develops between the two roles, separate counsel should be appointed for the child. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).

15. **Minors: Due Process.** The due process requirements announced in *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), apply to proceedings to determine delinquency which may result in commitment to an institution.
16. ____: ____. *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), provides the requisite due process requirements for children in proceedings under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002).
17. **Minors: Guardians Ad Litem: Attorneys at Law.** *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), does not require splitting the roles of guardian ad litem and counsel for the juvenile. Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002).

Appeal from the Separate Juvenile Court of Douglas County: ELIZABETH G. CRNKOVICH, Judge. Affirmed.

Douglas R. Switzer and Jessica A. Kerkhofs, of Nebraska Legal Services, guardians ad litem for J.K., pro se.

Marian G. Heaney, of Nebraska Legal Services, for appellants.

James S. Jansen, Douglas County Attorney, and James M. Masteller for appellee State of Nebraska.

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

CONNOLLY, J.

The separate juvenile court of Douglas County adjudicated J.K. under Neb. Rev. Stat. § 43-247(3)(a) (Cum. Supp. 2002). J.K.'s guardians ad litem argue that J.K. was entitled to separate counsel under Neb. Rev. Stat. § 43-272(3) (Cum. Supp. 2002). This section provides in part, "A guardian ad litem shall act as his or her own counsel and as counsel for the juvenile, unless there are special reasons in a particular case why the guardian ad litem or the juvenile or both should have separate counsel." We conclude that the juvenile court did not abuse its discretion in refusing to appoint separate counsel. We affirm.

I. FACTUAL BACKGROUND

In March 2002, the Douglas County Attorney filed a petition in the separate juvenile court of Douglas County, asking the court to find that J.K. was a child within the meaning of § 43-247(3)(a)

because he was without support through no fault of his parents. In the petition, the State alleged that J.K. exhibits suicidal and homicidal tendencies and that the treating psychiatrist determined that J.K. should be placed in a residential treatment center for psychiatric care.

One of J.K.'s guardians ad litem moved to have the court appoint separate legal counsel for J.K. The guardian ad litem argued that special reasons existed under § 43-272(3) requiring the appointment of separate counsel for J.K.

The court refused to appoint separate counsel. The court noted that the proceedings were brought pursuant to § 43-247(3)(a), under which the parents are charged with being unable to meet the juvenile's needs, rather than § 43-247(3)(b) or (c). The court determined that the only issue was whether J.K.'s parents could provide for his care. It held the guardian ad litem could adequately "defend any issues concerning his placement and the appropriateness of his placement and/or any care that he might require in his best interests and to promote his health and safety."

In April 2002, J.K.'s parents entered pleas of admission to the petition and the county attorney gave a factual basis for the charges. The county attorney described J.K.'s mental health history, including times when he had demonstrated suicidal or homicidal tendencies. The court also received into evidence the affidavit of J.K.'s treating psychiatrist. He recommended that J.K. be placed "in [a residential treatment center] to meet his needs, which would include a locked, structured environment, school program . . . chemical dependency treatment, and psychiatric care." The county attorney stated that the parents had tried to address the juvenile's needs at home and by treatment, but had failed. He stated they needed the court's assistance in placing J.K. into a residential, long-term treatment facility. Over one of the guardian ad litem's objection, the court accepted the plea and found the factual basis sufficient to adjudicate J.K. The guardians ad litem appealed.

II. ASSIGNMENT OF ERROR

The guardians ad litem assign that the juvenile court erred in finding that special reasons did not exist in the present case requiring separate legal counsel for the juvenile.

III. STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, on which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

IV. ANALYSIS

1. Statutory Background

[2] The State proceeded under § 43-247(3)(a), which, in part, provides that the juvenile court shall have jurisdiction of any juvenile "who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian." The dual purpose of proceedings under § 43-247(3)(a) is to protect the welfare of the minor and to safeguard the parents' right to properly raise their child. *In re Interest of Constance G.*, 247 Neb. 629, 529 N.W.2d 534 (1995).

This case requires us to consider how the interests of the juvenile are represented in § 43-247(3)(a) proceedings. The question is governed by § 43-272(2) and (3). Section 43-272(2)(e) requires that the court appoint a guardian ad litem for the juvenile "in any proceeding pursuant to the provisions of [§ 43-247(3)(a)]." Section 43-272(3) requires that the person appointed be an attorney. It also provides that "a guardian ad litem shall act as his or her own counsel and as counsel for the juvenile, unless there are special reasons in a particular case why the guardian ad litem or the juvenile or both should have separate counsel."

[3-6] The plain language of § 43-272(2) and (3) envisions a dual role for an attorney appointed under these subsections. First, the attorney serves as guardian ad litem. Generally, a guardian ad litem determines the best interests of the juvenile and reports that determination to the court. *Betz v. Betz*, 254 Neb. 341, 575 N.W.2d 406 (1998). Under the Nebraska Juvenile Code, the guardian ad litem is given somewhat broader powers; he or she not only determines and reports to the court what is in the juvenile's best legal and social interests, but also advocates that position. Neb. Rev. Stat. § 43-272.01 (Reissue 1998); *In re Interest of Rachael M. & Sherry M.*, 258 Neb. 250, 603 N.W.2d 10 (1999). Second, an attorney appointed under § 43-272(2) and

(3) serves as counsel for the juvenile. As counsel, an attorney is required to zealously advocate the wishes of the juvenile (as opposed to the best interests of the juvenile), as long as those wishes are within the bounds of the law. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983); Canon 7, EC 7-1, of the Code of Professional Responsibility.

[7] The juvenile code recognizes that generally, the roles of guardian ad litem and counsel can be carried out by the same attorney. But the code requires that the roles be split when there are "special reasons in a particular case." § 43-272(3). The guardians ad litem argue that special reasons are present and thus that the court should have appointed separate counsel for J.K.

2. Interpretation of "special reasons in a particular case"

[8] 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. *Newman v. Thomas*, 264 Neb. 801, 652 N.W.2d 565 (2002).

[9,10] Although "special reasons in a particular case" is broad, it is not vague or ambiguous. It grants juvenile courts broad power to safeguard the interests of the juvenile and to ensure that the juvenile's statutory and constitutional rights are respected. See Neb. Rev. Stat. § 43-246 (Reissue 1998) (setting out guidelines for construing the juvenile code). Thus, the determination whether "special reasons" exist must be based on a case-by-case basis, taking into consideration the totality of circumstances. We do note that in determining whether special reasons are present in a case, the juvenile courts should be particularly wary of the ethical implications that result from combining the roles of guardian ad litem and counsel for the juvenile in one person. See, Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Roles to Improve Effectiveness*, 27 Fam. L.Q. 327 (1993).

3. Standard of Review for Determining if Special Reasons Are Present

[11,12] Before we turn to the question whether special reasons exist requiring the appointment of separate counsel, we must

determine the appropriate standard of review. Generally, juvenile cases are reviewed de novo on the record, and the appellate court is required to reach a conclusion independent of the trial court's findings. *In re Interest of Anthony R. et al.*, 264 Neb. 699, 651 N.W.2d 231 (2002). We have, however, employed an abuse of discretion standard in situations when the Legislature has granted the juvenile courts broad discretion to act or not to act. See, e.g., *In re Interest of Brandy M. et al.*, 250 Neb. 510, 550 N.W.2d 17 (1996) (holding prompt adjudication determinations are reviewed de novo to determine if there has been abuse of discretion); *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990) (holding whether juvenile should be present during § 43-247(3)(a) proceedings rests in discretion of court). The Legislature has granted broad power to the juvenile courts to determine whether the guardian ad litem role and the role of counsel for the juvenile should be split. Accordingly, we review the decision whether to use that power de novo on the record for an abuse of discretion.

4. Do Special Reasons Exist?

The guardians ad litem argue that three grounds exist for concluding that special reasons exist: (1) a conflict between their roles as guardians ad litem and counsel for J.K.; (2) procedural due process required the appointment of separate counsel; and (3) the legal and social interests of J.K., as determined by the guardians ad litem, conflicted.

[13] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Gallner v. Hoffman*, 264 Neb. 995, 653 N.W.2d 838 (2002). On the record before us, the juvenile court did not abuse its discretion in refusing to find that special reasons existed requiring the appointment of separate counsel.

(a) Conflict of Interest

[14] A conflict of interest can develop between the roles of counsel for the juvenile and guardian ad litem if the juvenile expresses interests that are adverse to what the attorney considers

to be in the juvenile's best interests. See, *In re C.D.*, 27 S.W.3d 826 (Mo. App. 2000); *In re Shaffer*, 213 Mich. App. 429, 540 N.W.2d 706 (1995); *In re Interest of G.Y.*, 486 N.W.2d 288 (Iowa 1992); *In re Baby Girl Baxter*, 17 Ohio St. 3d 229, 479 N.E.2d 257 (1985); Heartz, *supra*; ABA Standards of Practice for Lawyers Representing a Child in Abuse and Neglect Cases A-2 cmt. (1996), at www.abanet.org/child/childrep.html. As counsel for the juvenile, the attorney is bound to advocate the juvenile's expressed interests; but, as guardian ad litem, the attorney is bound to present what he or she believes to be in the child's best interests. Usually, when an *actual conflict of interest* develops between the two roles, separate counsel should be appointed for the child.

The guardians ad litem argue that a conflict of interest existed between their role as guardians ad litem and their role as counsel for J.K. They claim that the court should have appointed separate counsel for J.K. The State sought to confine J.K. in a residential treatment facility. On appeal, the guardians ad litem state that they believe this confinement to be in the best interests of the juvenile. Nothing in the record suggests that J.K. ever expressed contrary wishes, and the guardians ad litem did not inform the court that a conflict existed. Rather, the guardians ad litem suggest that we should presume that J.K. had contrary wishes because the State sought to limit his liberty. A review of the record, however, shows that J.K.'s psychological problems led to a troubled homelife and that his parents sought intervention from the State. Under these circumstances, the court was under no obligation to presume that J.K. opposed being taken away from his parents and placed into a residential treatment facility. The juvenile court did not abuse its discretion in refusing to find an actual conflict between the roles of guardians ad litem and counsel for the juvenile. Accord *In re C.D., supra*.

(b) Due Process

[15] The guardians ad litem next argue that "special reasons" existed because procedural due process required that J.K. be appointed separate counsel. This argument is without merit. The guardians ad litem rely on *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967). *In re Gault*, however, applies to

"proceedings to determine *delinquency* which may result in commitment to an institution." (Emphasis supplied.) 387 U.S. at 41. While this case involves a juvenile's being committed to a locked, residential treatment center, it does not involve delinquency. Rather, it was brought under § 43-247(3)(a), and the question is whether J.K.'s parents could provide him with the psychological care he needed. See *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990).

[16,17] "This is not to say that children are without legal rights which must be protected in proceedings under § 43-247(3)(a)." *In re Interest of D.D.P.*, 235 Neb. at 868, 458 N.W.2d at 197. We have recognized that *Parham v. J. R.*, 442 U.S. 584, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979), establishes due process requirements when parents civilly commit a child. Thus, *Parham* provides the requisite due process requirements instead of *In re Gault*. See *In re Interest of D.D.P., supra*. *Parham* does not require a right to counsel, let alone splitting the roles of guardian ad litem and counsel for the juvenile.

(c) Conflict Between J.K.'s Legal and Social Interests

Section 43-272.01(2) provides a nonexhaustive list of criteria that the guardian ad litem is to consider in discharging his or her duties. Section 43-272.01(2)(b) requires the guardian ad litem to defend the juvenile's legal and social interests. The guardians ad litem argue that a conflict existed between what they considered to be J.K.'s legal interests and what they considered to be J.K.'s social interests. The guardians ad litem claim that they could not adequately defend either interest and that separate counsel should have been appointed to defend J.K.'s legal interests.

As we understand it, this argument is different from the guardians ad litem's claim that a conflict of interest existed because J.K. had expressed interests different from what the guardians ad litem thought were in J.K.'s best interests. Rather, we understand their argument to be that a conflict existed because *they had concluded* that treatment was in J.K.'s best social interests but that challenging the constitutionality of the proceedings was in J.K.'s best legal interests.

Although situations might exist when the juvenile's legal interests are so divergent with the juvenile's social interests that

one person cannot adequately represent both, this case does not present that problem. The juvenile court did not abuse its discretion. If the guardians ad litem believed that J.K. should have been committed for treatment, this would not have prevented J.K. from arguing that the State and the court were not following the requisite statutory and constitutional procedures. In fact, the record shows that the guardians ad litem did just that.

V. CONCLUSION

The juvenile court did not abuse its discretion in refusing to appoint separate counsel for J.K. Accordingly, we affirm.

AFFIRMED.

CITY OF ALLIANCE, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT, V. BOX BUTTE COUNTY BOARD OF EQUALIZATION, APPELLEE.

656 N.W.2d 439

Filed January 31, 2003. No. S-02-495.

1. **Taxation: Appeal and Error.** Questions of law arising during appellate review of Tax Equalization and Review Commission decisions are reviewed de novo on the record.
2. **Taxation: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the Tax Equalization and Review Commission.
3. **Administrative Law.** In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning.
4. **Statutes: Taxation: Proof.** Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to that exemption.

Appeal from the Nebraska Tax Equalization and Review Commission. Reversed and remanded with directions.

Leo Dobrovolny for appellant.

Karen A. Ditsch, Box Butte County Attorney, for appellee.

William G. Blake, of Pierson, Fitchett, Hunzeker, Blake & Katt, for amicus curiae League of Nebraska Municipalities.

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

STEPHAN, J.

The Box Butte County Board of Equalization (Board) denied tax-exempt status for 67 properties owned by the City of Alliance, based upon the Board's determination that the subject properties were not being used for a public purpose. The Tax Equalization and Review Commission (TERC) affirmed the Board's decisions. The city appeals.

FACTS

The pertinent facts are not disputed. Alliance is a city of the first class having those powers enumerated in Neb. Rev. Stat. § 16-101 et seq. (Reissue 1997 & Cum. Supp. 2002). Such powers include the creation by ordinance of improvement districts for the purpose of building and financing streets, sewers, and water mains within and adjoining the corporate limits of the city. §§ 16-617 and 16-667. Alliance created several improvement districts in connection with the anticipated development of five residential subdivisions within the city.

The city issued bonds to pay the cost of the improvements, as provided by §§ 16-623 and 16-670. As required by §§ 16-622 and 16-669, the city by ordinance levied special assessments against various residential lots which were specially benefited by the improvements, including the lots which are the subject of this action. When collected, special assessments constitute a sinking fund for payment of the bonds issued with respect to the improvements. §§ 16-623 and 16-670.

Because property owners did not pay the special assessments, the city made expenditures from its general fund to service the bonded indebtedness. As a result of the special assessment defaults, the city acquired title to various properties by foreclosure or conveyance in lieu of foreclosure. The city offered these properties for sale to the public at prices which did not exceed the amount of delinquent special assessments and interest for each property. The city has not leased or rented any of the properties and does not realize any revenue from them. When a property is sold, the proceeds are used to reimburse the

city's general fund for debt service expenditures pursuant to § 16-648. The city sold 14 of the properties in 1998, 1 in 1999, and 7 in 2000. The remaining 67 properties are the subject of this appeal.

On March 1, 2001, the Board determined that the subject properties were taxable because they were not being used for a public purpose or being developed for a public use. Thereafter, the city filed protests on each of the subject properties, which the Board denied. The city filed appeals with TERC. The city and the Board stipulated that the only issue before TERC was whether the properties were being utilized for a public purpose. On April 9, 2002, TERC entered an order in which it affirmed the Board's decisions. The city filed this timely appeal.

ASSIGNMENT OF ERROR

The city assigns, restated and consolidated, that TERC erred in finding that the subject properties were not being used for a public purpose and were therefore subject to taxation.

STANDARD OF REVIEW

[1] Questions of law arising during appellate review of TERC decisions are reviewed de novo on the record. *Lyman-Richey Corp. v. Cass Cty. Bd. of Equal.*, 258 Neb. 1003, 607 N.W.2d 806 (2000).

ANALYSIS

The sole issue before us is one of first impression in Nebraska: When real property is acquired by a city through enforcement of special assessment liens and is offered for sale to the public at a price which does not exceed the delinquent special assessments and accrued interest, is the real property being used "for a public purpose" and therefore exempt from real estate taxation?

[2-4] Certain propositions of law govern our determination of the issue before us. The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by TERC. *Falotico v. Grant Cty. Bd. of Equal.*, 262 Neb. 292, 631 N.W.2d 492 (2001). In the absence of anything to the contrary, language contained in a rule or regulation is to be given its plain and ordinary meaning. *Vinci v. Nebraska Dept. of Corr. Servs.*, 253 Neb. 423, 571 N.W.2d 53

(1997). Since a statute conferring an exemption from taxation is strictly construed, one claiming an exemption from taxation of the claimant or the claimant's property must establish entitlement to that exemption. *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002).

The Constitution of Nebraska provides that property of the state and its governmental subdivisions "shall be exempt from taxation to the extent such property is used by the state or governmental subdivision for public purposes authorized to the state or governmental subdivision by this Constitution or the Legislature." Neb. Const. art. VIII, § 2. The Legislature has further clarified the public purpose exemption in Neb. Rev. Stat. § 77-202(1)(a) (Cum. Supp. 2002), which states:

> (1) The following property shall be exempt from property taxes:
>
> (a) Property of the state and its governmental subdivisions to the extent used or being developed for use by the state or governmental subdivision for a public purpose. For purposes of this subdivision, public purpose means use of the property (i) *to provide public services* with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and welfare, developments by a public housing authority, parks, culture, recreation, community development, and cemetery purposes, or (ii) *to carry out the duties and responsibilities conferred by law* with or without consideration. Public purpose does not include leasing of property to a private party unless the lease of the property is at fair market value for a public purpose. Leases of property by a public housing authority to low-income individuals as a place of residence are for the authority's public purpose.

(Emphasis supplied.) The Department of Property Assessment and Taxation has also addressed the issue of exemptions and has adopted a regulation defining public purpose as

> the use of property *to provide public services* with or without cost to the recipient, including the general operation of government, public education, public safety, transportation, public works, civil and criminal justice, public health and

> welfare, developments by a public housing agency, parks, culture, recreation, community development, and cemetery purposes. Public purpose includes any use of the property *to carry out duties or responsibilities conferred by law.* Public purpose does not include the leasing of property to a private party for purposes other than a public purpose.

(Emphasis supplied.) 350 Neb. Admin. Code, ch. 15, § 002.01 (2002). Based on the preceding authorities, it is clear that in order to qualify for the public purpose exemption, the subject properties must either be used to carry out the city's "duties or responsibilities conferred by law," or to provide "public services."

As noted above, the city has statutory authority to establish improvement districts in order to build certain public improvements and a statutory obligation to levy special assessments on the properties benefited by such improvements as a means of creating a sinking fund for payment of bonds issued to finance the improvements. See §§ 16-617 to 16-619, 16-622, 16-623, 16-667, 16-669, and 16-670. When levied, the special assessments become a lien upon the properties assessed. See §§ 16-646 and 16-672.08. Such special assessment liens are inferior only to general taxes levied by the state and its political subdivisions. Neb. Rev. Stat. § 77-1917.01 (Reissue 1996). The Board contends that the city is not carrying out its "duties and responsibilities" when it forecloses on special assessment liens because no statute "require[s]" it to do so. Brief for appellee at 4.

If a landowner becomes delinquent on special assessments, a city has the power to foreclose. Neb. Rev. Stat. § 18-1216(1) (Reissue 1997) provides:

> (1) Any city of the metropolitan, primary, first, or second class or any village shall have authority to collect the special assessments which it levies and to perform all other necessary functions related thereto including foreclosure. The governing body of any city or village collecting its own special assessments shall direct that notice that special assessments are due shall be mailed or otherwise delivered to the last-known address of the person against whom such special assessments are assessed or to the lending institution or other party responsible for paying such special assessments. Failure to receive such notice shall not relieve

> the taxpayer from any liability to pay such special assessments and any interest or penalties accrued thereon.

Section § 77-1917.01 further clarifies the effect of delinquent special assessments and provides in relevant part:

> All cities . . . in Nebraska *shall* have a lien upon real estate within their boundaries for all special assessments due thereon to the municipal corporation or district, which lien shall be inferior only to general taxes levied by the state and its political subdivisions. When such special assessments have become delinquent . . . the municipal corporation or district involved *may* itself as party plaintiff proceed in the district court of the county in which the real estate is situated to foreclose, in its own name, the lien for such delinquent special assessments in the same manner and with like effect as in the foreclosure of a real estate mortgage . . . .

(Emphasis supplied.) It is true that § 77-1917.01 does not mandate that a city use the authority it has been granted by § 18-1216 to foreclose on properties with delinquent special assessments. However, in the absence of voluntary payment, foreclosure and resale of the property is the sole means by which a city may protect its lien and ultimately recover some or all of the special assessments it is due.

The record reflects that the city has acquired and offers the subject properties for sale for the sole purpose of realizing the value of the city's special assessment liens so as to reimburse its general fund for payments on its bonded indebtedness. As such, the city is prudently exercising its legal authority to defray the cost of public improvements from a revenue source legally designated for that purpose. Based on the undisputed facts, we conclude that the city acquired and is holding the subject properties for resale in conjunction with its municipal duties and responsibilities. The plain language of § 77-202(1)(a)(ii) provides that property which is used "to carry out the duties and responsibilities conferred by law" is held for a public purpose and is not subject to taxation.

Our decision is based on undisputed facts presented by the record and the plain language of our constitution and statutes. Cases from other jurisdictions also lend support to our conclusion

that property acquired in the enforcement of tax liens and held solely for purposes of recovering those taxes is held for a public purpose. For example, in *Pulaski v. Carriage Creek Property*, 319 Ark. 12, 888 S.W.2d 652 (1994), a governmental improvement district acquired property as the result of foreclosure for failure to pay improvement assessments. The district requested that the county assessor remove the property from the tax rolls until it could be sold. The county assessor refused, claiming that the property was not being used exclusively for a public purpose as required for the exemption. The Arkansas Supreme Court, in deciding whether the property was held for a public purpose, relied on an early Arkansas case in which it had stated:

> "There is a material difference between the use of property exclusively for public purposes and renting it out and then applying the proceeds arising therefrom to the public use. The property under our Constitution must be actually occupied or made use of for a public purpose and our court has recognized the difference between the actual use of the property and the use of the income."
>
> . . . "The levee district only held the lands that it acquired at levee tax sale until it was practical to dispose of them again. They were not held for any purpose of gain or as income producing property. When sold, the proceeds took the place of the levee taxes, for the enforcement of which and the expenses incident thereto, they were sold, and in this way we think the lands were directly and immediately used exclusively for public purposes within the meaning of the Constitution, and were not subject to taxation."

Id. at 15, 888 S.W.2d at 654, quoting *Robinson v. Indiana & Ark. Lbr. & Mfg. Co.*, 128 Ark. 550, 194 S.W. 870 (1917). In finding the property exempt from taxation, the court reasoned that the district in *Pulaski*, like the levee district in *Robinson*, was simply holding the property " 'in its governmental capacity pending sale of the [property] to recover delinquent taxes and penalties.' " *Pulaski*, 319 Ark. at 15, 888 S.W.2d at 654.

Other courts have reached similar conclusions under analogous factual circumstances. See, e.g., *State of Texas v. City of San Antonio*, 147 Tex. 1, 209 S.W.2d 756 (1948) (where city owns and holds property solely for purpose of collecting taxes

thereon until it can be resold, city owns and holds property for public purpose); *City of Austin v. Sheppard, Comptroller*, 144 Tex. 291, 190 S.W.2d 486 (1945) (property acquired by city under tax foreclosure proceedings is used solely for public purpose when it is not rented and city's sole intention is to sell property and obtain tax money). See, also, 71 Am. Jur. 2d *State and Local Taxation* § 277 (2001). As in these cases, the City of Alliance holds the subject property in a governmental capacity for the sole purpose of realizing the revenue attributable to its special assessment liens.

In support of its position that the properties are not exempt, the Board relies upon *Sun 'N Lake of Sebring Dist. v. McIntyre*, 800 So. 2d 715 (Fla. App. 2001). We find that case to be distinguishable in that the taxing entity entered into an agreement with private entities, including developers and bondholders, to jointly market property which was subject to delinquent assessments in a manner which would confer benefits upon the private enterprises. Here, the City of Alliance has acted independently in its governmental capacity to acquire and resell the property for the sole purpose of protecting its liens and realizing the proceeds of lawful assessments.

CONCLUSION

Based on the foregoing analysis, we conclude that the subject properties are used by the city exclusively for a public purpose and are therefore exempt from taxation pursuant to § 77-202(1)(a). We therefore reverse the TERC order and remand the cause to TERC with directions to instruct the Board to grant the requested exemptions on each of the subject properties.

REVERSED AND REMANDED WITH DIRECTIONS.

GALAXY TELECOM, L.L.C., APPELLANT, V.
J.P. THEISEN & SONS, INC., A NEBRASKA
CORPORATION, APPELLEE.
656 N.W.2d 444

Filed February 7, 2003. No. S-01-1306.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.

Appeal from the District Court for Otoe County: RANDALL L. REHMEIER, Judge. Reversed and remanded for further proceedings.

Gary J. Nedved and Joel D. Nelson, of Keating, O'Gara, Davis & Nedved, P.C., L.L.O., for appellant.

Larry E. Welch, Jr., of Welch Law Firm, P.C., for appellee.

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

STEPHAN, J.

Galaxy Telecom, L.L.C. (Galaxy), appeals from an order of the district court for Otoe County dismissing its action for damages against J.P. Theisen & Sons, Inc. (Theisen). Galaxy sought recovery for damage caused by Theisen to an underground fiber-optic cable, based upon alternate theories of strict liability under the Nebraska One-Call Notification System Act (Act), Neb. Rev. Stat. §§ 76-2301 to 76-2330 (Reissue 1996), and negligence. We conclude as a matter of law that Galaxy is entitled to recover under its statutory strict liability claim.

BACKGROUND

Galaxy provides distance learning services to schools throughout southeastern Nebraska utilizing a fiber-optic cable network. Theisen is a construction contractor specializing in highway grading work. Approximately 95 percent of Theisen's business involves highway projects of the Nebraska Department of Roads.

The Act was enacted in Nebraska in 1994. 1994 Neb. Laws, L.B. 421. The legislative intent as expressly stated in the Act was

> to establish a means by which excavators may notify operators of underground facilities in an excavation area so that operators have the opportunity to identify and locate the underground facilities prior to excavation and so that the excavators may then observe proper precautions to safeguard the underground facilities from damage.

§ 76-2302(1). The purpose of the Act is "to aid the public by preventing injury to persons and damage to property and the interruption of utility services resulting from accidents caused by damage to underground facilities." § 76-2302(2).

The Act provides that "[o]perators of underground facilities shall become members of and participate in the statewide one-call notification center." § 76-2318. The term "underground facility" as used in the Act includes buried fiber-optic cables. § 76-2317. The statewide one-call notification center established by the Act is governed by a board of directors which is responsible for selecting a vendor to "provide the notification service," establish cost-sharing procedures among members, and "do all other things necessary to implement the purpose of the center." § 76-2319. At all times relevant to this action, Diggers Hotline of Nebraska (Diggers Hotline) was the vendor selected to perform these tasks.

The Act requires operators of underground facilities to provide information to the center concerning the location of such facilities. § 76-2320. At the time of the events which are the subject of this action, § 76-2321 provided:

> (1) A person shall not commence any excavation without first giving notice to every operator. An excavator's notice to the center shall be deemed notice to all operators. An excavator's notice to operators shall be ineffective for purposes of this subsection unless given to the center. Notice to the center shall be given at least two full business days, but no more than ten business days, before commencing the excavation, except notice may be given more than ten business days in advance when the excavation is a road construction, widening, repair, or grading project provided for in [Neb. Rev. Stat. §] 86-334

> [(Reissue 1999)]. An excavator may commence work before the elapse of two full business days when (a) notice to the center has been given as provided by this subsection and (b) all the affected operators have notified the excavator that the location[s] of all the affected operator's underground facilities have been marked or that the operators have no underground facilities in the location of the proposed excavation.
>
> (2) The notice required pursuant to subsection (1) of this section shall include (a) the name and telephone number of the person making the notification, (b) the name, address, and telephone number of the excavator, (c) the location of the area of the proposed excavation, including the range, township, section, and quarter section, unless the area is within the corporate limits of a city or village, in which case the location may be by street address, (d) the date and time excavation is scheduled to commence, (e) the depth of excavation, (f) the type and extent of excavation being planned, including whether the excavation involves tunneling or horizontal boring, and (g) whether the use of explosives is anticipated.

The Act further provides that upon receipt of such notice from excavators, "[t]he center shall inform the excavator of all operators to whom such notice will be transmitted and shall promptly transmit such notice to every operator having an underground facility in the area of intended excavation." § 76-2322.

The Act requires that operators receiving notice from the center of a planned excavation "shall advise the excavator of the approximate location of underground facilities in the area of the proposed excavation by marking or identifying the location of the underground facilities with stakes, flags, paint, or any other clearly identifiable marking or reference point." § 76-2323(1). The Act further specifies that marking or identification of underground facilities

> shall be done in a manner that will last for a minimum of five business days on any nonpermanent surface and a minimum of ten business days on any permanent surface. If the excavation will continue for longer than five business days, the operator shall remark or reidentify the location of the

> underground facility upon the request of the excavator. The request for remarking or reidentification shall be made through the center.

§ 76-2323(2).

In May 1997, Theisen began work on a project for the Nebraska Department of Roads which involved grading a 6-mile segment of Nebraska Highway 2 being widened between Syracuse and Unadilla, Nebraska. At the beginning of this project, Theisen filed "locate requests" with Diggers Hotline for the six quarter sections of land involved in the project. The "contractor work date" listed on all six locate request forms was May 6, 1997.

After Theisen filed its locate requests, Diggers Hotline contacted all operators having underground facilities in the six quarter sections designated by Theisen. Galaxy received notice with respect to its fiber-optic cable located in one of these quarter sections, and it marked the location of that cable. At that time, Galaxy had no cables in the other five quarter sections.

Approximately 1 year later, in the spring of 1998, Galaxy installed a new underground fiber-optic cable in one of the other quarter sections along Highway 2 between Syracuse and Unadilla which had been designated by Theisen in the locate requests submitted to Diggers Hotline on May 2, 1997. In July 1998, Galaxy notified Diggers Hotline of the existence and location of this new cable. Theisen did not contact Diggers Hotline at any time after May 2, 1997. On April 7, 1999, while performing excavation work in connection with the ongoing highway widening project, Theisen struck and damaged the cable which Galaxy had installed in 1998.

Galaxy filed this action for damages, alleging alternate theories of strict liability under the Act and negligence. Both parties filed motions for partial summary judgment as to the statutory strict liability claim. The district court granted partial summary judgment in favor of Theisen, concluding as a matter of law that Theisen was not strictly liable under the Act. After a subsequent bench trial on the issue of liability under Galaxy's negligence theory, the district court found in favor of Theisen and dismissed Galaxy's petition. Galaxy filed this timely appeal.

ASSIGNMENTS OF ERROR

Galaxy assigns, restated, that the trial court erred (1) in concluding that Theisen was not strictly liable as a matter of law under the Act and (2) in finding that Theisen was not liable under a negligence theory.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002); *Volquardson v. Hartford Ins. Co.*, 264 Neb. 337, 647 N.W.2d 599 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp., supra*; *Luethke v. Suhr*, 264 Neb. 505, 650 N.W.2d 220 (2002).

ANALYSIS

In its first assignment of error, Galaxy contends that the trial court erred as a matter of law in dismissing its strict liability claim. Galaxy argues that Theisen is strictly liable under § 76-2324 because Theisen failed to give notice of the 1999 excavation and, alternatively, that Theisen is strictly liable even if it gave notice of the 1999 excavation because Galaxy fully complied with the provisions of the Act. Pursuant to § 76-2324, which states in part:

> An excavator who fails to give notice of an excavation pursuant to section 76-2321 and who damages an underground facility by such excavation shall be strictly liable to the operator of the underground facility for the cost of all repairs to the underground facility. An excavator who gives the notice and who damages an underground facility shall be liable to the operator for the cost of all repairs to the underground facility unless the damage to the underground facility was due to the operator's failure to comply with section 76-2323.

According to the first sentence of this statute, the threshold question is whether Theisen gave proper notice under § 76-2321 prior to the excavation that damaged Galaxy's cable. At the time of the excavation, the notice requirement was as follows:

> Notice to the center shall be given at least two full business days, but no more than ten business days, before

> commencing the excavation, except notice may be given more than ten business days in advance when the excavation is a road construction, widening, repair, or grading project provided for in section 86-334.

§ 76-2321(1). We note that effective January 1, 2003, Neb. Rev. Stat. § 86-334 (Reissue 1999) was recodified as Neb. Rev. Stat. § 86-708 (Cum. Supp. 2002) and that the reference to that statute in § 76-2321 was amended accordingly. 2002 Neb. Laws, L.B. 1105, §§ 413 and 496. Because the operative facts in this case occurred prior to the recodification, we refer to the statutes as codified prior thereto.

It is undisputed that the only notice given by Theisen to Diggers Hotline occurred in May 1997, more than 10 business days before Theisen commenced the April 1999 excavation during which it struck and damaged Galaxy's fiber-optic cable. Therefore, unless the notice exception in § 76-2321(1) applies, Theisen failed to give proper notice under the Act and is strictly liable to Galaxy for the cost of repairs to the damaged cable.

The language of the exception in § 76-2321(1) provides that notice may be given more than 10 days in advance "when the excavation is a road construction, widening, repair, or grading project provided for in section 86-334." The district court interpreted this exception to apply to all road construction projects. So construed, the exception would apply when the excavation is for "road construction," "widening," "repair," or when the excavation is a "grading project provided for in section 86-334."

[2] We disagree with this interpretation. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *A-1 Metro Movers v. Egr*, 264 Neb. 291, 647 N.W.2d 593 (2002); *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). The district court's expansive construction of the notice exception would, to a large degree, negate the purpose of the Act. We think it is significant that the phrase "road construction, widening, repair, or grading project" used in § 76-2321(1) corresponds to language in § 86-334, which provides:

> Whenever any county or township *road construction, widening, repair, or grading project* requires, or can reasonably

> be expected to require, the performance of any work within six feet of any telephone, electric transmission, or electric distribution line or its poles or anchors, notice to the owner of such line, poles, or anchors shall be given by the respective county or township officers in charge of such projects. Such notice shall be given at least thirty days prior to the start of any work when, because of *road construction, widening, repair, or grading*, or for any other reason, it is necessary to relocate such line or any of its poles or anchors.

(Emphasis supplied.) Because the exception to the notice requirement in § 76-2321(1) mirrors the language used to define the scope of § 86-334, we conclude that the exception is intended to apply only with respect to those projects falling within that scope.

The remaining question, then, is whether the road construction project on which Theisen was working at the time it cut Galaxy's fiber-optic cable falls within § 86-334. The plain language of that statute provides that it is applicable to road construction, widening, repair, or grading projects, undertaken by counties and townships, which require work within 6 feet of any telephone, electric transmission, or electric distribution lines and related structures. The statute makes no reference to similar work on state highway projects; nor does it include any reference to fiber-optic cable. Because Theisen was working on a state highway road construction project at the time it struck and damaged Galaxy's fiber-optic cable, which fact is undisputed, the § 86-334 exception to the notice requirement in § 76-2321(1) is inapplicable. The district court erred as a matter of law in determining that Theisen's failure to provide notice within 10 days prior to the excavation fell within the exception set forth in § 76-2321(1).

Because it did not give proper and timely notice under the Act, Theisen is strictly liable for the cost of all repairs to Galaxy's fiber-optic cable under § 76-2324. The district court therefore erred as a matter of law in failing to grant Galaxy's motion for partial summary judgment on its strict liability claim. This error necessitates a reversal and remand for a determination of damages, and because Galaxy sought the same damages under each of its alternate theories of recovery, we need not reach Galaxy's assignment of error relating to its negligence claim.

CONCLUSION

The notice given to Diggers Hotline by Theisen was given more than 10 days prior to the commencement of the excavation that resulted in damage to Galaxy, and the notice exception in § 76-2321 does not apply to the undisputed facts of this case. The judgment of the district court is reversed, and the cause is remanded for further proceedings to determine the amount of damages which Galaxy is entitled to recover for the cost of repairing the cable damaged by Theisen.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

SHIRLEY FINCH, APPELLANT, V. FARMERS INSURANCE EXCHANGE, AN INTERINSURANCE EXCHANGE, APPELLANT, AND PAFCO GENERAL INSURANCE COMPANY, APPELLEE.

656 N.W.2d 262

Filed February 7, 2003. No. S-01-1336.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In 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: 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 that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Insurance: Contracts.** An insurance policy is a contract.
5. **Insurance: Contracts: Intent.** An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
6. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

7. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
8. ____: ____. Unless the facts dictate otherwise, the declarations page is part of the insurance policy and is incorporated by reference into the policy.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed.

Daniel P. Chesire and Raymond E. Walden, of Lamson, Dugan & Murray, L.L.P., for appellants.

Larry E. Welch, Jr., of Welch Law Firm, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Shirley Finch brought this declaratory judgment action in Douglas County District Court against Farmers Insurance Exchange (Farmers) and PAFCO General Insurance Company (PAFCO). In a separate action, Finch had been named as a defendant in a lawsuit filed by Florence Sherman, who claimed she suffered damages as a result of a June 11, 1998, automobile accident involving Sherman and Finch. At the time of the accident, Finch was driving a vehicle owned by Jeffrey Willis and insured by PAFCO under a policy covering the period March 27 to September 27, 1998 (the March 27 policy). Also at the time of the accident, Finch owned a vehicle which was insured under an automobile insurance policy issued by Farmers. In the declaratory judgment action, Finch sought a declaration as to which liability insurance policy, if any, provided coverage with respect to the June 11 accident and had a duty to defend Finch in the Sherman litigation.

PAFCO and Finch filed motions for summary judgment. The district court determined that the March 27 policy excluded Finch as a driver and that, therefore, the March 27 policy did not provide coverage relative to the accident. The district court further determined that Finch's Farmers policy covered the accident. Based on these determinations, the district court granted

PAFCO's motion for summary judgment against Finch, denied Finch's motion for summary judgment against PAFCO, and granted Finch's motion for summary judgment against Farmers. Finch's declaratory judgment action against PAFCO was dismissed, and judgment entered in conformity with the determinations of the district court. Finch and Farmers appeal the district court's order sustaining PAFCO's motion for summary judgment and overruling Finch's motion for summary judgment against PAFCO. We affirm.

STATEMENT OF FACTS

On June 11, 1998, Finch was involved in an automobile accident with Sherman in Omaha, Nebraska. At the time of the accident, Finch was driving a 1986 Jeep Wagoneer owned by Willis. Willis and Finch had been residing together for approximately 19 years, and Finch was driving the Wagoneer with Willis' permission. On June 11, Finch's car was in the shop for repairs.

At the time of the accident, the Wagoneer was a covered vehicle under an automobile liability insurance policy issued by PAFCO to Willis. On November 21, 1997, Willis had first applied for PAFCO liability insurance on a 1980 Buick which he owned. According to the evidence, Willis was told by the insurance agent who was taking his application that all members of the household had to be listed as drivers under the policy or be excluded. In this connection, Willis initialed the following statement in the application: "I understand that failure to disclose all operators in household will jeopardize my coverage." Willis requested that Finch be excluded from coverage under the policy. Willis signed the application form and separately executed the "Driver Exclusion" portion of the application that provided as follows: "I understand that this policy will not provide coverage when any vehicle is driven by the following person(s): Shirley Finch." According to Willis' testimony, he knew Finch was excluded from coverage initially and under the March 27 policy.

PAFCO issued a liability insurance policy covering Willis' 1980 Buick effective November 21, 1997. The policy's declarations page denominated the insurance as a "New Policy" and stated that "[t]his declarations page with policy provisions and endorsements, if any, completes the . . . policy." Under the section

of the declarations page labeled "Policy Forms and Endorsements," Finch was identified as an excluded driver, with the language "EXCLD-SHIRLEY FINCH."

After the policy was issued, Willis failed to pay his premium when due, and coverage was canceled. On February 1, 1998, at Willis' request and following the payment of his premium, the policy was "rewritten." A new declarations page was issued setting forth identical insurance coverage as the original policy and again stating that the declarations page with policy provisions and endorsements constituted the policy. Under the section of the declarations page labeled "Policy Forms and Endorsements," the rewritten policy identified Finch as an excluded driver.

Willis again failed to pay his insurance premium when due, and coverage was canceled. On or about March 27, 1998, the policy was again rewritten. At this time, Willis added the Wagoneer as an additional covered vehicle under the policy. The rewritten policy listing both the Buick and Wagoneer is the March 27 policy, effective on that date. Other than the addition of the Wagoneer and the resulting increased insurance premium, the insurance coverage was identical to the previously-issued policies. Specifically, the March 27 policy's declarations page identified Finch as an excluded driver and stated that "[t]his declarations page with policy provisions and endorsements, if any, completes the . . . policy." On June 11, 1998, while driving the Wagoneer, Finch was involved in an automobile accident with Sherman. There is no dispute among the parties to the present appeal that the Wagoneer was a covered vehicle under the March 27 policy or that the March 27 policy was the PAFCO policy then in effect at the time of the accident.

In August 1999, Sherman filed a lawsuit against Finch, alleging negligence and seeking damages as a result of the automobile accident. Thereafter, Finch filed this declaratory judgment action. In her amended petition filed on January 12, 2001, against PAFCO and Farmers, Finch sought a judicial determination as to which insurance policy provided coverage and which company had an obligation to defend Finch in the lawsuit brought by Sherman.

PAFCO filed its answer on February 15, 2001, and denied coverage, claiming Finch was an excluded driver under the March 27

policy. In its answer to the amended petition, Farmers denied coverage for reasons that are not relevant to the pending appeal.

Finch moved for summary judgment against both PAFCO and Farmers. PAFCO filed a motion for summary judgment against Finch. An evidentiary hearing on the motions for summary judgment was held on September 4, 2001, and continued on September 27. A total of 13 exhibits were admitted into evidence.

In a memorandum and order filed November 6, 2001, the district court determined that Finch was an excluded driver under the March 27 policy, granted PAFCO's motion for summary judgment against Finch, overruled Finch's motion for summary judgment against PAFCO, and granted Finch's summary judgment motion against Farmers. The district court concluded that Finch's accident with Sherman was covered under the Farmers insurance policy.

Finch appeals the district court's order sustaining PAFCO's motion for summary judgment and overruling her motion for summary judgment against PAFCO. Farmers joins Finch's appeal. Farmers has not appealed the district court's order granting Finch's motion for summary judgment against Farmers.

ASSIGNMENT OF ERROR

On appeal, Finch and Farmers assert three assignments of error which can be restated as one. Finch and Farmers claim the district court erred in determining that Finch was an excluded driver under the March 27 policy and entering summary judgment in PAFCO's favor.

STANDARDS OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002). See, also, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). 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. *Egan v. Stoler, ante* p. 1, 653 N.W.2d 855 (2002).

[3] 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 that is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Hogan v. Garden County*, 264 Neb. 115, 646 N.W.2d 257 (2002).

The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

ANALYSIS

The issue before this court is the propriety of the entry of summary judgment in favor of PAFCO and against Finch based on the district court's determination that Finch was an excluded driver under the March 27 policy. On appeal, Finch and Farmers claim that Finch was not an excluded driver under the March 27 policy, and in this regard, they note that Willis did not execute a new application, including a new driver exclusion provision, in connection with the March 27 policy. Finch and Farmers contend that the language of the March 27 policy is ambiguous. We reject the arguments of Finch and Farmers.

[4-7] An insurance policy is a contract. *American Fam. Mut. Ins. Co., supra*; *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *American Fam. Mut. Ins. Co., supra*; *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand

them. *American Fam. Mut. Ins. Co., supra*; *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *American Fam. Mut. Ins. Co., supra*; *Tighe v. Combined Ins. Co. of America, supra*.

In the instant case, there is no dispute that Willis was insured by PAFCO on June 11, 1998, that the PAFCO policy in effect on that day was the March 27 policy, and that the Wagoneer was a covered vehicle under that policy. The issue in this case involves the claim by Finch and Farmers that because Willis did not execute a new application form including a driver exclusion provision in connection with the March 27 policy, the policy is ambiguous. This claim by Finch and Farmers is incorrect as a matter of law.

[8] The record contains the documents which taken together compose the March 27 policy, and the policy thus constituted unambiguously provides that Finch is excluded. The declarations page states that "[t]his declarations page with policy provisions and endorsements, if any, completes the . . . policy." It has been held, and we agree, that unless the facts dictate otherwise, the declarations page is part of the insurance policy and is incorporated by reference into the policy. *Ruiz v. State Wide Insulation and Const.*, 269 A.D.2d 518, 703 N.Y.S.2d 257 (2000). See, also, 2 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 21:21 at 21-42 (1997) ("[e]ndorsements, riders, marginal references, and other similar writings are a part of the contract of insurance and are to be read and construed with the proper policy").

In this case, the declarations page contains a section entitled "Policy Forms and Endorsements," below which are listed the following: "2000004," "NE1," "A1091," "EXCLD-SHIRLEY FINCH." Referring to the expression "EXCLD-SHIRLEY FINCH," it is clear that this phrase on the declarations page signifies that Finch is an excluded driver. It is also clear that this declarations page term, along with endorsements and policy provisions, "completes . . . the policy." Thus the term excluding Finch contained in the declarations page is a provision of the

policy, and, contrary to the assertion of Finch and Farmers, the effectiveness of this provision is not conditioned upon the execution of a new application form including a driver exclusion provision. For the sake of completeness, we note that "2000004" refers to a multipage booklet, "NE1" refers to the "Nebraska Endorsement," and "A1091" refers to "Underinsured Motorists Coverage." "NE1" and "A1091" are attached to the booklet. By its express and plain terms, the insurance contract which was in effect at the time of the accident was a contract made up of the declarations page, the policy booklet, and the endorsement forms, and the declarations page specifically excluded Finch. We conclude as a matter of law that the March 27 policy with PAFCO was unambiguous and excluded Finch from coverage. See, *American Fam. Mut. Ins. Co. v. Hadley*, 264 Neb. 435, 648 N.W.2d 769 (2002); *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Cum. Supp. 2002). See, also, *Soukop v. ConAgra, Inc.*, 264 Neb. 1015, 653 N.W.2d 655 (2002). We conclude that there is no genuine issue as to any material fact and that PAFCO was entitled to summary judgment as a matter of law. Accordingly, there is no merit to Finch and Farmers' appeal, and we affirm the district court's order which granted PAFCO's motion for summary judgment on the ground that Finch was an excluded driver under the March 27 policy and denied Finch's motion for summary judgment.

CONCLUSION

The declarations page which forms a part of the March 27 policy excludes Finch from coverage under the policy as a matter of law. For the reasons stated herein, we affirm the district court's decision granting PAFCO's motion for summary judgment against Finch and denying Finch's motion for summary judgment against PAFCO.

AFFIRMED.

DAVID L. FORD, APPELLANT, V. THE ESTATE OF MARK B. CLINTON, DECEASED, APPELLEE.

656 N.W.2d 606

Filed February 14, 2003. No. S-01-1082.

1. **Trial: Evidence: Appeal and Error.** The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion.
2. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion.
3. **Judgments: Words and Phrases.** An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence.
4. **Trial: Evidence: Testimony: Proof.** Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial.
5. ____: ____: ____: ____. Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice.
6. **Trial: Evidence.** Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly.
7. ____: ____. It is not essential that conditions existing at the time of an illustrative experiment be identical with those existing at the time of the occurrence, but they should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. The lack of similarity regarding nonessential factors then goes to the weight of the evidence rather than to its admissibility.
8. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
9. **Trial: Evidence: Appeal and Error.** One may not, on appeal, assert a different ground for excluding evidence than was urged in the objection made to the trial court.
10. **Trial: Appeal and Error.** Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review.
11. **Trial: Evidence.** An objection on the basis of insufficient foundation is a general objection.
12. **Trial: Evidence: Appeal and Error.** If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Affirmed.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellant.

Leland K. Kovarik, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee.

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

GERRARD, J.

I. NATURE OF CASE

David L. Ford, the plaintiff, was working on a broken water main when he was hit by a truck driven by the defendant's decedent, Mark B. Clinton. The primary issue in this appeal is the admissibility of accident reconstruction photographs taken by Randy Westfall, who testified for the defense as an accident reconstruction expert.

II. BACKGROUND

1. FACTUAL AND PROCEDURAL

Ford, an employee of the city of Kimball, Nebraska, was struck by Clinton's truck and injured while working on a water main at approximately 4 a.m. on August 7, 1997. Ford and his coworkers were working to repair a leaking water main on Third Street in Kimball. Third Street is a three-lane street at the point of the accident: one lane for eastbound traffic, one lane for westbound traffic, and a center turn lane. Ford had parked his vehicle, a pickup truck belonging to the city of Kimball, facing west in the eastbound lane. All the lights on the vehicle were on: the headlights, hazard lights, and flashing strobe light. No other barricades or signs were placed on the street, and Ford was not wearing reflective clothing. Clinton's truck approached the scene traveling eastbound, and Clinton attempted to pass Ford's truck by driving on the side of the road to the right. Ford, who was working in the road near the front of his truck, was struck and injured by Clinton's truck. It should be noted that before Ford filed suit, Clinton was murdered, see *State v. Redmond*, 262 Neb. 411, 631 N.W.2d 501 (2001), and did not testify by deposition or at trial.

Westfall testified for the defense as an accident reconstruction expert. Westfall had received a management degree from Bellevue

University, was a certified Iowa police officer, and had over 1,000 hours of accident-related training, including training and certification as an accident reconstructionist. Westfall testified, generally, that he attempted to re-create the scene of the accident by placing a pickup truck similar to Ford's at the site of the accident. The photographs at issue were taken from a camera mounted in another pickup truck, representing Clinton's vehicle, that approached the scene and stopped at various distances for photographs to be taken. Westfall testified that an external battery was connected to the truck used to represent Clinton's vehicle, so that the truck's headlights could be left on, but the engine turned off, while photographs were taken from the truck.

Westfall testified that at the time of the reconstruction, he did not know whether Ford's truck had been equipped with a flashing strobe light or simply an amber rotating beacon, which Westfall conceded would not be as bright. The truck used for the reconstruction was equipped with an amber rotating beacon and not the brighter strobe light with which Ford's truck had been equipped. Westfall testified, however, that for the purpose of evaluating whether Ford had been visible to oncoming drivers, the presence of a beacon as opposed to a strobe light was not important. The district court, in overruling Ford's objections to Westfall's testimony, noted that the issue was not the visibility of the pickup truck, which Clinton obviously saw or he would not have driven around it, but, rather, whether Clinton should have seen Ford working by the side of the road.

Westfall also testified regarding the photographs he took of the site of the reconstruction. Westfall testified, generally, that he took a series of photographs from different positions and using different variables, that he developed the photographs in different ways, and that he then selected the photographs that, to his recollection, best represented what he had seen at the site of the reconstruction. Westfall testified that each of the photographs admitted into evidence represented what Westfall had seen at the site of the reconstruction. The district court overruled Ford's objection to the photographs and instructed the jury that the photographs were admitted for the limited purpose of demonstrating what Westfall saw on the night of his reconstruction. Ford did not object at trial to the limiting instruction.

The members of the repair crew, who were witnesses from the accident scene, testified that as part of their work, they had opened a fire hydrant east of Ford's truck. Westfall acknowledged that his reconstruction of the accident did not include an open fire hydrant and that the reconstruction did not include spraying water or wet pavement. Westfall testified that it was unnecessary for the fire hydrant to be opened during the reconstruction, because the fire hydrant was behind the truck, and that in his reconstruction, he could not see past the front of the truck. Ford did not refer specifically to the fire hydrant in objecting to Westfall's reconstruction of the accident scene.

In rebuttal, Ford presented several witnesses who had been at the scene of the accident and who testified that the photographs produced by Westfall did not represent the lighting conditions at the scene of the accident. The defense cross-examined these witnesses with respect to where they had been at the scene of the accident and whether they had observed the scene from Clinton's perspective of a motorist eastbound on Third Street. Westfall testified that he did not ask any of the witnesses if the photographs matched the perspective of the witnesses, because, as far as he was aware, none of the witnesses had approached the scene from the same direction as Clinton.

Ford presented the rebuttal testimony of Tom Feiereisen, an accident reconstruction expert, who testified at length regarding the photographs and opined that the photographs were darker than the conditions he had observed on his visits to the site of the accident. Ford also referred to a videotape made by the defense at Ford's own "visibility study" of the site of the accident, which videotape Ford's witnesses testified better represented the lighting conditions at the scene of the accident, but which Feiereisen testified did not show the clarity that was shown by the photographs. Feiereisen stated that "neither, the videotape or the photographs, show what the eye sees." Feiereisen generally testified that no photograph or videotape could accurately depict what the human eye would see at the site of the accident.

Westfall was also asked by the defense whether on the night of the accident, Clinton "[did] what was reasonable expecting a person to do given the situation he was presented with at the time." Ford objected on the basis that the question posed by the defense

"call[ed] for speculation." Westfall's response to the question was that in his opinion, "there was no reasonable expectation, this is an unexpected event, you can't have an expected response."

After trial and deliberation, the jury returned a verdict in favor of the defendant. In accordance with the jury's verdict, Ford's petition was dismissed by the district court. A motion for new trial, filed by Ford, was subsequently overruled. Ford timely appealed.

2. Appellate Record

We note, although it does not affect our disposition of this appeal, that there are some troubling aspects to the record presented on appeal. The transcript contains two separate file-stamped journal entries, each purporting to enter judgment in favor of the defendant and against Ford. These journal entries, and several other orders contained in the record, show significant disparities between the date reflected on the face of each order, the date on which each order was purportedly signed, and the date on which each order was eventually file stamped. In one instance, the order overruling Ford's motion for new trial reflects a delay of 9 weeks between the date of the order and the date the order was file stamped.

Official entry of a judgment, decree, or final order, however, occurs only when the clerk of the court places the file stamp and date upon the judgment, decree, or final order. See, *Macke v. Pierce*, 263 Neb. 868, 643 N.W.2d 673 (2002); Neb. Rev. Stat. § 25-1301(3) (Cum. Supp. 2002). Failure to promptly file stamp orders causes difficulties for parties and appellate courts. Inordinate delay, such as that reflected by the record in this case, creates procedural traps for unwary litigants. Although no injustice resulted here, we take this opportunity to remind the district court of its duty to ensure that court orders are timely entered in the manner provided by statute.

III. ASSIGNMENTS OF ERROR

Ford assigns, as consolidated, that the district court abused its discretion in (1) admitting into evidence photographs that did not represent the accident scene and (2) allowing testimony as to whether Clinton was reasonable in his actions and expectations.

IV. STANDARD OF REVIEW

[1-3] The admission of demonstrative evidence is within the discretion of the trial court, and a judgment will not be reversed on account of the admission or rejection of such evidence unless there has been a clear abuse of discretion. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). The admission of expert testimony is ordinarily within the trial court's discretion, and its ruling will be upheld absent an abuse of discretion. *Gittins v. Scholl*, 258 Neb. 18, 601 N.W.2d 765 (1999). An abuse of discretion occurs when a trial court's decision is based upon reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

V. ANALYSIS

1. Reconstruction Photographs

The first issue presented is the admissibility of the photographs made by Westfall of his reconstruction of the accident scene. Westfall testified that in his opinion, Clinton's vision was impaired by glare from the headlights of Ford's truck, and that Clinton had been unable to see Ford until just before the collision. Westfall generally based his opinion on his observations of his reconstruction of the scene of the accident and his measurements and calculations of skid marks, Clinton's speed, and the stopping distance of Clinton's truck.

The photographs at issue generally display a head-on view of the pickup truck placed by Westfall in approximately the same place as Ford's truck had been at the time of the accident. The photographs were used, essentially, to depict the reconstruction performed by Westfall and to illustrate the basis for Westfall's opinion testimony regarding the cause of the accident. Ford now complains of the photographs on several bases. Specifically, Ford argues that the photographs were misleading because (1) the reconstruction was inaccurate in that a rotating beacon was used instead of a strobe light and the fire hydrant was not opened and (2) the photographs were darker than the accident scene. Ford also contends that the photographs should not have been admitted because Ford's counsel was not invited to observe Westfall's reconstruction. We address each contention in turn.

(a) Inaccuracies in Reconstruction

[4,5] Demonstrative exhibits are admissible if they supplement the witness' spoken description of the transpired event, clarify some issue in the case, and are more probative than prejudicial. *Benzel, supra.* Demonstrative exhibits are inadmissible when they do not illustrate or make clearer some issue in the case; that is, where they are irrelevant or where the exhibit's character is such that its probative value is substantially outweighed by the danger of unfair prejudice. *Id.* Ford contends that because of differences between the reconstruction and the accident scene, the photographs were inadmissible.

It should be noted, however, that Ford does not contend on appeal that Westfall should not have been permitted to testify about his reconstruction of the accident scene or his findings at that reconstruction. Ford's appellate argument is directed at the photographs. Therefore, the question is whether the photographs were an appropriate illustration of Westfall's testimony. We conclude that they were.

The photographs were offered to illustrate for the jury the reconstruction that Westfall performed and on which his conclusions were partly based. Westfall specifically testified that his conclusions were based on his observations of the reconstructed accident scene and that the photographs offered by the defense accurately represented what Westfall had seen at the reconstructed scene. The jury was instructed that the photographs were admitted for that limited purpose.

Westfall also testified that the two deficiencies now complained of by Ford were not significant with respect to the purpose of the reconstruction: to determine the visibility of Ford, and not his pickup truck, at the time of the accident. Westfall explained that a strobe light on the truck, as opposed to the amber beacon used for the reconstruction, would have made the truck more visible, but not the person standing in Ford's position relative to the truck. Westfall also stated that the open fire hydrant would not have made a difference because it was behind the truck, while Westfall was unable to see past the front of the truck at the reconstruction.

[6,7] Evidence relating to an illustrative experiment is admissible if a competent person conducted the experiment, an apparatus

of suitable kind and condition was utilized, and the experiment was conducted fairly and honestly. *Kudlacek v. Fiat S.p.A.*, 244 Neb. 822, 509 N.W.2d 603 (1994); *Shover v. General Motors Corp.*, 198 Neb. 470, 253 N.W.2d 299 (1977). It is not essential that conditions existing at the time of the experiment be identical with those existing at the time of the occurrence, *Shover, supra*, but they should be essentially similar, that is, similar in all those factors necessary to make the comparison a fair and accurate one. See *Rullo v. General Motors Corp.*, 208 Conn. 74, 543 A.2d 279 (1988). The lack of similarity regarding nonessential factors then goes to the weight of the evidence rather than to its admissibility. See, *Kudlacek, supra*; *Rullo, supra*.

In this case, Westfall—whose expertise is not questioned on appeal—testified that the conditions of the reconstruction were essentially similar to the accident scene and that the photographs accurately depicted his observations of the reconstruction. The district court accepted this foundational testimony and instructed the jury that the photographs were admitted for the limited purpose of illustrating what Westfall saw at the reconstruction. Compare *Kudlacek, supra* (courts have allowed videotape as illustration where judge told jury that videotape is only visual illustration and not proof). The court's determination was not untenable or unreasonable, and thus, we find no abuse of discretion.

(b) Darkness of Photographs

Ford also argues that the photographs were developed in a way that made the scene appear darker than the actual accident scene had been. Ford presented witness testimony to that effect and contends that the dissimilarity rendered the photographs inadmissible.

However, Westfall testified that the photographs accurately represented what he had seen at the reconstruction. The photographs were admitted for the purpose of illustrating what Westfall had seen at the reconstruction. Westfall's testimony, therefore, provided adequate foundation for the admission of the photographs as illustrative evidence.

Westfall also explained that the witnesses to the accident had differing views of the scene and that their perspectives on the accident scene would be different from that of the driver of an

eastbound vehicle. Thus, the testimony of the witnesses, that the photographs did not represent what they saw on the night of the accident, is not inconsistent with Westfall's testimony regarding what he saw, from Clinton's re-created perspective, at the reconstruction of the accident scene.

Given Westfall's testimony in this regard, any discrepancies between the photographs and the testimony of the accident witnesses go not to the admissibility of the photographs, but to the weight to be given Westfall's testimony. Ford had ample opportunity to cross-examine Westfall with respect to the darkness of the photographs, and the strobe light and the fire hydrant, and to list and explain the differences between the photographs and the testimony of Ford's witnesses. Compare *Hueper v. Goodrich*, 263 N.W.2d 408 (Minn. 1978). Ford also had the opportunity to present expert testimony in rebuttal to Westfall's testimony. Given Ford's opportunity to present his arguments regarding the photographs to the jury, we again find no abuse of discretion.

(c) Notice of Reconstruction

Ford concedes that his counsel " 'doesn't have any right to be at [the defense's] re-enactment . . . unless the court deems that he has a right to be there.' " Brief for appellant at 17. Nonetheless, Ford contends that "fundamental fairness" requires a party to notify the opposing party of any reenactment. *Id.*

Ford relies on *Balian, et al. v. General Motors*, 121 N.J. Super. 118, 296 A.2d 317 (1972). In that case, the defendant prepared and filmed an experiment, without notice to the plaintiffs, just before trial and after discovery had been completed. The defendant contended that no notice of the experiment was required because the film had not been in existence at the time of the defendant's compliance with the plaintiffs' discovery requests. On appeal, the Superior Court of New Jersey stated:

> A motion picture in the eyes of the jury is one of [the] most spectacular forms of evidence. It is cumulative in nature. There are inherent dangers in its preparation and presentation. Effective rebuttal can only be had if opposing counsel and his expert are given an adequate opportunity to meet such evidence. We do not consider that cross-examination alone would ordinarily provide a sufficient

> avenue of rebuttal to the adverse party. Consequently, as a prerequisite to the admission into evidence of motion pictures of a reconstructed event or a posed demonstration *taken during the pendency of an action*, fundamental fairness dictates that the party proposing to offer such evidence give notice thereof and an opportunity to his adversary to monitor the experiment and the taking of the film.

(Emphasis supplied.) *Balian, et al.*, 121 N.J. Super. at 131, 296 A.2d at 324.

Balian, et al. is distinguishable from the case at bar. The reasoning of *Balian, et al.* was specifically predicated on the evidence being motion pictures, as opposed to still photographs. More significant, however, is the fact that the issue in *Balian, et al.* was not a general right to be present at an opposing party's reconstruction. *Balian, et al.* instead dealt with compliance with discovery requests, unfair surprise, and the ability of an opposing party to effectively respond to evidence presented at trial. Those issues are not presented in this case. While Ford was not present at Westfall's reconstruction, Ford does not argue that the defense failed to comply with court-ordered discovery regarding Westfall's proposed testimony or that Ford was unprepared to cross-examine Westfall or rebut his testimony at trial. The record, in fact, indicates the contrary.

Ford also fails to identify how, if at all, he was unfairly prejudiced by his failure to observe Westfall's reconstruction. Ford's complaint regarding the photographs is that they are not sufficiently similar to the scene of the actual accident. Ford does not identify how this would have changed if he had been present at the reconstruction. It is doubtful that opposing parties seek to be present at a reconstruction in order to assist one another in establishing the admissibility of their respective expert testimony and demonstrative evidence.

For the foregoing reasons, we reject Ford's argument that he had a legal right to be present at Westfall's reconstruction of the accident scene. We find no abuse of discretion, on this basis or the bases previously discussed, in the district court's overruling of Ford's objection to the photographs taken by Westfall at his reconstruction of the accident scene. Ford's first assignment of error is without merit.

(d) Limiting Instruction

Ford also complains that the district court's limiting instruction was erroneous, in that the court instructed the jury that the photographs were more probative than prejudicial. Although Ford's brief argues that the court's limiting instruction was erroneous, he does not specifically assign error to the limiting instruction or contend that the limiting instruction is itself basis for reversal; rather, the argument is presented as another reason that the photographs were purportedly inadmissible.

We first note that the record does not support Ford's interpretation of the court's actions. Ford's complaint is directed at the following exchange, quoted as relevant, which occurred when the defense made its first offer of one of Westfall's photographs into evidence:

> [Defense counsel]: I offer Exhibit No. [158].
>
> [Plaintiff's counsel]: Your Honor, I'm going to object on foundation and more specifically that that doesn't represent the accident that happened in this case. Mr. Ford's vehicle was available with the right stroboscopic light on it, second of all we were not notified of this particular experiment or re-enactment going on and when it happened it is inaccurate, it would mislead the jury and the prejudice that would be shown by this photograph with the preverbal [sic] dimmer bulb than a brighter strobe out weights [sic] any probative value it has. Thank you.
>
> THE COURT: It is the finding of the court that Exhibit No. [158] . . . .
>
> . . . .
>
> THE COURT: . . . is, first of all a demonstration and it is not the actually [sic] accident, no one has pictures of the actual accident. And the court does find that although there are some differences in the strobe light being whether it was strobe light and a beacon being one of them, that it is sufficiently, sufficiently alike. The depositions and the other information that was available to make it more probative th[a]n prejudicial and therefore it is admitted for the limited purposes of demonstrating what Mr. Westfall saw the night that he re-enacted it being fully — fully knowledgeable as it's been brought out here that there were some

differences that existed between the actual night of the accident and his re-enactment.

You as a jury are directed to understand the limited purpose for which it is admitted.

. . . .

[Plaintiff's counsel]: Your Honor, just so that we're clear and also in the interest of saving time I would like to have a continuing objection to all these photographs on the same basis . . . . And so we'll speed things along, [defense counsel] would you stipulate that I have a continuing objection on the same basis?

[Defense counsel]: Yes, I'll stipulate to that.

[Plaintiff's counsel]: Thank you.

The above colloquy is the extent of the relevant comments to the jury regarding the admission of the photographs. Our reading of the record is that the court made the findings necessary to support its overruling of Ford's evidentiary objection, albeit somewhat inartfully, then proceeded to instruct the jury regarding the limited purpose for which the photographs were admitted. We see no abuse of discretion in this regard. Ford made his evidentiary objection and chose to argue the objection in the presence of the jury and cannot now complain that the court's ruling on the objection was also made in the presence of the jury. Compare, e.g., *Boyd v. Lynch*, 493 So. 2d 1315 (Miss. 1986); *Aldridge v. State*, 236 Ga. 773, 225 S.E.2d 421 (1976) (appellants waived error by failing to object to conducting proceedings in presence of jury). Furthermore, the court later "reminded" the jury, after more of the photographs were offered into evidence, that the photographs were "admitted for the limited purpose as a demonstration of what Mr. Westfall saw when he re-enacted — the re-enactment he testified to and taking into account that there are differences." Any confusion present in the first limiting instruction was subsequently cured by the court's clarification of the purpose for which the photographs had been admitted.

[8] Finally, we note that, as the above quotation from the record makes clear, Ford made no objection at trial based on any perceived error in the district court's limiting instruction. A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Davis v. Wimes*, 263 Neb. 504,

641 N.W.2d 37 (2002). Ford did not make any objection at trial which would have afforded the court the opportunity to cure any defect in the limiting instruction; Ford therefore failed to preserve any such argument for appellate review.

2. Reasonableness of Clinton's Actions

Ford assigns that the district court "erred in allowing testimony as to opinion of whether [Clinton] was reasonable in his actions and expectations." Ford presents little argument in his brief in support of this assignment of error, and it is difficult to discern precisely on what basis he contends that the testimony should have been excluded. It is clear, however, that Ford's complaint relates to the following colloquy from direct examination of Westfall:

> [Defense counsel:] Do you have an opinion based upon your training and experience in safety and automobiles and all of the subjects that you testified about earlier having received training in whether or not . . . Clinton, as he drove to the right of the pickup in front of him, drove as would be reasonably be anticipated given the situation he was presented with?
>
> [Plaintiff's counsel]: Your Honor, I'm going to object on form and foundation, this calls for speculation on the part of the witness as to what . . . Clinton could be anticipated to do.
>
> THE COURT: Overruled, you may answer.
>
> [Westfall:] I hate to have you repeat that but it was so long, was that expected?
>
> [Defense counsel:] Did [Clinton] do what was reasonable expecting a person to do given the situation he was presented with at the time.
>
> [Plaintiff's counsel]: Same objection.
>
> THE COURT: Overruled.
>
> [Westfall:] In my opinion there was no reasonable expectation, this is an unexpected event, you can't have an expected response.
>
> [Defense counsel]: No further questions, Your Honor.

[9,10] As the foregoing colloquy indicates, the objection made by Ford at trial was that the question posed by the defense

called for speculation on the part of the witness. The argument in Ford's appellate brief, however, is not that the testimony was speculative. One may not, on appeal, assert a different ground for excluding evidence than was urged in the objection made to the trial court. *Benzel v. Keller Indus.*, 253 Neb. 20, 567 N.W.2d 552 (1997). Where the grounds specified for the objection at trial are different from the grounds advanced on appeal, nothing has been preserved for an appellate court to review. *Id.* Ford has waived any valid objection that might have been made to Westfall's opinion testimony.

Furthermore, we note that to the extent we can determine the basis of Ford's appellate argument, it seems to be that the testimony given by Westfall addressed the ultimate issue to be decided in the case. However, testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. Neb. Rev. Stat. § 27-704 (Reissue 1995). More significantly, we note that whatever objection might have been appropriate to the question posed by the defense, Westfall's answer to the question did not include an opinion that Clinton's actions on the night of the accident had been reasonable. Instead, Westfall simply testified, in essence, that the circumstances prior to the accident were unexpected. While the question asked by the defense may have been objectionable, Westfall did not give any prejudicial opinion testimony in response to the question. Any error by the court in allowing the question to be asked was harmless, because Westfall's answer to the question was not prejudicial to Ford.

[11,12] The only other discernible appellate argument on this issue seems to be that Westfall was not a properly qualified expert witness. Ford's objection at trial does refer to "foundation." However, an objection on the basis of insufficient foundation is a general objection. *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991). If a general objection on the basis of insufficient foundation is overruled, the objecting party may not complain on appeal unless (1) the ground for exclusion was obvious without stating it or (2) the evidence was not admissible for any purpose. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991). Neither of those criteria

is met in the instant case, and no valid foundational objection has been preserved for appellate review.

Ford's second assignment of error is unsupported by any argument identifying a valid objection that was properly made at trial and preserved for appellate review. Furthermore, Westfall, in responding to the defense's question, did not give an opinion that Clinton's behavior prior to the accident had been reasonable, and any error in permitting the question to be asked was therefore harmless. Ford's second assignment of error is without merit.

VI. CONCLUSION

The district court did not abuse its discretion in overruling Ford's objection to the photographs from Westfall's reconstruction of the accident scene, and Ford failed to preserve any basis for concluding that the court committed prejudicial error by allowing the defense to ask for Westfall's opinion regarding the reasonableness of Clinton's actions. The judgment of the district court is therefore affirmed.

AFFIRMED.

GRACE L. OLSEN, APPELLANT AND CROSS-APPELLEE, V. CHERIE OLSEN, PERSONAL REPRESENTATIVE OF THE ESTATE OF HAROLD C. OLSEN, DECEASED, APPELLEE AND CROSS-APPELLANT.

657 N.W.2d 1

Filed February 14, 2003. No. S-01-1271.

1. **Equity: Quiet Title.** A quiet title action 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, 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. **Limitations of Actions: Quiet Title.** Neb. Rev. Stat. § 25-202 (Reissue 1989) is applicable to an action to quiet title to an interest in real estate.
4. **Equity: Estoppel: Limitations of Actions.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently

attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed.

5. **Equity: Estoppel: Fraud: Limitations of Actions.** Equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present.
6. **Equity: Estoppel.** Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so.
7. **Equity: Estoppel: Appeal and Error.** A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court.
8. **Equity: Laches.** Laches is an equitable defense, and, in order to benefit from the operation of laches, a party must come to the court with clean hands. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.

Appeal from the District Court for Banner County: KRISTINE R. CECAVA, Judge. Affirmed in part, and in part reversed and remanded with directions.

Paul E. Hofmeister, of Chaloupka, Holyoke, Hofmeister, Snyder & Chaloupka, P.C., L.L.O., for appellant.

James M. Mathis, of Holtorf, Kovarik, Ellison & Mathis, P.C., for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Grace L. Olsen appeals the order of the district court for Banner County granting some but not all of the relief she sought

in an action she filed against Harold C. Olsen, her subsequently deceased former husband. In the instant case, the district court quieted title to certain mineral interests which Harold was required to transfer to Grace pursuant to their divorce decree; but because the court found Grace guilty of laches, it quieted title as of February 6, 1990, the date she filed the petition in this case, rather than as of a date in 1979, when the mineral interests were purportedly transferred. Under the court's ruling, Grace did not share in proceeds attributable to the mineral interests which accrued prior to February 6, 1990.

Grace argues on appeal that the district court erred in finding her guilty of laches and therefore failing to quiet title as of 1979. Cherie Olsen, the personal representative of Harold's estate, cross-appeals on his estate's behalf and argues that Grace's action to quiet title was barred by the statute of limitations or, in the alternative, that the court's finding of laches should have completely barred relief.

We conclude that Harold, by and through Cherie, was equitably estopped from asserting the statute of limitations and, due to his unclean hands, was prevented from asserting laches. In view of our conclusions, the court correctly quieted title in Grace. However, the court erred in quieting title as of February 6, 1990, rather than August 15, 1979. We further conclude that the court erred in finding Grace guilty of laches. We therefore affirm the district court's decision in part, reverse it in part, and remand the cause for further proceedings.

STATEMENT OF FACTS

Grace and Harold were divorced pursuant to a decree of dissolution filed February 13, 1979, in the district court for Kimball County. At the time of the dissolution, Grace and Harold reached a property settlement agreement which was approved by the district court. In the decree of dissolution, the court ordered that the property of the parties be distributed in accordance with the agreement. The agreement provided, inter alia, that each of the parties "shall have an undivided 1/2 interest in all of the oil, gas and other minerals which are now presently owned by the parties." The agreement did not specify legal descriptions for the mineral interests owned by the parties.

Although the decree directed the parties to execute the necessary documents, it did not provide that a transfer would be deemed to have occurred in the absence of such execution.

On August 15, 1979, Grace and Harold signed a mineral deed prepared by Grace's attorney. The mineral deed was designed to carry out the property settlement agreement by purportedly transferring equal undivided mineral interests to Grace and Harold. Grace testified that the mineral deed was prepared using legal descriptions provided by Harold's sister.

Sometime in 1984, Grace learned that the 1979 mineral deed contained inaccurate legal descriptions of certain mineral interests and omitted other mineral interests owned by Harold at the time of the dissolution. Grace researched real estate records to obtain correct and complete legal descriptions. In 1985, Grace's attorney prepared a correction mineral deed to reform and supplement the 1979 mineral deed and sent the correction mineral deed to Harold with a letter requesting that he execute the correction mineral deed. Because Harold had remarried, the letter also requested that Cherie, his wife, execute the correction mineral deed. Harold met with Grace's attorney shortly thereafter and indicated that he would not sign the correction mineral deed. However, Harold did not tell Grace that he would not sign the deed.

Grace testified that over the next several years, prior to her filing the petition in the present case, she had numerous conversations with Harold about signing the correction mineral deed. He generally put her off by saying that his attorney was reviewing the deed and that he would get to it later. Grace testified that during this time, Harold never told her that he would not execute the correction mineral deed and instead indicated that he would sign it after it had been reviewed. In 1988, Harold requested Grace's assistance with his participation in a federal farm program. Grace told Harold she would cooperate if he would sign the correction mineral deed. Harold promised he would sign the deed, and Grace assisted Harold by loaning him $60,000. Harold did not subsequently sign the deed.

In 1989, Harold and his attorney began a series of communications with Union Oil Company of California (Unocal) regarding royalties from mineral interests on one of the properties which had been misidentified in the 1979 mineral deed. Unocal

had been holding royalties in suspense since 1984 when Grace communicated her claim to a share of the royalties. In a letter to Unocal dated August 18, 1989, Harold's attorney stated that the statute of limitations had run on any action Grace might have brought to correct the legal descriptions in the 1979 mineral deed. In March 1990, Harold received a check from Unocal for royalties of $28,795.77.

Grace filed her first petition in the present action on February 6, 1990. In the petition, Grace requested that the district court order Harold to account to her for her share of the income from the mineral interests which were omitted or misidentified in the 1979 mineral deed. Grace filed various amended petitions. The fourth amended petition was filed January 21, 1991, and is the operative petition. Grace fashioned the petition to contain what she identified as four "causes of action." In the first "cause of action," Grace sought a declaration of the mineral interest rights of each party pursuant to the property settlement agreement. In the second "cause of action," Grace requested that the court quiet title in her name to her share of the mineral interests which were omitted or misidentified in the 1979 mineral deed. In the third "cause of action," Grace sought reformation of the 1979 mineral deed to correct the omissions and errors in the legal descriptions of the mineral interests transferred. Finally, in the fourth "cause of action," Grace sought an accounting for all proceeds received by Harold which were attributable to her shares of the mineral interests omitted or misidentified in the 1979 mineral deed.

In his answer to the fourth amended petition, Harold asserted, inter alia, that Grace's petition was barred by the statute of limitations and that Grace was guilty of laches such that it would be inequitable to permit her to recover on the petition. We note that in her petition, Grace had alleged facts regarding Harold's representations and promises that he would sign the correction mineral deed, Harold's intent that Grace rely on such representations, and her actual reliance on such representations. We note that such facts, if proven, could support a conclusion that Harold was equitably estopped from succeeding on his defenses.

The district court held a trial on the first three "causes of action" but stayed trial on the accounting "cause of action" pending

its decision on the first three issues. Following trial, the court issued a decree filed June 7, 1993. In the decree, the court summarily found for Harold and against Grace on the first "cause of action," for a declaration of rights, and on the third "cause of action," for reformation of the mineral deed. With regard to the second "cause of action," to quiet title, the court found generally for Grace and against Harold. The court specifically found that Grace's quiet title action accrued in 1984 when she discovered the errors. The court further determined that even if Grace's cause of action had accrued on August 15, 1979, Harold's representations over the years that he would sign a correction mineral deed effectively tolled the statute of limitations with respect to the quiet title action. The court also determined that Grace's "inexplicable failure" to press her claim in light of Harold's inaction "constitute[d] laches on her part such as to make it manifestly unjust to quiet title in her as of the date of the decree of dissolution." The court, however, made no finding regarding prejudice to Harold as a result of Grace's delay in filing her action. Based on its findings, the court issued an order quieting title in Grace's name to an undivided one-half interest in the mineral interests omitted or misidentified in the 1979 mineral deed. The court quieted title as of February 6, 1990, the date Grace filed her original petition.

Grace and Harold both filed motions for new trial which were denied by the district court. Grace appealed and Harold cross-appealed the decision. This court dismissed the appeal and cross-appeal after concluding that the decree filed June 7, 1993, was not a final order because the accounting portion of the action was still pending before the district court. *Olsen v. Olsen*, 248 Neb. 393, 534 N.W.2d 762 (1995).

Harold died in December 1995, and Cherie, his widow, as personal representative of his estate, was substituted as the defendant in the proceedings in the district court. However, for convenience, we will henceforward refer to Cherie, in her capacity as defendant, appellee, and cross-appellant in the instant case, as "Harold."

Trial on the accounting action was held on February 7, 2000. The district court issued an order dated June 23, 2000, in which it noted that the parties had stipulated to an accounting of proceeds received since February 6, 1990. The court approved the stipulation and noted the existence of an issue regarding the

check for $28,795.77 that Harold had received from Unocal in March 1990. The court concluded that because the check represented proceeds which had accrued prior to February 6, the payment was correctly made to Harold and should not be included in the accounting sought by Grace.

Although the order dated June 23, 2000, was file stamped on June 27, the district court clerk failed to notify counsel for Grace and Harold of the filing. The parties were not notified until an identical entry of judgment was filed on August 18. Grace filed a notice of appeal on September 13. On January 24, 2001, this court issued an order to show cause why the appeal should not be dismissed for lack of jurisdiction for failure to timely appeal the judgment entered June 27, 2000, or to show cause why the remedy was not in the district court under its authority to vacate a judgment due to mistake, neglect, or omission by the district court clerk. On February 6, 2001, the parties filed a joint motion for this court to dismiss the appeal on the ground that the parties intended to ask the district court to vacate its judgment due to error by the clerk. We dismissed the appeal on February 22.

The parties subsequently moved the district court to vacate the orders filed June 27 and August 18, 2000. On October 16, 2001, the court entered an order vacating the orders filed June 27 and August 18, 2000. On that same day, the court filed an order disposing of the accounting action which was effectively identical to the orders it vacated. Grace now appeals from the order filed October 16, 2001, and Harold cross-appeals.

ASSIGNMENTS OF ERROR

Grace asserts that the district court erred in finding her guilty of laches and therefore quieting title as of February 6, 1990, rather than August 15, 1979. Grace makes additional assignments of error which, considering our disposition of this case, we need not consider.

In his cross-appeal, Harold asserts that the district court erred in failing to find that Grace's action to quiet title was completely barred by either the statute of limitations or laches.

STANDARDS OF REVIEW

[1,2] A quiet title action sounds in equity. *Burk v. Demaray*, 264 Neb. 257, 646 N.W.2d 635 (2002). In an appeal of an

equitable action, an appellate court tries factual questions de novo on the record, 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. *Id.*

ANALYSIS

Cross-Appeal: Statute of Limitations.

Harold argues in his cross-appeal that the statute of limitations barred Grace's action to quiet title or, in the alternative, that the district court's finding of laches should have barred all relief to Grace. We consider Harold's arguments regarding the statute of limitations first because if Grace's action was barred by the statute of limitations, then the other issues in this appeal would become moot. We treat the issues related to laches in the analysis of Grace's appeal.

[3] Harold asserts that Grace's action to quiet title was barred by the statute of limitations. We determine that Harold is equitably estopped from asserting a statute of limitations defense. Harold notes that Neb. Rev. Stat. § 25-202 (Reissue 1989) provides in part, "An action for the recovery of the title or possession of lands, tenements, or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have accrued." This court has held that § 25-202 is applicable to an action to quiet title to an interest in real estate. *Nemaha Nat. Resources Dist. v. Neeman*, 210 Neb. 442, 454, 315 N.W.2d 619, 626 (1982) ("a suit to quiet title is an action for the recovery of real property within the statute of limitations applying to such an action"). Harold argues that Grace's action to quiet title accrued in February 1979, when the decree of dissolution was entered, or on August 15, 1979, when the erroneous mineral deed was executed, and that therefore, Grace's petition filed February 6, 1990, was filed outside the 10-year period of limitations under § 25-202.

In its June 7, 1993, decree, the district court determined that the statute of limitations with respect to the quiet title action did not accrue until 1984, when Grace discovered the errors in the 1979 mineral deed. The court further stated that even if the action

had accrued in 1979, Harold's representations over the years that he would sign the correction mineral deed effectively tolled the statute of limitations.

Grace's action to quiet title arose from the fact that the 1979 mineral deed contained certain errors and omissions. Therefore, her action accrued on August 15, 1979, when the erroneous mineral deed was executed. Under the 10-year statute of limitations in § 25-202, the limitations period would normally have run on August 15, 1989. However, we conclude that because of his representations, promises, and conduct, Harold was equitably estopped from asserting the statute of limitations as a defense.

[4] The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). The first prong of this test is met when one lulls his or her adversary into a false sense of security, thereby causing that person to subject his or her claim to the bar of the statute of limitations, and then pleads the very delay caused by his or her conduct as a defense to the action when it is filed. *Id.*

[5,6] Equitable estoppel is not limited to circumstances of fraud. The doctrine of equitable estoppel may be applied to prevent an inequitable resort to a statute of limitations as well, and a defendant may, by his or her representations, promises, or conduct, be so estopped where the other elements of estoppel are present. *Id.* Equity is determined on a case-by-case basis when justice and fairness so require. Equity may be used under appropriate

circumstances, and equitable principles may prevent one from asserting a particular defense when it would be unfair or unjust to allow that person to do so. *Id.*

In the present case, the district court determined that even if Grace's cause of action had accrued on August 15, 1979, Harold's promises over the years that he would sign the correction mineral deed effectively tolled the statute of limitations with respect to the quiet title action. Although the court speaks in terms of a "tolling" of the statute of limitations, the facts of this case support a conclusion that Harold was equitably estopped from asserting the statute of limitations as a defense to Grace's action to quiet title.

[7] A claim of equitable estoppel rests in equity, and in an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the trial court. *Id.* The record in this case indicates that after discovering the errors in the 1979 mineral deed in 1984, Grace had a correction mineral deed prepared. In 1985, Grace's attorney wrote a letter requesting Harold to execute the correction mineral deed. The attorney testified that some time after he sent the letter, Harold met with the attorney and advised him that he was not going to sign the correction mineral deed. Grace testified, however, that over the next several years, Harold repeatedly represented to her that he would execute the correction mineral deed after his attorney had reviewed it, and that Harold never indicated to her that he did not intend to sign that deed. Grace understood that Harold would sign the deed.

Grace testified that in 1988, Harold asked her to assist him with his participation in a federal farm program. Grace told him that she would cooperate only if he executed the correction mineral deed. Harold promised her that he would sign it, and Grace assisted him by loaning him $60,000. We note that Harold's promise in 1988 occurred within the 10-year limitations period under § 25-202 for Grace's quiet title action, which accrued in 1979.

Grace testified that she did not have much contact with Harold in 1989, but that in early 1990, she again asked him whether he was going to sign the correction mineral deed, and that he told her that he had not yet done it but was going to do

so. Grace filed her first petition in this case shortly thereafter, on February 6, 1990.

The evidence shows that in 1989, Harold and his attorney corresponded with Unocal regarding royalties from certain mineral interests that were misidentified in the 1979 deed. In a letter dated August 18, 1989, Harold's attorney stated to Unocal that the statute of limitations had run on any action Grace might bring to make a claim to the mineral interest. As noted above, Grace's cause of action accrued when the erroneous mineral deed was executed on August 15, 1979, and therefore, the 10-year limitations period under § 25-202 ended on August 15, 1989.

We determine that although Harold initially told Grace's attorney that he was not going to sign the correction mineral deed, he subsequently and repeatedly represented to Grace that he would sign the deed and never told her that he did not so intend. Grace understood that Harold would sign the deed. Furthermore, Harold reiterated his promise to sign in 1988 in order to induce Grace to assist him with his participation in a federal farm program. Harold's correspondence with Unocal in 1989 indicates that Harold was aware of the statute of limitations on Grace's claim. The evidence indicates that Harold was leading Grace to believe that he planned to sign the correction mineral deed in order to influence her not to file an action prior to the running of the statute of limitations, all the while knowing that he did not intend to sign the deed.

Harold's representations, promises, and conduct were such as to lull Grace into a false sense of security, thereby causing Grace to subject her claim to the bar of the statute of limitations. See *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). Equitable estoppel should be applied to prevent Harold from asserting the statute of limitations as a defense, because it would be unfair to allow Harold to raise that defense when his own promises and representations led to Grace's delay in filing her action.

Because we determine that equitable estoppel is appropriate in this case, Harold cannot assert the statute of limitations as a bar, and we, therefore, conclude that Grace's action will not be barred by the statute of limitations. Accordingly, albeit for different reasons, the district court did not err in rejecting Harold's

claim that Grace's case should be dismissed as time barred. Harold's assignment of error on cross-appeal with regard to the statute of limitations is therefore without merit.

Appeal: Laches.

Grace argues that the district court erred in finding her guilty of laches in bringing her action to quiet title. In his cross-appeal, Harold argues that the court erred in failing to find that laches completely barred Grace's action. Based on its finding of laches, the court ordered that title be quieted as of February 6, 1990, the date Grace filed her petition, rather than as of the date of the dissolution of the parties' marriage in February 1979 or the date of the erroneous mineral deed in August 1979. Pursuant to its ruling, the court determined in the accounting requested by Grace that Grace was not entitled to a share of the mineral interest proceeds accrued prior to February 6, 1990, including the Unocal proceeds. We conclude that Harold is precluded from asserting laches as a defense due to unclean hands and, therefore, that the district court erred in finding laches. Because the court erred in this finding, the court also erred in concluding that title should be quieted as of February 6, 1990, rather than August 15, 1979, and that Grace was not entitled to proceeds accrued prior to February 6, 1990.

[8] Laches is an equitable defense, and in order to benefit from the operation of laches, a party must come to the court with clean hands. Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue. *Manker v. Manker, supra.*

In the present case, Harold pled laches as an affirmative defense to Grace's claims. As discussed above, Harold's promises and representations were such that Harold was equitably estopped from asserting the statute of limitations as a defense. Under the same reasoning, because of his actions, Harold has unclean hands with respect to Grace's delay in filing her petition in this case, and pursuant to the doctrine of unclean hands, Harold is prevented from asserting laches as a defense. We therefore conclude that the district court erred in finding Grace guilty of laches.

Because laches was not available to Harold as a defense in this case, the district court erred in finding laches and in quieting title as of February 6, 1990. Instead, the court should have quieted title as of August 15, 1979, the date the erroneous mineral deed was executed. The court further erred in the accounting when it concluded that Grace was not entitled to a share of the proceeds, including the Unocal proceeds, which accrued prior to February 6, 1990. We therefore conclude that the portion of the court's order finding laches and its associated accounting must be reversed and the cause remanded to the district court to enter an order quieting title as of August 15, 1979, and to order an accounting for proceeds since that date.

CONCLUSION

We conclude that Harold is equitably estopped from asserting the statute of limitations and is barred by unclean hands from asserting laches. In view of the foregoing, we conclude that the district court did not err in finding that Grace's action to quiet title was not barred by the statute of limitations and that title to Grace's share of the disputed property should be quieted in Grace. We also conclude, however, that the court erred in finding Grace guilty of laches. We therefore affirm that portion of the order in which the court held in favor of Grace on the quiet title action, but we reverse that portion of the order in which the court found Grace guilty of laches and erroneously quieted title as of February 6, 1990, rather than August 15, 1979. The accounting based on these errors must also be reversed. We remand this cause to the district court with instructions to amend its order to provide that title to Grace's share of the disputed property be quieted in Grace as of August 15, 1979, and to order an accounting for proceeds earned since that date.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

ALEGENT HEALTH, A PARTNERSHIP, APPELLEE, V. AMERICAN FAMILY INSURANCE, INC., APPELLANT.
656 N.W.2d 906

Filed February 21, 2003. No. S-01-1366.

1. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
2. **Health Care Providers: Liens.** A hospital lien attaches upon admission of a patient to the hospital for treatment.
3. **Health Care Providers: Liens: Tort-feasors: Insurance.** Upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien. If such an insurer settles directly with the injured party despite the existence of a perfected hospital lien, it has breached that duty and is liable directly to the hospital.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Kirk E. Brumbaugh for appellee.

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

WRIGHT, J.

NATURE OF CASE

American Family Insurance, Inc. (American Family), appeals from a judgment of the Douglas County District Court, which found that a hospital lien filed by Alegent Health (Alegent) was valid and enforceable against American Family. Alegent was awarded $10,120.32 in damages.

SCOPE OF REVIEW

[1] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002).

FACTS

On May 22, 1997, Alegent notified American Family and James Coran that Alegent claimed a statutory hospital lien for

expenses totaling $10,120.32 which were incurred in the treatment of Coran. Coran's injuries resulted from an automobile collision on September 24, 1996, and he was treated at Alegent from April 1 through November 6, 1997. The other party involved in the collision was insured by American Family. An amended notice of a hospital lien was sent to Coran, his attorney, and American Family on November 20.

Patty Vana, patient account representative for Alegent, stated in an affidavit that on November 20, 1997, she was told by Kimberly Nash at American Family that the company was negotiating with Coran and his attorney and that Nash had informed the attorney of the hospital lien. The attorney indicated to Nash that he would honor Alegent's lien.

Vana discussed Alegent's lien with Coran's attorney on December 8, 1997. Vana did not receive any further information from the attorney concerning settlement of Coran's claim.

Subsequent to perfection of the lien, American Family settled Coran's claim through his counsel. A check payable to Coran and his attorney for the policy limit of $100,000 was issued by American Family, and it was cashed on December 24, 1997. American Family did not include Alegent on the check because it had been assured by Coran's attorney that he would "work out" all liens.

On February 9, 1998, Coran's attorney told Vana that Alegent needed to bill Medicaid because Coran's bills would exceed the limits of American Family's policy. The attorney also indicated that Coran might file for bankruptcy. On that same day, Nash told Vana that American Family had settled the claim on November 25, 1997, and paid the policy limits to Coran and his attorney.

On February 11, 1998, Alegent contacted the Nebraska Department of Health and Human Services (DHHS), and DHHS indicated that pursuant to 471 Neb. Admin. Code, ch. 3, § 004.01 (1982), Medicaid would not pay medical expenses unless all funds from a settlement had been exhausted, and that Medicaid was the payor of last resort. Alegent was also told that Coran did not become eligible for Medicaid until November 1, 1996, and that, therefore, his original medical bills from the accident were not Medicaid eligible. In addition, Coran was required as a condition of eligibility to disclose a pending

third-party liability situation and to cooperate in securing payment of related bills. Neither Coran nor his attorney furnished DHHS with such information.

On April 15, 1998, Alegent filed a petition alleging that American Family had not protected Alegent's lien because American Family did not note the existence of the lien on the check which disbursed the insurance proceeds. Alegent claimed that Coran received the proceeds and subsequently filed for bankruptcy relief under chapter 7 of the federal bankruptcy statutes. Alegent asserted that as a result, any remedy it had against Coran had been legally foreclosed, and that Alegent was therefore entitled to enforce its hospital lien against American Family.

In its answer, American Family claimed that Coran was a "Medicare/Medicaid eligible beneficiary" and that all the services claimed by Alegent were Medicare/Medicaid-covered services. American Family asserted that the lien was in violation of federal law, 42 C.F.R. § 411.54(c)(2)(i) (1997), which provides that a hospital may not bill a liability insurer nor place a lien against the beneficiary's liability insurance settlement for Medicare-covered services. American Family also claimed that Alegent could not file a lien to secure a debt which did not exist because the debt had been discharged in bankruptcy.

Alegent filed a motion for relief from the automatic stay in the U.S. Bankruptcy Court for the District of Nebraska. On June 3, 1998, the bankruptcy court entered an order granting relief to the extent necessary for Alegent to determine the validity of its lien on the proceeds through a declaratory judgment or other action. The order noted that counsel for Coran had retained $25,000 of the $100,000 settlement in his trust account and that Coran deposited $43,548.61 in a " 'special account.' "

On June 9, 1998, the bankruptcy court vacated a portion of its earlier order which had retained jurisdiction of the proceeds in the trust account. The court stated:

> This is a fight between a debtor who claims certain assets as exempt and a creditor who claims a lien on those assets. The trustee has abandoned any interest in the assets . . . . The estate will not benefit no matter what the state court determination is. Therefore, there is no legal reason for this court to entertain continuing jurisdiction.

Both parties filed motions for summary judgment in the district court. At the summary judgment hearing, the parties stipulated that Coran had been granted a discharge in bankruptcy, that the enforceability of Alegent's lien rested on a determination of whether the lien on the proceeds of the settlement made the hospital a secured creditor, and that Coran's attorney had paid proceeds from the settlement to the clerk of the district court for Douglas County.

On November 14, 2001, the district court entered an order finding that Alegent had a valid and enforceable lien in the sum of $10,120.32.

ASSIGNMENTS OF ERROR

American Family assigns as error that the district court erred in finding that a hospital lien can be enforced when the underlying debt has been discharged in bankruptcy. American Family also asserts that the filing of a hospital lien for "medicare/medicaid eligible charges" violates federal law, specifically 42 C.F.R. § 411.54(c)(2)(i).

ANALYSIS

American Family argues that when an underlying debt has been discharged in bankruptcy, there are no proceeds available to which a perfected hospital lien can attach. It relies on the fact that Coran included Alegent's lien on $10,120.32 in Schedule F of his bankruptcy petition. Schedule F lists those creditors holding unsecured nonpriority claims. Alegent was among the parties who were served with notice of Coran's discharge in bankruptcy. American Family claims that since Alegent sought and obtained relief in the bankruptcy court but did not object to the discharge of Coran's debt, Alegent's lien is void as a matter of law.

Alegent asserts that it did not seek to collect a debt against a patient who had filed and been discharged in bankruptcy; rather, it sought to enforce a hospital lien against American Family. Alegent argues that American Family was on notice that Alegent had a lien but failed to protect the lien by paying the settlement proceeds directly to Coran and his attorney. Alegent claims that its hospital lien remained valid despite the bankruptcy filing.

Neb. Rev. Stat. § 52-401 (Reissue 1998), which governs hospital liens, states:

> Whenever any person employs a . . . 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 . . . hospital . . . shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the usual and customary charges of such . . . hospital applicable at the times services are performed . . . .
>
> In order to prosecute such lien, it shall be necessary for such . . . hospital to serve a written notice upon the person or corporation from whom damages are claimed that such . . . hospital claims a lien for such services and stating the amount due and the nature of such services . . . .

[2] The parties here do not question the attachment, perfection, or amount of the lien. In *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991), this court held that a hospital lien attaches upon admission of the patient to the hospital for treatment. The lien in this case attached when Coran was admitted to Alegent for medical treatment. American Family's refusal to honor the lien is based on its assertion that no proceeds are available for the perfected lien to attach to, since the underlying debt has been discharged in bankruptcy. This argument has not been adopted by other courts.

In a case with similar facts, *Filker v. Honda Motor Co., Ltd.*, 87 Ill. App. 3d 865, 409 N.E.2d 495, 42 Ill. Dec. 880 (1980), the court held that a hospital was entitled to enforce its lien subsequent to a bankruptcy because the hospital's security interest was not affected by the bankruptcy. " 'A discharge in bankruptcy does not affect, release, or discharge any securities or valid liens on property of the bankrupt which were in existence prior to the petition or adjudication in bankruptcy.' " *Id.* at 867, 409 N.E.2d at 496, 42 Ill. Dec. at 881. The court held that the classification of a creditor on a bankruptcy plaintiff's schedule of creditors is not conclusive as to the creditor's status.

In *Filker*, the plaintiff received medical treatment following a motorcycle accident and was discharged from the hospital with unpaid bills in excess of $25,000. The hospital filed and perfected a hospital lien under state law. The plaintiff filed a personal injury

action against the motorcycle company and subsequently filed for bankruptcy. His debts were discharged in bankruptcy, and he then recovered a judgment of more than $186,000 in the personal injury action. The lower court allowed the hospital's petition to enforce its lien, and the plaintiff appealed.

The plaintiff in *Filker* asserted that the hospital was an unsecured creditor whose debt was discharged in bankruptcy, barring its action to recover on the debt. The appellate court disagreed and held that perfection of the lien made the debt a secured one under state law. The court stated that a discharge in bankruptcy is personal to the bankrupt and " 'does not act as a release of liens or security interests in property owned by him. Accordingly, a creditor holding a security interest need not proceed in bankruptcy court but may rely on his security and enforce his rights against it in any court of competent jurisdiction.' " *Filker*, 87 Ill. App. 3d at 867, 409 N.E.2d at 496, 42 Ill. Dec. at 881, quoting *Avco Finance Co. v. Erickson*, 132 Ill. App. 2d 868, 270 N.E.2d 111 (1971).

Several bankruptcy courts have also upheld the validity of hospital liens. In *In re Innis*, 181 B.R. 548 (N.D. Okla. 1995), a hospital executed a lien for hospital charges incurred by an accident victim in the amount of $223,345.31. The insurer settled the victim's claim for $40,000. The victim and his attorney both knew of the hospital lien and that it had not been released or satisfied before the victim filed for bankruptcy relief. On Schedule C, the victim listed his interest in personal injury proceeds as exempt. The hospital did not file an objection to the exemption, but filed a complaint in bankruptcy court.

The *In re Innis* court found that under federal law, the personal injury settlement proceeds, even though declared exempt, remained liable for the hospital debt to the extent it was secured by the hospital lien. The court also reviewed state law and found that under both laws, "a hospital lien . . . is enforceable against personal injury proceeds under $50,000.00, notwithstanding exemption of such proceeds under [federal bankruptcy law]." *Id.* at 551.

The U.S. Bankruptcy Court for the District of North Dakota has also held that a hospital lien which was in effect against a debtor before he filed for bankruptcy relief was valid. See *In re Dueis*, 130 B.R. 83 (D.N.D. 1991). The lien was unaffected by

the bankruptcy filing, and the court found that the hospital could pursue foreclosure of its lien under state law.

[3] The situation presented in the case at bar has not previously been considered by this court. However, in *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 287, 475 N.W.2d 901, 907 (1991), we held:

> Upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien. If such an insurer settles directly with the injured party despite the existence of a perfected hospital lien, it has breached that duty and is liable directly to the hospital.

The U.S. District Court for the District of Nebraska has adopted the *West Neb. Gen. Hosp.* holding. See *Bryan Memorial v. Allied Property and Cas. Ins.*, 163 F. Supp. 2d 1059 (D. Neb. 2001). The federal court noted that in such a case, the hospital needs to prove only that "it had a perfected hospital lien under Neb.Rev.Stat. § 52-401, the amount of that lien, and that [the insurer] impaired that lien." *Bryan Memorial*, 163 F. Supp. 2d at 1066.

No question has been raised concerning whether Alegent's lien was properly perfected or as to the amount of the lien. It has been demonstrated that American Family impaired the lien by settling directly with Coran via his attorney and by issuing the settlement check payable to them, without including Alegent.

American Family's reliance on *Satsky v. U.S.*, 993 F. Supp. 1027 (S.D. Tex. 1998), is misplaced. In *Satsky*, a hospital sought to recover for expenses incurred in treating an accident victim. The patient had an insurance policy which served as a prepaid health care plan. The hospital had agreed to accept the compensation set forth in the plan as payment in full for all hospital services provided to those insured under the plan. The hospital collected $42,300 from the insurer for services rendered and then filed a hospital lien for an additional $76,729.05, the amount by which the charges for treatment exceeded the amount paid by the insurer under the plan.

The federal district court found that the lien was barred because the hospital had agreed to accept payment as provided in the plan. American Family suggests that *Satsky* is analogous

because there was no debt and therefore no lien. The *Satsky* court had noted the "intrinsic reality that without a debt, a lien is purely illusory." *Id.* at 1030. However, American Family's reasoning is incorrect because the facts in *Satsky* are dissimilar. The hospital in *Satsky* had agreed to accept partial payment under the terms of an agreement with the insurance company and, therefore, had received all the payments to which it was entitled.

In the case at bar, Alegent has received nothing in return for the costs it incurred while treating Coran. There is no evidence of an agreement between American Family and Alegent stating that Alegent would accept an amount less than the actual charges. The hospital's lien attached prior to the bankruptcy filing and was unaffected by Coran's discharge in bankruptcy. Since American Family settled directly with Coran despite the existence of Alegent's perfected hospital lien, American Family breached its duty to Alegent not to impair Alegent's rights under its lien, and American Family is directly liable to Alegent.

American Family's second argument suggests that federal law prohibits the imposition of a hospital lien against a beneficiary's liability insurance settlement for Medicare-covered services. This assignment of error is without merit.

There is no evidence that Coran was eligible for Medicare, which is a program with a different purpose and different standards than Medicaid. See *Evanston Hosp. v. Hauck*, No. 92 C 732, 1992 WL 205900 (N.D. Ill. 1992), *affirmed* 1 F.3d 540 (7th Cir. 1993), *cert. denied* 510 U.S. 1091, 114 S. Ct. 921, 127 L. Ed. 2d 215 (1994). According to DHHS, Coran became eligible for Medicaid on November 1, 1996, and he was never eligible for Medicare during the relevant time period.

American Family cites to 42 C.F.R. § 411.54 for the proposition that a health care provider "[m]ay not bill the liability insurer nor place a lien against the beneficiary's liability insurance settlement for Medicare covered services." American Family asks us to rely on the affidavit of Coran's attorney, in which he stated that Coran was a "Medicaid eligible beneficiary and all the services upon which Alegent makes claim were Medicaid covered services." The attorney states that it was his judgment that the federal regulation was dispositive of Alegent's claim. In its brief, American Family states that one of Coran's medical bills from

another provider was paid pursuant to the "Medicare DRG's." See brief for appellant at 8. In the attorney's affidavit, he stated that the bill reflected Medicaid adjustments. While American Family may have relied upon Coran's attorney's statements, such statements have no bearing on our determination of this issue.

Apparently, American Family considers the Medicare and Medicaid programs to be interchangeable. American Family asks this court to apply the federal regulation concerning Medicare to "Medicare/Medicaid." Brief for appellant at 9. However, the regulation refers only to Medicare. As the court noted in *Evanston Hosp.*, the two programs are separate and governed by different statutes. "Federal Medicare enactments do not provide any mandates for state Medicaid practices. Plaintiff's attempt to treat a Medicare provision as part of the Medicaid statute is not appropriate." *Evanston Hosp.*, 1992 WL 205900 at *2.

Medicare and Medicaid are separate and distinct programs, and whether Coran was eligible for either has no effect on Alegent's lien, which was enforceable. Alegent did not violate federal law in attempting to obtain payment for its services to Coran.

When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). We find that the district court's conclusion was correct.

CONCLUSION

American Family settled directly with Coran despite the existence of Alegent's perfected hospital lien. Thus, American Family is directly liable to Alegent for American Family's breach of its duty not to impair Alegent's rights under the lien. The record does not support a finding that Coran was eligible for Medicare or that Alegent violated federal law by attempting to recover its expenses through the filing of a lien.

The district court correctly found that Alegent had a valid and enforceable lien in the amount of $10,120.32. The judgment is affirmed.

AFFIRMED.

HENDRY, C.J., participating on briefs.

LAYNE L. HASS, APPELLANT, V. BEVERLY NETH, DIRECTOR, NEBRASKA DEPARTMENT OF MOTOR VEHICLES, APPELLEE.

657 N.W.2d 11

Filed February 21, 2003. No. S-02-158.

1. **Appeal and Error.** A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief.
2. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **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 court below.
5. **Judgments: Appeal and Error.** Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. **Due Process: Notice.** Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.
7. **Constitutional Law: Due Process.** The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.
8. **Due Process.** The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
9. **Motor Vehicles: Licenses and Permits: Revocation: Due Process.** Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment.
10. **Due Process.** Once it is determined that due process applies, the question remains what process is due.
11. **Due Process: Words and Phrases.** Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.
12. **Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
13. **Administrative Law: Due Process: Notice: Evidence.** In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and

opportunity to present evidence concerning the accusation, and a hearing before an impartial board.

14. **Due Process.** There are a number of factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
15. **Motor Vehicles: Licenses and Permits: Due Process.** A driver's interest in his or her driving privileges is significant in today's society, as its loss may entail economic hardship and personal inconvenience.
16. **Drunk Driving: Public Health and Welfare.** There is no doubt of a substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways.
17. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
18. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
19. **Constitutional Law: Statutes: Proof.** The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional.
20. **Equal Protection: Statutes: Presumptions.** Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid.
21. **Equal Protection: Statutes.** In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose.
22. **Equal Protection: Proof.** The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.
23. **Constitutional Law: Equal Protection.** The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives.
24. **Administrative Law: Appeal and Error.** Generally, in an appeal under the Administrative Procedure Act, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency.
25. **Trial: Waiver: Appeal and Error.** A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal.
26. **Trial: Appeal and Error.** One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong.
27. **Public Officers and Employees.** Whether a notary is disqualified, by virtue of a relationship or interest, is a factual question to be determined from the circumstances of each particular case.

28. ____. A notary has a disqualifying interest in a proceeding if the notary has a financial or beneficial interest in the transaction other than receipt of the ordinary notarial fee, or is named, individually, as a party to the transaction.
29. **Affidavits: Words and Phrases.** An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.
30. **Affidavits: Proof.** An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same.
31. **Affidavits: Proof: Public Officers and Employees.** An affidavit does not require a notary to confirm the truth of the facts stated in the affidavit; rather, the certificate confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit.
32. **Actions: Oaths and Affirmations.** Where there is no imputation or charge of improper conduct or bad faith or undue advantage, the mere fact that an oath was taken before an interested party will not vitiate the ceremony or render it void, if otherwise it is free from objection or criticism.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Affirmed.

Jeffrey H. Bush for appellant.

Don Stenberg, Attorney General, Hobert B. Rupe, and Ingolf D. Maurstad, Senior Certified Law Student, for appellee.

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

GERRARD, J.

NATURE OF CASE

Layne L. Hass appeals from the judgment of the district court affirming a 1-year driver's license revocation imposed by the Department of Motor Vehicles (the Department). The primary question presented in this appeal is whether the state or federal Constitution required that Hass be allowed, at the administrative license revocation (ALR) hearing, to challenge the lawfulness of the traffic stop that led to his arrest.

BACKGROUND

Hass was stopped by the Nebraska State Patrol on the afternoon of July 22, 2001, based on erratic driving and speeding.

Rex Kindall, a trooper with the State Patrol, testified that he observed Hass' vehicle swerve onto the shoulder of the county road on which it was westbound. Kindall followed the vehicle and observed it weaving onto the shoulder and clocked the vehicle by radar traveling 59 miles per hour in a 55-mile-per-hour zone. Kindall then turned on his emergency lights and stopped the vehicle.

Kindall testified that it took Hass a little while to respond to Kindall's emergency lights and that when Hass did stop, he had difficulty getting his driver's license out of his wallet. Kindall testified that he could smell an odor of alcohol at the window of the vehicle as he spoke with Hass. Kindall asked Hass to step out of the vehicle and sit in the patrol car. Kindall issued "paperwork" for driving on the shoulder and not having a current proof of insurance and, while speaking with Hass, could clearly smell the odor of alcohol from Hass' breath. Hass was not cited for speeding. Kindall asked Hass if he had been drinking, and Hass stated that he " 'could not lie and had consumed several drinks earlier.' " Kindall administered field sobriety tests; Hass' performance on the tests was erratic.

At that point, Kindall administered a breath test, which Hass failed. Hass was placed under arrest and taken to the jail in Wahoo, Nebraska, where Hass submitted to an Intoxilyzer test. The test indicated .156 grams of alcohol per 210 liters of breath. Kindall completed and issued a "Notice/Sworn Report/Temporary License" (sworn report). Kindall's signature on the sworn report was notarized by the technician who administered the Intoxilyzer test to Hass.

On July 25, 2001, Hass filed a petition for administrative hearing with the Department. A hearing was held on August 2. The hearing officer took "[n]otice" of titles 177 and 247 of the Nebraska Administrative Code, but a copy of title 177 was not entered into the record. Hass did not object at the hearing to the hearing officer's taking notice of title 177. The hearing officer recommended revocation of Hass' driver's license, and the director of the Department ordered Hass' driver's license to be revoked for 1 year. Hass appealed to the district court, which affirmed the action of the Department.

ASSIGNMENTS OF ERROR

Hass assigns, reordered, that the district court erred in (1) failing to find that the ALR scheme as applied in the case at bar deprives Hass of due process, (2) failing to find that the ALR scheme as applied in the case at bar deprives Hass of equal protection, (3) finding that adequate foundation had been presented before the agency for receipt of evidence concerning the issue of whether Hass was under the influence of an intoxicating liquor because title 177 of the Nebraska Administrative Code was never made a part of the agency's records, and (4) finding that the notary public was not disqualified from administering an oath in this case.

[1] Hass also assigns that the court erred in finding that there was probable cause to believe Hass was under the influence of alcohol to such an extent that he could not prudently operate a motor vehicle. However, this assignment of error is not argued in Hass' brief. A claimed prejudicial error must not only be assigned, but must also be discussed in the brief of the asserting party, and an appellate court will not consider assignments of error which are not discussed in the brief. *Nauenburg v. Lewis, ante* p. 89, 655 N.W.2d 19 (2003).

STANDARD OF REVIEW

[2,3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *American Legion v. Nebraska Liquor Control Comm., ante* p. 112, 655 N.W.2d 38 (2003). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4,5] 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 court below. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001), *cert. denied sub nom. Armour v. K.D.G.*, 535 U.S.

1035, 122 S. Ct. 1792, 152 L. Ed. 2d 651 (2002). Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court. *In re Application of Lincoln Electric System, ante* p. 70, 655 N.W.2d 363 (2003).

ANALYSIS

DUE PROCESS

[6,7] We first turn to Hass' contention that the ALR scheme violates due process. Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty" or "property" interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). We note that the due process requirements of Nebraska's Constitution are similar to those of the federal Constitution. *Id.*

Hass argues that the ALR scheme violates due process because it does not permit him to challenge the Fourth Amendment constitutionality of the traffic stop at the administrative hearing. If a chemical test has disclosed the presence of alcohol in a concentration specified in Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2000), at the subsequent ALR hearing, the issues to be contested are limited to the following: (1) did the peace officer have probable cause to believe the person was operating or in the actual physical control of a motor vehicle in violation of § 60-6,196 or a city or village ordinance enacted pursuant to such section and (2) was the person operating or in the actual physical control of a motor vehicle while having an alcohol concentration in violation of § 60-6,196(1). See Neb. Rev. Stat. § 60-6,205(6)(c)(ii) (Reissue 1998). See, also, 247 Neb. Admin. Code, ch. 1, § 018 (2001).

However, while other issues such as the illegality of a stop are not contested at the ALR hearing, that does not mean that those issues are never raised. Pursuant to § 60-6,205(3), ALR proceedings are initiated when the driver is arrested pursuant to Neb. Rev. Stat. § 60-6,197 (Cum. Supp. 2000) and a chemical test discloses the presence of alcohol in a concentration specified in § 60-6,196.

> A person whose operator's license is subject to revocation pursuant to subsection (3) of section 60-6,205 shall have all proceedings dismissed or his or her operator's license immediately reinstated without payment of the reinstatement fee upon receipt of suitable evidence by the director that (a) within the thirty-day period following the date of arrest the prosecuting attorney responsible for the matter declined to file a complaint alleging a violation of section 60-6,196, (b) the charge was dismissed, or (c) the defendant, at trial, was found not guilty of violating such section.

Neb. Rev. Stat. § 60-6,206(4) (Reissue 1998). Consequently, any Fourth Amendment issue presented by the initial arrest may be raised in a subsequent criminal proceeding for driving under the influence (DUI). If there is no criminal prosecution, the criminal charge is dismissed or the defendant is acquitted, then either the ALR proceeding is dismissed or the driver's license is reinstated.

We note that Hass' argument implies that if the scope of the ALR hearing permitted the issue to be considered, the Fourth Amendment exclusionary rule would apply in an ALR proceeding. The majority of jurisdictions considering the issue have concluded that the rule barring admission in criminal trials of evidence derived from an unlawful stop, arrest, search, or seizure does not generally apply in license suspension proceedings. See, generally, Annot., 23 A.L.R.5th 108 (1994). The Fourth Amendment issue is not the same in Nebraska, however, by virtue of the statutory framework set forth above. Administrative revocation is contingent upon a successful prosecution of the driver in a criminal DUI proceeding. If the exclusionary rule, available in the criminal proceeding, prevents a conviction, then the exclusionary rule has also indirectly determined the outcome of the ALR proceeding. Compare *Brownsberger v. Dept. of Transp., MVD*, 460 N.W.2d 449 (Iowa 1990). Cf. *Young v. Neth*, 263 Neb. 20, 24, 637 N.W.2d 884, 888 (2002) (ALR must be based on "valid arrest"). The issue presented here is not based on the 4th Amendment; rather, the issue presented is whether 14th Amendment due process is violated by excluding 4th Amendment issues from the ALR proceeding and reserving those issues for the criminal DUI proceeding.

[8,9] The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001), citing *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987). Suspension of issued motor vehicle operators' licenses involves state action that adjudicates important property interests of the licensees. In such cases, the licenses are not to be taken away without that procedural due process required by the 14th Amendment. *Marshall, supra*, citing *Dixon v. Love*, 431 U.S. 105, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977), and *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971).

[10-13] Once it is determined that due process applies, the question remains what process is due. *Marshall, supra*, citing *Brock, supra*. Though the required procedures may vary according to the interests at stake in a particular context, the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Id.* Thus, before a state may deprive a motorist of his or her driver's license, that state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case. *Marshall, supra*. In proceedings before an administrative agency or tribunal, procedural due process requires notice, identification of the accuser, factual basis for the accusation, reasonable time and opportunity to present evidence concerning the accusation, and a hearing before an impartial board. *Id.*

[14] In *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the U.S. Supreme Court set forth a number of factors to be considered in resolving an inquiry into the specific dictates of due process: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Marshall, supra*.

[15] The private interest that is at issue in this proceeding is the driver's interest in continued possession of a motor vehicle operator's license. We have previously held, in a *Mathews* analysis,

that a driver's interest in his or her driving privileges is significant in today's society, as its loss may entail economic hardship and personal inconvenience. See *Marshall, supra.*

The second prong of the *Mathews* analysis is the risk of an erroneous determination and the value, if any, of alternative procedures. In the present context, this would refer to the risk of the revocation of a driver's license despite the existence of a potentially valid Fourth Amendment challenge to the driver's arrest. Ultimately, the risk of erroneous deprivation is minimized by the fact that any legitimately dispositive Fourth Amendment argument will ultimately be validated in the criminal proceeding and result in the dismissal of the ALR proceeding or reinstatement of the driver's license. The value, if any, of determining a Fourth Amendment challenge at an ALR proceeding is limited to avoiding the temporary deprivation of the driver's license for the time period between a final judgment regarding the administrative revocation and the conclusion of the criminal DUI proceeding. See Neb. Rev. Stat. § 60-6,208 (Reissue 1998).

[16] The final factor of the balancing test set out in *Mathews* is the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. There is no doubt of the substantial governmental interest in protecting public health and safety by removing drunken drivers from the highways. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). See, also, *Mackey v. Montrym*, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (states afforded "great leeway in adopting summary procedures to protect public health and safety" by removing drunken drivers from highways); *Dixon v. Love*, 431 U.S. 105, 114, 97 S. Ct. 1723, 52 L. Ed. 2d 172 (1977) (discussing "important public interest in safety on the roads and highways, and in the prompt removal of a safety hazard").

This court has previously discussed the "sound policy reasons for leaving a degree of separation between the civil ALR hearing and criminal DUI prosecutions." *State v. Young*, 249 Neb. 539, 544, 544 N.W.2d 808, 812 (1996).

> Were this court to force the State to litigate thoroughly every element of DUI at an ALR hearing, such a holding

> would seriously undermine the Legislature's goal of providing an informal and prompt review of the decision to suspend a driver's license. . . . ALR hearings would quickly evolve into full-blown trials at which the State must fully litigate every possible issue regarding a motorist's actions, thereby losing their effectiveness in removing potentially dangerous drivers from the Nebraska highways within 1 month of their offense.

(Citation omitted.) *Id.* at 544, 544 N.W.2d at 812-13.

[17-19] The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *State ex rel. Stenberg v. Omaha Expo. & Racing*, 263 Neb. 991, 644 N.W.2d 563 (2002). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Andrews v. Schram*, 252 Neb. 298, 562 N.W.2d 50 (1997). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996). We conclude that Hass has not shown due process is violated because he is precluded from raising Fourth Amendment issues in an ALR proceeding.

> 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 . . . .

§ 60-6,205(1). This stated purpose is advanced by the provisions of § 60-6,205(6)(c), which limit the issues at an ALR hearing to (1) whether the arresting officer had probable cause to believe the person was operating or in the actual physical control of a motor vehicle while under the influence of drugs or alcohol and (2) whether the driver actually was operating or in the actual physical control of a motor vehicle while under the influence of drugs or alcohol—in other words, the issues most pertinent to determining whether or not a driver actually represents a hazard to the health and safety of those using the highways.

We conclude that the State's interest in quickly and efficiently removing drunken drivers from the highways provides sufficient

justification for deferring consideration of Fourth Amendment issues to a criminal DUI proceeding. The State's interest in public safety outweighs the temporary inconvenience of the driver who is deprived of his or her driving privileges during the time period between receipt of a final order from an ALR hearing and the resolution of a subsequent criminal DUI prosecution. The ALR hearing is sufficiently meaningful, pursuant to the balancing test of *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to satisfy the requirements of constitutional due process. Hass' first assignment of error is without merit.

EQUAL PROTECTION

Hass next argues that the ALR scheme violates constitutional equal protection, in that one group (i.e., drivers subject to ALR proceedings) is treated differently (i.e., not permitted to raise Fourth Amendment issues) from a similarly situated group (i.e., drivers subject to criminal DUI prosecutions). For purposes of this analysis, we do not consider the equal protection requirements of the Nebraska Constitution to be any more demanding than the Equal Protection Clause of the U.S. Constitution. See *Mach v. County of Douglas*, 259 Neb. 787, 612 N.W.2d 237 (2000).

[20,21] Where a statute is challenged under the Equal Protection Clause, the general rule is that legislation is presumed to be valid. *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995). The burden of establishing the unconstitutionality of a statute is on the one attacking the statute's validity. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). In an equal protection challenge, when a fundamental right or suspect classification is not involved in legislation, the legislative act is a valid exercise of police power if the act is rationally related to a legitimate governmental purpose. See *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994). Hass concedes that no fundamental right or suspect classification is implicated by this case.

[22] The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim.

Benitez v. Rasmussen, 261 Neb. 806, 626 N.W.2d 209 (2001). Hass' argument fails to pass this initial inquiry, because, given the relationship between the ALR proceedings and criminal DUI prosecutions, there is no meaningful delineation between the "groups" identified by Hass. Any person whose license is revoked following a chemical test disclosing the presence of unlawful amounts of alcohol (a member of Hass' first "group") will, necessarily, also be the defendant in a criminal DUI prosecution (a member of Hass' second "group"). If criminal prosecution is not brought or is unsuccessful, then the ALR proceeding is dismissed or the driver's license is reinstated. Since no driver's license can be revoked in an ALR proceeding without that driver also facing a criminal DUI prosecution, there is no meaningful delineation between the two "groups" that Hass contends are separate.

[23] This conclusion is dispositive of Hass' equal protection claim. For the sake of completeness, however, we note that were we to proceed to judicial scrutiny of the challenged legislation, Hass' argument would again fail. The rational relationship standard, as the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution, is offended only if a classification rests on grounds which are wholly irrelevant to the achievement of the government's objectives. *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d 452 (1998). As previously noted in our due process analysis, the reservation of Fourth Amendment issues for a criminal DUI prosecution is rationally related to the State's objective of promoting public safety. Because there are no separate classifications at issue in this case, and because the State's policy is reasonable in any event, we conclude that Hass' second assignment of error is without merit.

NOTICE OF TITLE 177

Hass' next assignment of error relates to the hearing officer's taking notice of title 177 of the Nebraska Administrative Code, without the admission into evidence of title 177. The hearing officer took notice of both title 247, which contains rules and regulations of the Department of Motor Vehicles, and title 177, which contains regulations of the Department of Health. The essence of Hass' argument is that the Department of Motor Vehicles may

take notice of its own rules and regulations, but not the rules or regulations of other administrative agencies. Compare Neb. Rev. Stat. § 84-914(5) (Reissue 1999). The district court concluded that this was error, but after a de novo review of the record without considering title 177, the record was still sufficient to sustain the decision of the Department.

[24-26] We do not consider Hass' assignment of error, because the record reveals no indication that Hass objected at the ALR hearing to the hearing officer's taking notice of title 177. Generally, in an appeal under the Administrative Procedure Act, an appellate court will not consider an issue on appeal that was not presented to or passed upon by the administrative agency. See *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996). A litigant's failure to make a timely objection waives the right to assert prejudicial error on appeal. *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002). One cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong. *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001).

In this case, Hass was silent when the hearing officer took notice of title 177. Hass did not preserve any error in that ruling for appellate review. Thus, we reject Hass' assignment of error, albeit for reasons other than those relied upon by the court. See *Egan v. Stoler, ante* p. 1, 653 N.W.2d 855 (2002).

NOTARY PUBLIC

Hass' fourth and final assignment of error is based on the fact that the arresting officer's signature on the sworn report was notarized by the technician who administered the Intoxilyzer test. Hass argues that the notary public was an interested party, disqualified from acting in a case where he was interested.

[27,28] Whether a notary is disqualified, by virtue of a relationship or interest, is a factual question to be determined from the circumstances of each particular case. See, *Banking House of A. Castetter v. Stewart*, 70 Neb. 815, 98 N.W. 34 (1904); *Horbach v. Tyrrell*, 48 Neb. 514, 67 N.W. 485 (1896). The general rule is that a notary has a disqualifying interest in a proceeding if the notary has a financial or beneficial interest in the transaction other than receipt of the ordinary notarial fee, or is

named, individually, as a party to the transaction. See *Galloway v. Cinello*, 188 W. Va. 266, 423 S.E.2d 875 (1992) (citing cases). See, generally, Raymond C. Rothman, Notary Public Practices & Glossary (1978).

[29-31] The sworn report at issue in this case is, by definition, an affidavit. An affidavit is a written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation. *State v. Haase*, 247 Neb. 817, 530 N.W.2d 617 (1995). An affidavit must bear on its face, by the certificate of the officer before whom it is taken, evidence that it was duly sworn to by the party making the same. *Kennedy & Parsons Co. v. Schmidt*, 152 Neb. 637, 42 N.W.2d 191 (1950). An affidavit does not, however, require the notary to confirm the truth of the facts stated in the affidavit; rather, the certificate, also known as a jurat, confirms only that the affiant appeared before the notary, attested to the truth of his or her statements, and signed the affidavit. See Rothman, *supra*.

In this case, Hass has not identified any pecuniary or other beneficial interest that the notary would have in Hass' ALR proceeding. Hass argues only that the notary, having administered the Intoxilyzer test, was a witness to the State's case against Hass. This does not indicate, however, that the notary was impaired by a conflict of interest that would have precluded him from certifying the sworn report of the arresting officer, as the notary still had no personal interest in the outcome of the proceedings against Hass. The notary's function, with respect to the sworn report, was simply to certify that the arresting officer appeared before the notary, affirmed the truth of the statements made in the sworn report, and signed the affidavit. The notary's other function, as the technician who administered the Intoxilyzer test, did not disqualify him from performing his notarial function with respect to the sworn report. In short, there is substantial evidence to support the district court's conclusion that the notary was not disqualified from certifying the sworn report.

[32] Moreover, Hass has not indicated how he might have been prejudiced by such a conflict of interest, had it existed. Hass does not claim that the notary failed to perform his duties properly. Where there is no imputation or charge of improper conduct or

bad faith or undue advantage, the mere fact that an oath was taken before an interested party will not vitiate the ceremony or render it void, if otherwise it is free from objection or criticism. *Galloway, supra.* Hass does not offer any objection to or criticism of the sworn report aside from the observation that the same person administered the Intoxilyzer test and notarized the arresting officer's signature. Absent any indication of actual prejudice to Hass, there is no basis on which to void the sworn report.

The certification of a notary public's official duties, over his or her signature and official seal, is received by the courts as presumptive evidence of the facts certified therein. See Neb. Rev. Stat. § 64-107 (Reissue 1996). Hass offers no challenge to this presumption. In fact, the record shows the contrary, as the arresting officer testified at the ALR hearing to the substance of the facts set forth in the sworn report. Hass has not shown that the notary public was an interested party to this proceeding or how any purported conflict of interest may have worked to Hass' prejudice. Therefore, Hass' final assignment of error is without merit.

CONCLUSION

Hass' constitutional challenges to the ALR scheme are without merit, as are Hass' remaining assignments of error. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

JENNIFER J. MAXWELL, APPELLEE, V. KRISTY J. MONTEY AND MARVIN L. MONTEY, APPELLANTS, AND ZEBADIAH KAIN STEBBINS ET AL., APPELLEES.

656 N.W.2d 617

Filed February 21, 2003. No. S-02-361.

1. **Statutes.** Statutory interpretation presents a question of law.
2. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Statutes.** 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.

4. **Subrogation: Judgments: Damages.** Under Neb. Rev. Stat. § 25-1222.01 (Reissue 1995), a party is entitled to a credit on any judgment rendered against him or her for payments or partial payment of damages made on behalf of such party to an injured person.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed.

Thomas B. Wood and Stephen L. Ahl, of Wolfe, Snowden, Hurd, Luers & Ahl, L.L.P., for appellants.

Daniel H. Friedman, of Friedman Law Offices, for appellee Jennifer J. Maxwell.

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

MILLER-LERMAN, J.

NATURE OF CASE

Jennifer J. Maxwell filed a lawsuit against Kristy J. Montey (Montey) and her father, Marvin L. Montey; Zebadiah Kain Stebbins (Stebbins) and his mother, Diana Lynn Stebbins; and Continental Western Insurance Company for injuries she sustained in an automobile accident. Maxwell alleged that the accident occurred as the result of a "speed contest" between Montey and Stebbins. Maxwell named Montey's father and Stebbins' mother as defendants under the family purpose doctrine. The district court granted Stebbins' motion for directed verdict at the close of Maxwell's case in chief, and the jury returned a verdict in favor of Maxwell and against the Monteys in the amount of $250,000. After trial, the district court granted Maxwell's motion for a new trial against Stebbins but denied the Monteys' motion for a new trial. Stebbins appealed, and the Monteys cross-appealed. Stebbins and Maxwell subsequently settled their dispute prior to oral argument in the Nebraska Court of Appeals. The Court of Appeals affirmed the judgment of the district court, and we granted the Monteys' petition for further review. We affirmed the judgment of the Court of Appeals. See *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001) (*Maxwell I*).

As part of the settlement between Stebbins and Maxwell, Stebbins paid Maxwell $15,000 for a full release. Subsequently

to the filing of *Maxwell I*, the Monteys moved the district court to credit the $15,000 payment against the $250,000 judgment against them. The Monteys asserted that such credit was required under Neb. Rev. Stat. § 25-1222.01 (Reissue 1995). The district court concluded that § 25-1222.01 did not provide for the relief requested by the Monteys and overruled the Monteys' motion for credit. The Monteys appeal. We affirm.

STATEMENT OF FACTS

The facts relevant to the underlying lawsuit in this case are set forth in *Maxwell I*. In *Maxwell I*, we held, inter alia, that the Monteys were not entitled to an allocation of damages between them and Stebbins under Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) because the plain language of the statute allowed for the allocation of damages between defendants only when there were multiple defendants at the time the case was submitted to the finder of fact. At the time the case was submitted to the jury, Stebbins had been dismissed. This court's decision in *Maxwell I* was issued on July 13, 2001.

On August 27, 2001, the Monteys filed a motion in the district court, seeking credit for the $15,000 paid by or on behalf of Stebbins to Maxwell. A hearing on the Monteys' motion for credit was held December 6. On December 21, Maxwell and the Monteys filed a stipulation of facts for the court to consider in deciding the motion. The stipulated facts were as follows:

> 1. Jennifer J. Maxwell filed a lawsuit against Kristy J. Montey and Marvin L. Montey as a result of an automobile accident that occurred on June 30, 1993 on "O" Street near its intersection with Piazza Terrace in Lincoln, Lancaster County, Nebraska. Zebadiah Kain Stebbins was later added by the Plaintiff as a party Defendant to the lawsuit[.]
>
> 2. The Plaintiff's only claim against Defendant Stebbins was based upon the theory that Stebbins was jointly and severally liable with Defendant Montey because he was engaged in a "speed contest" or "race" at the time of the accident. Both Defendant Stebbins and Defendant Montey denied there was a "race" or "speed contest."
>
> 3. Neither Defendant Montey nor Defendant Stebbins filed a cross claim against the other in the lawsuit.

4. At the conclusion of the Plaintiff's case in chief, Defendant Stebbins filed a Motion for Directed Verdict which was sustained on the basis that there was not sufficient evidence as a matter of law for the issue of whether Defendant Stebbins and Defendant Montey were engaged in a "speed contest" or a "race" at the time fo [sic] the accident to go to the jury. Defendants Montey did not oppose this motion, nor object to Stebbins being dismissed from the suit.

5. At the conclusion of the trial, the issues of Montey's liability and the amount of Maxwell's damage as a result of the accident went to the jury.

6. The jury determined that Montey was responsible for the accident and the total amount of damages sustained by Maxwell as a result of the accident was in the amount of $250,000.00.

7. Following the trial, Maxwell filed a Motion for New Trial against Stebbins on the theory that there was sufficient evidence of a "race" or "speed contest" between Stebbins and Montey for the issue to have been presented to the jury. This Motion for New Trial was sustained. The Monteys did not file a motion nor did they join in the Plaintiff's Motion for New Trial against Stebbins.

8. The Monteys also filed a Motion for New Trial against Maxwell, which was heard at the same time, and did not join Stebbins in the motion[.]

9. Maxwell's motion against Stebbins was sustained, and the Monteys[']motion against Maxwell was overruled.

10. The sustaining of the new trial against Stebbins was appealed to the Nebraska Court of Appeals by Stebbins. Defendant Montey did not appeal the Court[']s granting of a new trial against Defendant Stebbins, but did appeal the overruling of their motion against Maxwell.

11. During the pendency of the appeal of the granting of a new trial against Stebbins, a settlement was reached between the Plaintiff Maxwell and Defendant Stebbins that in exchange for the payment to the Plaintiff in the amount of $15,000.00 the Plaintiff waived her right to a new trial

against Defendant Stebbins and agreed not to retry the case against Defendant Stebbins.

12. As part of the settlement between Plaintiff Maxwell and Defendant Stebbins, the Plaintiff agreed to execute and file a Stipulation for Dismissal with Prejudice and allow a corresponding Order to be entered by the Court in the case caption *Jennifer J. Maxwell, Plaintiff, vs. Kristy J. Montey, Marvin L. Montey, Zebadiah Kain Stebbins and Diana Lynn Stebbins, Defendants* found at Docket 547, Page 108. The Monteys did not object to this Stipulation, nor did they object to the Order dismissing Stebbins.

The Monteys argued to the district court that they were entitled to a credit pursuant to § 25-1222.01, which provides:

> No advance payments or partial payment of damages made by an insurance company or other person, firm, trust, or corporation as an accommodation to an injured person or on his behalf to others or to the heirs at law or dependents of a deceased person made under any liability insurance policy, or other voluntary payments made because of an injury, death claim, property loss, or potential claim against any insured or other person, firm, trust, or corporation thereunder shall be construed as an admission of liability by the insured or other person, firm, trust, or corporation, or the payer's recognition of such liability, with respect to such injured or deceased person or with respect to any other claim arising from the same accident or event. Any such payments shall constitute a credit and be deductible from any final settlement made or judgment rendered with respect to such injured or deceased person. In the event of a trial involving such a claim, the fact that such payments have been made shall not be admissible in evidence or brought to the attention of the jury, and the matter of any credit to be deducted from a judgment shall be determined by the court in a separate hearing or upon the stipulation of the parties.

On March 20, 2002, the district court issued an order denying the Monteys' motion for credit. The court concluded that § 25-1222.01 did not "provide the post trial relief sought by [the] Montey[s] which is based on the actions of a non-party

(Stebbins) subsequent to the verdict against [the] Montey[s]." The Monteys appeal.

ASSIGNMENT OF ERROR

The Monteys assert on appeal that the district court erred in concluding that under § 25-1222.01, they were not entitled to a $15,000 credit against the $250,000 jury verdict against them.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law. *Eyl v. Ciba-Geigy Corp.*, 264 Neb. 582, 650 N.W.2d 744 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Id.*

ANALYSIS

The Monteys framed their motion, and the district court decided their motion, solely as a motion for a credit pursuant to § 25-1222.01. Therefore, the only issue before this court on appeal is whether the Monteys were entitled to a credit pursuant to § 25-1222.01.

The Monteys argue that § 25-1222.01 provides that they are entitled to a credit against the $250,000 judgment against them for the $15,000 payment that Stebbins made to Maxwell and that the district court erred in denying their motion for credit. In support of their claim, the Monteys rely on the word "any" found in the portion of § 25-1222.01 which states, "*Any* such payments shall constitute a credit and be deductible from *any* final settlement made or judgment rendered with respect to such injured or deceased person." (Emphasis supplied.) The Monteys argue that the use of the word "any" gives a broad meaning to the statute, such that "any" payment to the injured person, regardless of source, would entitle the unsuccessful defendant to a credit. We reject the Monteys' argument.

[3] 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. *Johnson v. Kenney, ante* p. 47, 654 N.W.2d 191 (2002). The Monteys' argument regarding the credit provided for under § 25-1222.01 places emphasis on the word "any" in

the credit sentence noted above. Reading the statute as a whole, however, it is clear that the purpose of the statute is to facilitate advance payments to injured persons while allowing the party making such payments to avoid having evidence of the payment used at trial as an admission of liability and to ensure that such payments constitute a credit to the payor upon "final settlement" or "judgment" involving the payor. In the context of the entire statute, the "any" language cannot be read broadly to provide that a party subject to a final judgment can receive credit for a payment that was not made by or on behalf of such party.

[4] The construction we place on § 25-1222.01 is consistent with the language of the statute and our prior opinions. In considering § 25-1222.01, we note that § 25-1222.01 as it read in 1967 existed in much the same form as it exists today except, for our purposes, that the statute referred only to payments made by an insurance company. The list of payors whose payment is to be credited was expanded in 1975 to include "other person[s], firm[s], trust[s], or corporation[s]." § 25-1222.01. This court has previously considered § 25-1222.01 and stated, inter alia, that under § 25-1222.01, a party is entitled to a credit on any judgment rendered against him or her for payments or partial payment of damages made on behalf of such party to an injured person. See *Beeder v. Fleer*, 211 Neb. 294, 318 N.W.2d 708 (1982). We did not, nor do we now, approve of the proposition advanced by the Monteys that any payment to an injured person, regardless of source, should be credited to the unsuccessful defendant.

In the present case, the Monteys sought a credit for the $15,000 payment made by Stebbins to Maxwell. With reference to this payment, the record indicates that a settlement was reached between Maxwell and Stebbins after trial, during the pendency of the appeal. Pursuant to the settlement, Maxwell waived her right to a new trial against Stebbins and agreed not to retry her case against Stebbins in exchange for Stebbins' payment of $15,000 to Maxwell. Stebbins' payment was not made on behalf of the Monteys. Because the $15,000 payment by Stebbins was not a payment made by or on behalf of the Monteys, it was not the type of payment for which the Monteys could receive a credit pursuant to § 25-1222.01. We therefore reject the Monteys' assignment of error on appeal and conclude

that the district court did not err in overruling the Monteys' motion for a credit pursuant to § 25-1222.01.

CONCLUSION

We conclude that the district court did not err in determining that § 25-1222.01 does not provide the relief sought by the Monteys in their motion for credit. We therefore affirm the district court's denial of the Monteys' motion for credit pursuant to § 25-1222.01.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
KELLY R. SHIPPS, APPELLANT.
656 N.W.2d 622

Filed February 21, 2003. No. S-02-475.

1. **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.
2. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
3. **Criminal Law: Motions for Mistrial: Appeal and Error.** 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 prevents a fair trial.
4. **Juries.** Voir dire examination of prospective jurors requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exist sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge.
5. **Trial: Evidence: Appeal and Error.** On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact.
6. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
7. **Due Process: Evidence: Prosecuting Attorneys.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution.
8. **Constitutional Law: Trial: Evidence.** Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable

probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

9. **Trial: Evidence.** A reasonable probability of a different result is shown when the State's evidentiary suppression undermines confidence in the outcome of the trial.
10. **Due Process: Evidence.** To meet the standard of a due process violation, alleged undisclosed exculpatory evidence must be material either to guilt or to punishment.
11. **Trial: Prosecuting Attorneys: Juries.** The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct.
12. **Verdicts: Evidence: Appeal and Error.** A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict.
13. **Convictions: Evidence: Appeal and Error.** 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.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

J. Bruce Teichman for appellant.

Don Stenberg, Attorney General, and Kevin J. Slimp for appellee.

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

WRIGHT, J.

NATURE OF CASE

Kelly R. Shipps appeals from his conviction for kidnapping.

SCOPE OF REVIEW

[1] 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. Haltom*, 264 Neb. 976, 653 N.W.2d 232 (2002).

[2] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

FACTS

Shipps pled not guilty to four counts filed in the Hall County District Court: kidnapping, a Class IA felony, in violation of Neb. Rev. Stat. § 28-313(1) (Reissue 1995); first degree sexual assault, a Class II felony, in violation of Neb. Rev. Stat. § 28-319(1)(a) (Reissue 1995); robbery, a Class II felony, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1995); and burglary, a Class III felony, in violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1995). The charges were based on events which occurred in June 2001 involving D.H., a woman Shipps had met in 1999 and with whom he had been involved for about 2 years.

On June 19, 2001, Shipps went to D.H.'s home in the afternoon, and D.H. told Shipps that they should not see each other any more. That night, D.H. went to bed between 11 o'clock and midnight. At about 2 a.m., she was awakened by Shipps, who was holding her wrists in the air very firmly. He said, " 'We're going to have sex whether you want to or not.' " D.H. testified that she asked Shipps not to hurt her and then got up and undressed because she knew from the tone of his voice that Shipps was serious and she did not want to "get beat up."

D.H. said she did not think she could get away from Shipps or resist having sex with him. During the night, they had sex twice. Shipps went to the bathroom once during the night, but D.H. did not try to leave because she thought she would be safe if she allowed Shipps to stay until he went to work in the morning.

At about 5 a.m. on June 20, 2001, D.H. arose, dressed, and made coffee because Shipps said he was going to work soon. Shipps appeared in the kitchen undressed and said he wanted D.H. to have sex with him again. D.H. said that Shipps talked her into doing so and that they returned to the bedroom, where they had sex again. D.H. then got up and began to dress because she thought she would need to drive Shipps to work.

Before D.H. could put on a blouse, Shipps playfully pushed her down onto the bed. Shipps then got on D.H.'s stomach and chest, slipped twine around one of her wrists, and yanked the twine until it was tight. Shipps yelled at D.H. and accused her of using him. He then looped the twine twice around her neck. D.H. repeated, " 'You don't want to do this.' " Shipps said he wanted D.H.'s other hand, and as she started to give it to him, D.H. began screaming.

Shipps told her that if she did not let him tie her up, he would beat her. D.H. said that she gave him her wrists and that he tightened the twine around her neck. D.H. began praying, and Shipps said, " 'You better pray.' " He then tied the twine to the bedposts.

Shipps left the room and returned with duct tape, which he put over D.H.'s mouth and around her ankles. Shipps left again, but he returned, untied the twine, and helped D.H. get up as she motioned toward the bathroom. He removed the duct tape from her mouth. Shipps picked up D.H., threw her over his right shoulder, and carried her down the basement stairs into the washroom, where he put her down by a table. Shipps indicated that D.H. should walk the rest of the way to the bathroom, but she said she could not walk. Shipps picked her up, carried her into the bathroom, helped her pull down her pants, and sat her on the stool.

Shipps went back upstairs and returned with a light bulb because there was no other light downstairs. He told D.H. he would be back after work. Shipps then went upstairs and got the duct tape. He put more duct tape on the twine, tied D.H.'s hands together, and put tape around her hands, chest, and arms. Shipps asked her if she was all right, and he then left the room.

Although D.H. felt that the twine was a little loose, she sat and waited 30 to 45 minutes for Shipps to leave for work. When she could not hear any noise in the house, she pulled her arms out of the twine, removed the duct tape from her mouth, and used her teeth to unfasten some of the tape. She used her belt buckle to scratch through the duct tape on her legs. She pushed at the bathroom door and was able to push boxes off a table that Shipps had placed in front of the door. She ran upstairs, unlocked the back door, and then went to get her purse. She next ran into the bedroom, grabbed a shirt, and ran to a neighbor's house, but no one was home.

D.H. then ran two to three blocks to a friend's house. After the police were called, D.H. was taken to a hospital for medical examination. She also discovered that her billfold, which had contained $2 to $3, was missing.

The friend testified that when D.H. arrived that morning, D.H. was shaking, traumatized, and very upset. D.H. was carrying her purse on one arm, her belt buckle was hanging from her pants, and there was duct tape residue at the bottom of her pants. The

friend observed red marks about a half-inch wide on D.H.'s neck and wrists.

A police officer found D.H.'s vehicle in a parking lot about a block north of Shipps' workplace. In a search of D.H.'s house, police found twine and pieces of duct tape, but no evidence of forced entry.

Shipps testified that he was married and had three children. Shipps said that during his relationship with D.H., he bought groceries and paid her gas bills, car payments, car insurance, and rent. Shipps said he also shoveled snow, mowed, did general housekeeping, repaired items around the house, and helped D.H. move once before he injured his hand. Shipps said he and D.H. did not socialize with others because D.H. did not want people to know they were together.

Shipps testified that he was at work on June 19, 2001, when D.H. called and asked him to buy some twine, which he purchased at a hardware store after work. When he showed her the twine, she said it was not the right kind to use for a clothesline. Shipps said he went to physical therapy at 3 p.m. and then to a friend's house. He returned to D.H.'s house at 12:45 or 1 a.m. and knocked on the door, and D.H. let him in. They went to bed, had sex, and then went to sleep. Shipps said he woke up at 6 a.m. and took D.H.'s vehicle to work. He said they had argued about money and about Shipps' providing support to D.H. Shipps said he had told D.H. that he could not afford to pay her bills all the time and that the relationship needed to end. He later testified that he and D.H. argued when she said she wanted to break off the relationship. Shipps said he did not break into D.H.'s house and did not have sex with her without her permission. He stated that he never beat or threatened her and that he did not bind her with twine and duct tape.

A jury found Shipps guilty of kidnapping and not guilty of the other three charges. His motion for new trial was overruled at the time he was sentenced on April 2, 2002. The trial court sentenced Shipps to life imprisonment, which is the required sentence for a Class IA felony. See Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2002).

On April 8, 2002, Shipps filed a supplementary motion for new trial, asserting that the State had failed to disclose it had

information concerning whether Shipps was able to use his right hand at the time of the alleged incident. That motion was also overruled. Shipps appeals from the denial of his motions for new trial.

ASSIGNMENTS OF ERROR

Shipps asserts numerous errors that can be summarized as follows: (1) The trial court erred in denying his motions for mistrial and for new trial based on the State's comments during voir dire that Shipps was a married man who had engaged in an adulterous relationship; (2) the trial court erred in denying his motions for mistrial and for new trial based on the State's production of inflammatory, prejudicial, and irrelevant testimony from a witness in violation of U.S. Const. amend. XIV and Neb. Const. art. I, § 3; (3) the trial court erred in failing to grant a new trial when the State wrongfully withheld exculpatory material which had been requested during discovery, depriving Shipps of a fair trial under U.S. Const. amend. XIV and Neb. Const. art. I, § 3; (4) the trial court erred in failing to grant a new trial based on prosecutorial misconduct; and (5) cumulative trial error denied Shipps his constitutional right to a fair trial.

ANALYSIS

State's Remarks During Voir Dire

Shipps asserts that the trial court erred in denying his motions for mistrial and for new trial based on the State's remarks during voir dire that Shipps was a married man who had engaged in an adulterous relationship.

During voir dire, the trial court asked a number of questions of the prospective jurors, and then the State began its questioning by indicating that the case involved sexual matters. The prosecutor said:

> The evidence, I think, is going to show, ladies and gentlemen, that when the defendant, Kelly Shipps, was having — he had a relationship with an individual named [D.H.,] who is the victim. At the time that Mr. Shipps and [D.H.] were having the relationship, Mr. Shipps was still married. Do any of you feel that the fact that —

At that point, defense counsel objected, and a sidebar conference was held. Defense counsel's motion for a mistrial was overruled.

The prosecutor then asked, "Do any of you feel that if a woman is engaged in a relationship with a married guy, that means she deserves whatever she gets? In other words, it's okay to sexually assault somebody if they've been having an affair?" The defense raised no objection to these questions. The State continued its line of questioning about sexual relationships and sexual assault without objection.

During defense counsel's questioning on voir dire, he stated:

> [Y]ou heard statements before that Mr. Shipps was married, and the testimony will come out that Mr. Shipps indeed was married. Mr. Shipps had had a long-time relationship with the complaining witness, [D.H.,] and that this — that Mr. Shipps spending the night with [D.H.] was a frequent event despite the fact he was married, and does the fact — well, does the fact that this information will come out, will this cause you to be prejudiced to Mr. Shipps so that you wouldn't be able to provide a fair verdict for him? And that means following the judge's instructions?

Counsel continued:

> This is a case involving a married man who's had a relationship. I think the term of art is a meretricious relationship with another woman, and now he's accused of having sex with this other woman without her consent.
>
> Would this cause you any problems in judging this case and following the judge's instructions?

At one point, the trial court intervened and stated:

> Whether or not the victim or the defendant was married is not an element of [the] crime, so it is not relevant to the proof in this case. So given that, do you think you would be able to fairly judge it, knowing that the defendant was or was not a married man, and simply stick to what I tell you the State has to prove?

Shipps claims that the prosecutor's comments about the relationship between Shipps and D.H. poisoned the proceedings from the beginning because his marital status and the adulterous relationship had no relevance to the charges brought against him.

[3] 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. Haltom*,

264 Neb. 976, 653 N.W.2d 232 (2002). 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 prevents a fair trial. *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999). In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Aguilar*, 264 Neb. 899, 652 N.W.2d 894 (2002).

[4] The right of both parties in a criminal action to question prospective jurors is well established. This court has long held that voir dire examination of prospective jurors

> requires the trial court to give each of the parties the right, within reasonable limits, to put pertinent questions to each and all of the prospective jurors for the purpose of ascertaining whether or not there exists [sic] sufficient grounds for challenge for cause and also to aid each of the parties in the exercise of the statutory right of peremptory challenge.

Oden v. State, 166 Neb. 729, 735, 90 N.W.2d 356, 360 (1958).

The *Oden* court cited to *Strong v. State*, 106 Neb. 339, 340, 183 N.W. 559, 559-60 (1921), in which the court stated:

> The principal purpose of the *voir dire* examination is to ascertain whether the proposed juror is free from bias or prejudice, and whether he is in such attitude of mind with respect to the case in hand that he would be a fair and impartial juror. With this end in view, it is the policy of the law to give to the parties ample opportunity to question the venireman upon matters bearing upon his competency, and questions which tend to show his attitude of mind and feelings should not be unreasonably abridged. And as each party has the right to exercise a certain number of peremptory challenges, it is proper, within reasonable limits, to propound questions which, in the judgment of the respective parties, may assist them in the exercise of that right. The extent to which the examination may be carried rests in the sound discretion of the trial court, and its ruling will not be disturbed unless there has been an abuse of discretion to the prejudice of the party complaining.

See, also, *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374 (1951).

The questions asked by the prosecutor during voir dire can be interpreted as an attempt to determine the "attitude of mind and feelings" of the jurors. See *Strong*, 106 Neb. at 340, 183 N.W. at 559. The State has the right within reasonable limits to ask questions which will assist it in exercising its peremptory challenges. Shipps was charged with sexual assault. The relationship between Shipps and D.H. included consensual sex, and it may have been important for the State to ask prospective jurors whether they could determine the case based solely on the evidence or whether they had preconceived notions about the character of the parties. The defense also asked questions about the issue after objecting to the State's comments, indicating that the defense had concerns about the jury's thoughts and feelings related to an adulterous relationship.

The trial court did not abuse its discretion in denying both the motion for mistrial and the motion for new trial on the basis of the State's remarks during voir dire. These assignments of error have no merit.

Testimony of Sandy Hull

Shipps argues that the trial court erred in denying his motions for mistrial and for new trial based on the State's production of inflammatory, prejudicial, and irrelevant testimony from Sandy Hull in violation of U.S. Const. amend. XIV and Neb. Const. art. I, § 3. Hull was called as a witness on behalf of the State.

Shipps' defense was based, at least in part, on a claim that he had been injured and did not have full use of his right hand at the time of the alleged incident. Hull, a friend of Shipps, testified that during the week of June 20, 2001, Shipps could not help move a couch because of his injury. Hull had earlier told a police officer that Shipps was able to help move the couch. Hull said that Shipps could use his right arm, but not his right hand. Hull added that he had seen Shipps move a small dresser with his left hand and right arm, but Hull never saw Shipps grasp anything with his right hand.

Hull also testified that for 2 years prior to the alleged crime, Shipps and Hull played pool together several times a week.

Shipps stopped playing pool with his right hand after his work accident because he could not hold a pool cue in that hand. He subsequently tried to play pool with his left hand. Hull saw Shipps playing pool left handed approximately 1 week before June 20, 2001.

Shipps objected when the State questioned Hull as follows: "Q[.] You were a very good friend of [Shipps], is that correct? A[.] Yes. Q[.] Okay. In fact, during 2001 you would perform a favor for [Shipps], if women stopped by your house . . . ." Defense counsel interposed an objection to the question as leading and irrelevant. Arguments on the objection were held in camera, with both parties waiving the presence of a court reporter. The objection was overruled.

The State proceeded with its questioning: "If a woman stopped by your place . . . and asked for [Shipps], what would you tell [her]?" Defense counsel again objected, on grounds of foundation and that the form of the question was hypothetical, and the objection was overruled. Hull stated that he would tell the woman that Shipps was living there but was not home at the time. Hull admitted that Shipps was not in fact living there and that he had lied for Shipps. On recross-examination, Hull stated that he did not know where Shipps was when he was not at Hull's house, but that Shipps could have been at D.H.'s house.

At trial, Shipps first objected as to the relevance of the question about Hull's performing a favor for him. Shipps' second objection was based on foundation and the form of the question. In his brief, Shipps also objects to the use of Hull's testimony as impeachment. Shipps argues that this testimony, on collateral matters, was used to impeach at a time when he had not decided whether he was going to testify at trial, and that thus, he was forced to modify his trial strategy in order to address the impeachment.

[5,6] The record shows that Shipps' complaints concerning whether this testimony constituted improper impeachment were not raised before the trial court. On appeal, a defendant may not assert a different ground for his objection to the admission of evidence than was offered to the trier of fact. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *Id.* Thus, Shipps has

waived any objection that might have been made to Hull's testimony on the basis of impeachment.

It appears that the State's questions were intended to demonstrate that as a friend of Shipps, Hull was willing to be less than truthful. Neb. Rev. Stat. § 27-607 (Reissue 1995) provides that the credibility of a witness "may be attacked by any party, including the party calling him." See, also, *State v. Marco*, 220 Neb. 96, 368 N.W.2d 470 (1985). The relationship between Hull and Shipps could be seen as close enough that Hull was willing to show bias in his testimony. The State was attempting to demonstrate this bias, and its questioning was not improper. The trial court did not abuse its discretion in failing to grant a mistrial or new trial on the basis of Hull's testimony.

Brady Violation

Shipps asserts that the trial court erred in failing to grant a new trial after the State wrongfully withheld exculpatory material which had been requested during discovery, depriving Shipps of a fair trial under U.S. Const. amend. XIV and Neb. Const. art. I, § 3.

[7-9] Under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or the bad faith of the prosecution. *State v. Castor*, 257 Neb. 572, 599 N.W.2d 201 (1999). Favorable evidence is material, and constitutional error results from its suppression by the State, if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* A reasonable probability of a different result is accordingly shown when the State's evidentiary suppression undermines confidence in the outcome of the trial. *Id.*

This assignment of error relates to Shipps' claim that because of the injury to his hand in March 2001, he would have been prevented from binding D.H. as she described. Shipps testified that he worked as an apprentice meatcutter at a grocery store and that he was not able to use his right hand in June 2001.

Rhonda Skiles, human resource coordinator for the grocery store in question, testified that on March 27, 2001, when Shipps filled out a workers' compensation claim, his hand was wrapped in a bandage and was in a splint held tightly to his torso. She said she told Shipps' supervisor that Shipps was not to use his right hand and that he should do no pushing, pulling, grasping, or fine manipulation of any type with his right hand. He was to be assigned only left-hand work. The restrictions continued through June 2001.

Rodney Thorngate, manager of the meat and seafood departments at the grocery store, testified that Shipps injured his right hand in March 2001 and was placed on light duty. By June, Shipps was able to stock shelves with his left hand if someone else opened boxes for him, and he could perform cleaning tasks. Shipps was not expected to grip, push, lift, or exercise any fine tasks with his right hand. Thorngate said he observed Shipps balancing items on his right shoulder, elbow, and upper arm.

Rory Miles, a friend of Shipps, testified that in June 2001, Shipps was not playing in a pool league because he had cut his hand in a meat grinder at work.

D.H. testified that Shipps helped her move in May 2001 and that during the move, she saw Shipps picking up items with both hands or with his left hand and his right forearm. D.H. said she saw Shipps use his right hand between May 15 and June 20. At first, he was unable to do much with it, but then he could pick up light items. D.H. said Shipps had more strength when he held the hand in a certain position. She could not remember whether he was using one hand or both hands when he was tying her with the twine or using the duct tape.

Shipps argues that the evidence at trial was equally balanced as to whether he was able to use his right hand at the time of the alleged incident. Shipps claims that when he and his defense counsel reviewed the presentence investigation report on April 2, 2002, the day of sentencing, they found a report concerning a followup interview completed by Investigator Kelly Williams of the Grand Island Police Department. The report stated that Rhonda White had told Williams on September 10, 2001, that she saw Shipps about once a week between the time of his hand injury and the time he was arrested. She said he periodically stayed

overnight at her home and that for a time, he lived with her. White reported that she never saw Shipps without a brace on his hand, nor did she see him use the injured hand for any purpose.

Williams testified during the State's rebuttal that when he first observed Shipps at Shipps' place of employment, Shipps' right arm was in a brace, without a sling. Shipps' counsel had interviewed White on other matters, but counsel claims that he did not know that White had made the above-mentioned statement concerning Shipps' hand and brace to police and that he did not learn of it until 6 weeks after trial, at the time of Shipps' sentencing.

Shipps argues that White's statements to Williams could have been used to impeach Williams' testimony. This argument is difficult to comprehend. To "impeach" means "[t]o discredit the veracity of (a witness)." Black's Law Dictionary 755 (7th ed. 1999). White told Williams that she had seen Shipps wearing a brace on his hand and that she did not see him use the hand. Williams also testified that he saw a brace on Shipps' hand. Shipps argues that he could have used the report of the interview with White to discredit the veracity of Williams' testimony. White and Williams testified to the same fact—seeing Shipps with a brace on his hand. This alleged error has no merit.

The State argues that Shipps has waived this allegation of error because he made no objection to the presentence investigation report when asked if he was prepared for sentencing on April 2, 2002. We do not decide the waiver issue because Shipps has not shown that Williams' report is a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

[10] To meet the standard of a due process violation, alleged undisclosed exculpatory evidence must be " 'material either to guilt or to punishment.' " See *State v. Castor*, 257 Neb. 572, 584, 599 N.W.2d 201, 211 (1999). Shipps presented other evidence concerning his hand injury, and the jury was free to take it into consideration. For constitutional error to result from nondisclosure of evidence, there must have been " ' "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." ' " *Id.* The mere fact that one more witness could have testified concerning

whether Shipps was able to use his hand does not support a finding that the result of the trial would have been different.

The police report describing the interview with White did not prejudice Shipps, whose counsel had previously interviewed White. We conclude that any failure to disclose the report does not undermine confidence in the outcome of the trial, and this assignment of error therefore has no merit.

Prosecutorial Misconduct

[11] Shipps assigns as error the trial court's failure to grant a new trial based on prosecutorial misconduct. The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000). As noted above, none of the actions of the prosecutor constituted misconduct, nor did they mislead or unduly influence the jury. The court did not abuse its discretion in failing to grant a new trial on this basis.

Cumulative Trial Error

Finally, Shipps alleges that he was denied his constitutional right to a fair trial by cumulative trial error, reasserting the errors discussed above.

[12,13] A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the verdict. *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001). The jury heard the first-person account of D.H., who described the events of the day in question. It heard the testimony of D.H.'s friend, who observed D.H. immediately after she escaped. It heard Shipps' own testimony as to his actions on the day in question. 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. Jackson*, 264 Neb. 420, 648 N.W.2d 282 (2002). The evidence here is sufficient, and the assigned errors do not require a new trial.

CONCLUSION

The trial court did not abuse its discretion in denying Shipps' motions for new trial and for mistrial based on the State's comments during voir dire, the introduction of testimony from Hull, or any other alleged prosecutorial misconduct. The court did not err in failing to grant a new trial based on the alleged failure to disclose exculpatory material per *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and we do not find cumulative trial error which demonstrates that Shipps was denied his constitutional right to a fair trial. Thus, the judgment of conviction is affirmed.

AFFIRMED.

MICHAEL R. BREEDEN AND CARILYN BREEDEN, HUSBAND AND WIFE, APPELLANTS AND CROSS-APPELLEES, V. ANESTHESIA WEST, P.C., ET AL., APPELLEES AND CROSS-APPELLANTS.

656 N.W.2d 913

Filed February 28, 2003. No. S-01-774.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
2. **Negligence.** Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case.
3. ____. Whether a duty is nondelegable is a question of law.
4. ____. There is no set formula for determining when a duty is nondelegable. Whether a particular duty is properly categorized as nondelegable necessarily entails a sui generis inquiry, since the conclusion ultimately rests on policy considerations.
5. **Negligence: Liability: Independent Contractor: Words and Phrases.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
6. **Negligence.** The person owing a nondelegable duty is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures.
7. **Malpractice: Physicians and Surgeons: Negligence.** The rationale behind nondelegable duties does not limit their application to principal surgeons, since the

determination of whether a particular duty is nondelegable is a question of law which ultimately rests on policy considerations.

8. **Negligence.** The risk reasonably to be perceived defines the duty to be obeyed.
9. ____. Under established principles, one's reasonable expectations and beliefs about who will render a particular service are a significant factor in identifying duties that should be deemed to be nondelegable.
10. **Physician and Patient: Negligence: Public Policy.** Public interest warrants the imposition of a nondelegable duty upon an anesthesiologist to be aware of reasonably available medical information significant to the health of his or her patient prior to administering anesthesia.
11. **Malpractice: Physicians and Surgeons.** The appropriate standard of care in a medical malpractice action is a question of fact.
12. **Trial: Jury Instructions: Appeal and Error.** In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level.
13. **Malpractice: Physicians and Surgeons: Expert Witnesses.** Except in exceptional cases, each element of a claim of medical malpractice must be proved through expert testimony.
14. **Rules of Evidence.** Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule.
15. **Rules of Evidence: Expert Witnesses.** Pursuant to Neb. Rev. Stat. § 27-803(17) (Cum. Supp. 2002), learned treatises which have been established as a reliable authority are admissible into evidence only to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination.
16. **Malpractice: Physicians and Surgeons: Evidence: Expert Witnesses.** Duly admitted learned treatises do not independently establish the standard of care in a medical malpractice action. They are merely evidence of the standard of care to the extent relied upon by the expert witness in direct examination, or called to the attention of the expert witness upon cross-examination.
17. **Witnesses: Testimony: Juries.** A nonparty witness' changed testimony, even if made without reasonable explanation and in order to meet the exigencies of pending litigation, is but a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for a new trial.

Daniel B. Cullan, Paul W. Madgett, and Diana J. Vogt, of Cullan & Cullan, for appellants.

David D. Ernst and Earl G. Greene III, of Gaines, Pansing & Hogan, for appellees Wesley K. Hubka and Janet Lemonds.

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

HENDRY, C.J.

I. INTRODUCTION

Michael R. Breeden and Carilyn Breeden sued appellees Anesthesia West, P.C., and its employees Dr. Wesley K. Hubka, an anesthesiologist, and Janet Lemonds, a nurse anesthetist, for medical malpractice. (Appellees are referred to collectively herein as "Anesthesia West.") The Breedens alleged that Michael Breeden (hereinafter Breeden) suffered brain damage as a result of Dr. Hubka's and Lemonds' negligence in administering general anesthesia during Breeden's gallbladder removal surgery. The Breedens appeal a jury verdict in favor of Anesthesia West.

II. FACTUAL BACKGROUND

Breeden was admitted to Methodist Hospital in Omaha, Nebraska, on August 14, 1994, to have his gallbladder surgically removed. During the evening of August 15, Dr. Doug Rennels, an anesthesiologist, conducted a preanesthetic evaluation of Breeden. Such examination disclosed, inter alia, no evidence of "peripheral neurological deficits."

During the morning of August 16, Nurse Joyce Clark, an employee of Methodist Hospital, again evaluated Breeden's condition. As a result of this evaluation, Clark made an entry in Breeden's electronic file on Methodist Hospital's computer system that Breeden was experiencing "TINGLING OF RT LEG, RT SIDE OF BODY TO MID CHEST." The entry reflected that Clark observed the symptom at 9:50 a.m.

At approximately 10:35 a.m., Breeden was taken to the preoperation holding area in order to receive general anesthesia. There, Breeden's condition was again evaluated, this time by Dr. Hubka, after which Dr. Hubka and Lemonds administered general anesthesia to Breeden. Although, according to Dr. Hubka, there were "at least three" computers in the preoperation holding area on which the nursing notes in Breeden's electronic file could have been accessed, neither Dr. Hubka nor Lemonds accessed Breeden's electronic file to read Clark's entry prior to administering anesthesia. Breeden's anesthesia was monitored throughout the surgery by Dr. Hubka and Lemonds.

The Breedens filed a medical malpractice action against Anesthesia West, alleging that Dr. Hubka and Lemonds were

negligent in administering general anesthesia and that as a result, Breeden suffered brain damage. In their operative petition, the Breedens alleged, inter alia, that Dr. Hubka and Lemonds breached their duty to "[e]nsure that [Breeden's] surgery was postponed" based on the information in Clark's note.

During two pretrial depositions, Clark gave conflicting testimony regarding the time she actually entered the note regarding Breeden's "tingling" symptom into the Methodist Hospital computer system. Clark testified in her first deposition that she entered the note at 9:50 a.m. on August 16. However, in her second deposition, Clark testified she may have entered the note later in the day, after Breeden's surgery.

Prior to trial, the district court ruled, over Anesthesia West's objection, that pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981), Clark's "earlier deposition which indicates that the entry was made at a time on or before the day of surgery or the specific words of her own testimony will be the testimony at trial as a matter of law." Such determination was ultimately incorporated into jury instruction No. 5, which provided that "[t]he Court has determined as a matter of law that the following fact exists and you must accept it as true: Nurse Joyce Clark entered her nursing note on the computer at 9:50 a.m. on August 16, 1994."

At trial, the Breedens' expert, Dr. Richard Fields, opined that Clark's note indicating Breeden complained of "tingling" in his right side and right leg might have reflected a transient ischemic attack, or "TIA," a condition during which the brain receives insufficient oxygen. Dr. Fields opined that administering general anesthesia to a patient suffering a TIA "puts [the patient] at extreme risk of producing a permanent bad result or aggravating — extending the problems that he has."

Dr. Hubka agreed that if Breeden was suffering from a TIA prior to surgery, his anesthesia should have been postponed. Dr. Hubka asserted, however, that he acted within the prevailing standard of care by relying on Clark to verbally report to him if, in her view, the "tingling" symptom was significant. Dr. Hubka stated that "[n]urses will always call us and give us reports on significant findings that they've made." In Dr. Hubka's view, the fact that Clark did not verbally communicate to him concerns about the

"tingling" symptom suggested that Breeden probably was not suffering from a TIA prior to surgery. Similarly, Anesthesia West's expert, Dr. Myrna Newland, an anesthesiologist and member of the faculty at the University of Nebraska Medical Center, opined that Dr. Hubka acted within the prevailing standard of care by relying on nurses to verbally report "significant" symptoms to him. Dr. Newland stated that in her practice, "we depend on the preoperative nurse and the nurse taking care of the patient to communicate any significant change that should be brought to our attention."

The jury returned a verdict in favor of Anesthesia West and against the Breedens. The Breedens moved for a new trial, which was overruled by the district court. The Breedens appealed. We moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

III. ASSIGNMENTS OF ERROR

The Breedens assign, rephrased, that the district court erred in (1) "fail[ing] to give Instruction No. 12A [which provided] that the duties of an anesthesiologist [are] nondelegable"; (2) giving jury instruction No. 9 regarding the applicable standard of care because it "violated Due Process, misstated the law, was misleading, and was not supported by the evidence"; (3) "fail[ing] to modify Instruction 9. to correctly state the law"; (4) failing to grant the Breedens' motion for a mistrial; and (5) denying the Breedens' motion for a new trial.

IV. CROSS-APPEAL

Anesthesia West assigns on cross-appeal that the district court erred (1) "[w]hen it ruled as a matter of law that the inconsistent, nonparty witness statement made by Clark constituted changed testimony for the exigencies of trial pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981)," and (2) "[b]y the giving of Jury Instruction No. 5 because the court gave the instruction based on its erroneous application of *Momsen* to the testimony of the witness Joyce Clark."

V. STANDARD OF REVIEW

Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Fu v.*

State, 263 Neb. 848, 643 N.W.2d 659 (2002); *Sharkey v. Board of Regents*, 260 Neb. 166, 615 N.W.2d 889 (2000).

To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002); *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

Whether the jury instructions given by a trial court are correct is a question of law. *Malone, supra*; *Springer, supra*. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smith v. Fire Ins. Exch. of Los Angeles*, 261 Neb. 857, 626 N.W.2d 534 (2001); *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

VI. ANALYSIS

1. Jury Instruction No. 12A

The Breedens first assign that the district court erred by refusing to give the Breedens' tendered jury instruction No. 12A. Instruction No. 12A provided:

> The duty to read the nursing notes from the period immediately after the Pre-Anesthesia Evaluation through the period immediately before surgery is a duty owed by the anesthesiologists. It is a nondelegable duty. That means the anesthesiologist by assigning to another the duty to read such nursing notes is not relieve[d] from liability arising from the delegated duties if they are negligently performed.
>
> Since the duty to read such nursing notes is a nondelega[ble] duty, the responsibility and ultimate liability for the proper performance of that duty cannot be delegated, although the actual performance of the task may be done by another.

[1] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law,

(2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Malone, supra*; *Springer, supra.*

(a) Correct Statement of Law and Warranted by the Evidence

[2] Whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular case. *Fu, supra*; *Sharkey, supra.* This court has previously held that in certain circumstances, the ultimate responsibility for the performance of duties owed by a physician to his or her patient is nondelegable. *Hawkes v. Lewis*, 252 Neb. 178, 560 N.W.2d 844 (1997); *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

In *Hawkes, supra*, this court held that "the surgeon in charge" of performing an abdominal hysterectomy owed a nondelegable duty to his patient to properly "'"pack away"'" the patient's small intestine during the surgery so as to avoid damage to surrounding organs. 252 Neb. at 179, 181, 560 N.W.2d at 846-47. In *Swierczek, supra*, this court held that the "'surgeon in charge'" while an operation was in progress had a nondelegable duty to ensure the safety of his patient while she was in the operating room having her teeth removed. 237 Neb. at 479, 466 N.W.2d at 518. See, also, *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994) (noting that principal surgeon performing breast reduction surgery had nondelegable duty to properly close surgical incisions).

Long, supra, involved a surgeon who, in reliance on a radiologist's misinterpretation of a spinal x ray, operated on the wrong vertebrae of his patient's spine. In the ensuing medical malpractice action brought by the patient against the surgeon, the surgeon contended that he acted within the prevailing standard of care by relying on the radiologist's x-ray interpretation to localize the operative site of his patient.

This court found no merit in the surgeon's contention. We relied on our prior decisions in medical malpractice cases as authority for the rule that "a head surgeon is ultimately liable for the negligent acts or omissions of others who are assisting in the surgery." *Id.* at 555, 520 N.W.2d at 201. Accordingly, we held that

the ultimate responsibility for identifying the operative site of his patient could not be delegated by the surgeon to the radiologist.

The nondelegable duty rule evolved as an exception to the general rule that an employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984); *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981); Restatement (Second) of Torts § 409 (1965). See, also, *Kleeman v. Rheingold*, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993); *Saiz v. Belen School Dist.*, 113 N.M. 387, 393, 827 P.2d 102, 108 (1992) (noting that "[t]he absence of a right of control over the manner in which the work is to be done is the most commonly accepted criterion for distinguishing independent contractors from employees whose negligence the employer is vicariously liable").

[3,4] Whether a duty is nondelegable is a question of law. *Saiz, supra*; *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 82 Cal. Rptr. 2d 162 (1999). There is no set formula for determining when a duty is nondelegable. "Indeed, whether a particular duty is properly categorized as 'nondelegable' necessarily entails a *sui generis* inquiry, since the conclusion ultimately rests on policy considerations." *Kleeman*, 81 N.Y.2d at 275, 614 N.E.2d at 715, 598 N.Y.S.2d at 152. See, also, Restatement, *supra*, Introductory Note for §§ 416 to 429. As stated by the Michigan Supreme Court in *Funk v General Motors Corp*, 392 Mich. 91, 101-02, 220 N.W.2d 641, 645 (1974), *abrogated on other grounds, Hardy v Monsanto Enviro-Chem*, 414 Mich. 29, 323 N.W.2d 270 (1982), which was cited with approval in *Erickson, supra*:

> Inevitably it becomes a matter of judgment, case by case, where to draw the line between so-called "delegable" and "nondelegable" tasks and duties. In a given case, the policy question facing a court (the law of torts is largely judge-made) is whether on the facts presented the public interest warrants imposition upon a person who has delegated a task the duty to guard against risks implicit in the performance of the task.

Courts have often deemed a duty to be nondelegable when "'the responsibility is so important to the community that the employer should not be permitted to transfer it to another.'"

Feliberty v. Damon, 72 N.Y.2d 112, 119, 527 N.E.2d 261, 264, 531 N.Y.S.2d 778, 781 (1988) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 71 (5th ed. 1984)). See, also, Restatement, *supra*, §§ 417 and 418; *Hammond v. The Nebraska Nat. Gas Co.*, 204 Neb. 80, 281 N.W.2d 520 (1979) (holding that duty natural gas utility owed to public to install safe natural gas pipelines was nondelegable).

[5,6] The exception for nondelegable duties "requires the person upon whom it is imposed to answer for it that care is exercised by anyone, even though he be an independent contractor, to whom the performance of the duty is entrusted." Restatement, *supra*, Introductory Note for §§ 416 to 429 at 394. This court has explained that a nondelegable duty

> " 'means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.' "

Long v. Hacker, 246 Neb. 547, 555, 520 N.W.2d 195, 201 (1994) (quoting *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991), and *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985)). Thus, the person owing a nondelegable duty "is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures." *Hickman v. Parks Construction Co.*, 162 Neb. 461, 470, 76 N.W.2d 403, 410 (1956).

[7] While this court has previously determined that duties owed by the principal surgeon are nondelegable, it has not had occasion to determine whether duties owed by an anesthesiologist are nondelegable. However, the rationale behind nondelegable duties does not limit their application to principal surgeons, since the determination of whether a particular duty is nondelegable is a question of law which ultimately rests on policy considerations. *Kleeman v. Rheingold*, 81 N.Y.2d 270, 614 N.E.2d 712, 598 N.Y.S.2d 149 (1993); *Saiz v. Belen School Dist.*, 113 N.M. 387,

827 P.2d 102 (1992); *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 82 Cal. Rptr. 2d 162 (1999).

[8,9] This court has stated that the risk reasonably to be perceived defines the duty to be obeyed. *Knoll v. Board of Regents*, 258 Neb. 1, 601 N.W.2d 757 (1999). The experts in this case would appear to agree that "significant" symptoms which put one's patient at risk should be known by the anesthesiologist prior to commencing anesthesia. The disagreement lies in the acceptable manner in which such information is made known to the anesthesiologist. Given the inherent risks of anesthesia, it is reasonable for a patient to assume that medical information significant to a determination of whether the patient can be safely anesthetized will be known by the anesthesiologist before the patient receives anesthesia. "Under established principles, the client's reasonable expectations and beliefs about who will render a particular service are a significant factor in identifying duties that should be deemed to be 'nondelegable.' " *Kleeman*, 81 N.Y.2d at 276, 614 N.E.2d at 716, 598 N.Y.S.2d at 153. Accord Restatement (Second) of Torts § 429 (1965).

[10] We therefore determine that because a patient can sustain severe injuries and even death if anesthesia is not administered properly, public interest warrants the imposition of a nondelegable duty upon an anesthesiologist to be aware of reasonably available medical information significant to the health of his or her patient prior to administering anesthesia. *Kleeman, supra*; *Feliberty v. Damon*, 72 N.Y.2d 112, 527 N.E.2d 261, 531 N.Y.S.2d 778 (1988); *Funk v General Motors Corp*, 392 Mich. 91, 220 N.W.2d 641 (1974), *abrogated on other grounds, Hardy v Monsanto Enviro-Chem*, 414 Mich. 29, 323 N.W.2d 270 (1982). Such duty is an integral part of the care the anesthesiologist delivers, and he or she should not be able to avoid the responsibility for the proper performance of such duty by delegating it to others.

[11] The appropriate standard of care in a medical malpractice action is a question of fact. See *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). If, on retrial, the standard of care is ultimately found to be one which delegates to others the responsibility for reporting to the anesthesiologist reasonably available medical information significant to the health of the patient, the anesthesiologist is not relieved from liability if the finder of fact

determines the delegated duties were performed negligently. *Long v. Hacker*, 246 Neb. 547, 520 N.W.2d 195 (1994).

Tendered jury instruction No. 12A is both a correct statement of the law and warranted by the evidence. In essence, the tendered instruction informed the jury that an anesthesiologist who delegates to others the responsibility for reporting to him or her reasonably available medical information significant to the health of the patient prior to the patient's undergoing anesthesia is not relieved from liability if the delegated responsibility is done negligently.

(b) Prejudice

The failure to give the Breedens' tendered jury instruction No. 12A was prejudicial. The jury was instructed, inter alia, that the Breedens claimed Anesthesia West, through its employees Dr. Hubka and Lemonds, breached the standard of care by "[f]ailing to read the nursing notes between the time that its employee, Douglas E. Rennels, M.D., performed the pre-anesthetic evaluation and that [sic] when Wesley K. Hubka, M.D. and Janet Lemonds performed their anesthetic duties." The jury was also instructed that "[t]he defendants further allege that the cause of plaintiffs' injuries and damages, if any, was something other than the alleged action or inaction of the defendants."

Anesthesia West asserted in closing argument that under the prevailing standard of care, neither Dr. Hubka nor Lemonds was required to be aware of the information in the nurses' notes unless such information was verbally brought to their attention. Anesthesia West's counsel argued, "Ladies and gentlemen, what is the standard of care? . . . The standard of care is to verbally pass along the information. . . . It's verbal communication. That's how it's done in this case. The plaintiff has not met the burden on standard of care."

In the absence of the Breedens' tendered instruction No. 12A, the jury was free to find that if the standard of care permitted Anesthesia West to delegate to others the responsibility of bringing to its attention reasonably available medical information significant to Breeden's health, Anesthesia West was relieved of liability even if the party to whom the responsibility was delegated performed that responsibility negligently. The district court's

failure to give the Breedens' tendered instruction No. 12A was prejudicial and necessitates reversal.

Having determined that the trial court's failure to give the Breedens' tendered instruction No. 12A requires reversal, we limit our consideration of the Breedens' remaining assignments of error to issues likely to arise again on retrial. See *Pleiss v. Barnes*, 260 Neb. 770, 619 N.W.2d 825 (2000).

2. Jury Instruction No. 9

The Breedens assign that the district court erred in several respects regarding instruction No. 9. We address but one such contention. Instruction No. 9 provided:

> This is an action based upon a claim of malpractice, sometimes called professional negligence. A statute of the State of Nebraska provides:
>
> "Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in this or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of the health care provider in a particular community, the test shall be that which healthcare providers in the community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances."
>
> We are here concerned with a highly specialized field with which laymen cannot be expected to be familiar. Accordingly, the standard of care of the required skill and knowledge to be exercised must necessarily be established by expert witnesses who are learned in the field of medicine. You must not, therefore, arbitrarily set your own standards, but you should determine the standard of care or required skill and knowledge from the testimony of the expert witness[es] who testified in this case.
>
> The defendants in this case are health care providers under the terms of the foregoing statute.

Before discussing the merits of the Breedens' assigned errors with respect to instruction No. 9, we first address Anesthesia West's contention that the Breedens waived any objection to instruction No. 9 because they did not offer an alternative jury instruction. In support of this contention, Anesthesia West relies upon *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998), and *State v. Al-Zubaidy*, 253 Neb. 357, 570 N.W.2d 713 (1997).

Appellants in both *Lotter* and *Al-Zubaidy* assigned as error the trial court's failure to give a requested jury instruction. In both cases, we did not consider the assigned error because appellant had failed to request that the trial court give the instruction in question. We held that "[a] party who does not request a desired jury instruction cannot complain on appeal about incomplete instructions." *Lotter*, 255 Neb. at 508, 586 N.W.2d at 628. Accord *Al-Zubaidy, supra*.

[12] Neither *Lotter* nor *Al-Zubaidy* is applicable to the Breedens' assignments of error regarding instruction No. 9. Unlike *Lotter* and *Al-Zubaidy*, the Breedens have assigned as error an instruction given, rather than the court's failure to give a requested instruction. The record reflects that the Breedens timely objected to instruction No. 9 at the jury instruction conference. Such objection preserved the Breedens' objection to instruction No. 9 for purposes of this appeal. In order to appeal a jury instruction, an objection to the proposed instruction must be made at the trial level. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). Therefore, contrary to Anesthesia West's contention, the Breedens' assignment of error regarding instruction No. 9 is properly before the court. We therefore consider one of the Breedens' contentions regarding instruction No. 9, which is likely to arise on retrial.

The Breedens contend that instruction No. 9, inter alia, erroneously required them to prove the applicable standard of care solely through expert testimony. Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002); *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

The portion of instruction No. 9 regarding the standard of care provided:

> We are here concerned with a highly specialized field with which laymen cannot be expected to be familiar. Accordingly, the standard of care of the required skill and knowledge to be exercised must necessarily be established by expert witnesses who are learned in the field of medicine. You must not, therefore, arbitrarily set your own standards, but *you should determine the standard of care or required skill and knowledge from the testimony of the expert witness[es] who testified in this case.*

(Emphasis supplied.)

[13] This portion of instruction No. 9 was an accurate statement of the longstanding rule that except in exceptional cases, each element of a claim of medical malpractice must be proved through expert testimony. See, *Fossett v. Board of Regents*, 258 Neb. 703, 605 N.W.2d 465 (2000); *McLaughlin v. Hellbusch*, 256 Neb. 615, 591 N.W.2d 569 (1999). The Breedens argue, however, that with the adoption of the "learned treatise" exception to the hearsay rule, Neb. Rev. Stat. § 27-803(17) (Cum. Supp. 2002), an exception to the expert testimony requirement regarding proof of the standard of care should be recognized. The Breedens contend that instruction No. 9 in effect "instructed the jury to disregard the evidence contained in the 'Learned Treatises' since it was not the testimony of the expert witness." Brief for appellants at 40.

Under § 27-803,

> [t]he following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> . . . .
>
> (17) Statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice, to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination. If admitted, the statements may be read into evidence but may not be received as exhibits.

[14] This court has not had occasion to construe § 27-803(17). Since § 27-803(17) is, however, substantially similar to Fed. R.

Evid. 803(18), we will look to federal decisions interpreting Fed. R. Evid. 803(18) for guidance in construing § 27-803(17). Where a Nebraska Evidence Rule is substantially similar to a corresponding federal rule of evidence, Nebraska courts will look to federal decisions interpreting the corresponding federal rule for guidance in construing the Nebraska rule. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). See, also, *State v. Johnson*, 220 Neb. 392, 370 N.W.2d 136 (1985), *abrogated on other grounds, State v. Morris*, 251 Neb. 23, 554 N.W.2d 627 (1996).

In *Tart v. McGann*, 697 F.2d 75, 78 (2d Cir. 1982), the court held that Fed. R. Evid. 803(18) permits the admission of learned treatises as substantive evidence "'to the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination,'" and only "as long as it is established that such literature is authoritative." The court explained that while rule 803(18) permits the admission of learned treatises as substantive evidence, learned treatises are not admissible independently of expert testimony:

> Prior to the enactment of Rule 803(18), learned treatises were generally usable only on cross-examination, and then only for impeachment purposes. [Citation omitted.] Most commentators found the hearsay objections to learned treatise evidence unconvincing, and recommended that treatises be admitted as substantive evidence. Some commentators went so far as to suggest that treatises be admitted independently of an expert's testimony. [Citation omitted.] The Advisory Committee rejected this position, noting that a treatise might be "misunderstood and misapplied without expert assistance and supervision." . . . Accordingly, the Rule permits the admission of learned treatises as substantive evidence, but only when "an expert is on the stand and available to explain and assist in the application of the treatise . . . ."

Tart, 697 F.2d at 78 (quoting Fed. R. Evid. 803(18) advisory committee notes).

We find the reasoning of the Second Circuit in *Tart, supra*, persuasive. In the instant case, excerpts from each of three treatises were read by Dr. Fields during his direct examination testimony. Such excerpts, which were established as authoritative, provided

substantive evidence of the standard of care because Dr. Fields was " 'on the stand and available to explain and assist in the application of the treatise[s].' " See *Tart*, 697 F.2d at 78. The learned treatises, however, were a part of Dr. Fields' testimony, and as such, we find no merit in the Breedens' contention that the district court erred in instructing the jury to determine the standard of care "from the testimony of the expert witness[es] who testified in this case."

[15,16] Additionally, we find no merit in the Breedens' contention that § 27-803(17) creates an exception to the expert testimony requirement in medical malpractice cases. Pursuant to § 27-803(17), learned treatises which have been established as a reliable authority are admissible into evidence only "to the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination." Thus, duly admitted learned treatises do not independently establish the standard of care in a medical malpractice action. They are merely evidence of the standard of care to the extent relied upon by the expert witness in direct examination, or called to the attention of the expert witness upon cross-examination. § 27-803(17); *Tart, supra.* See, also, *Morlino v. Medical Center*, 152 N.J. 563, 706 A.2d 721 (1998). But see *Wilson v. Knight*, 26 Kan. App. 2d 226, 229, 982 P.2d 400, 403 (1999) (noting that Kansas' learned treatise rule is "unique" since it permits "the admission into evidence of a medical treatise as independent substantive evidence" of the standard of care). The Breedens' assigned error is without merit.

3. Remaining Assignments of Error

Since our conclusion requires that we reverse, and remand this matter for a new trial, we find it unnecessary to further address the Breedens' arguments with respect to instruction No. 9 or their remaining assignments of error.

VII. CROSS-APPEAL

Anesthesia West assigns on cross-appeal that the district court erred in ruling as a matter of law that the inconsistent statements made by Clark constituted changed testimony for the exigencies of trial pursuant to *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). Anesthesia West further

assigns error in incorporating such pretrial ruling into jury instruction No. 5. Whether the jury instructions given by a trial court are correct is a question of law. *Malone v. American Bus. Info.*, 264 Neb. 127, 647 N.W.2d 569 (2002); *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

Clark testified in her initial deposition that she entered the note describing Michael Breeden's "tingling" symptom into Breeden's electronic file at 9:50 a.m. on August 16, 1994, prior to Breeden's surgery. However, in her second deposition, Clark testified she might have entered the note later in the day after Breeden's surgery:

> Q. [by Anesthesia West's counsel] [The notation of time on the nursing note is] not necessarily the moment that you're at the computer putting the note in; true?
>
> A. Correct.
>
> Q. And the computer doesn't print out a time which shows the moment that you were at the computer keyboard making the time entry; true?
>
> A. Not to my knowledge.
>
> Q. And you chart symptoms when you have the opportunity to do so; correct?
>
> A. Yes.
>
> Q. And sometimes you might chart it later in the day when you have the time, but you'll refer back to the time that the observation was made in the note; true?
>
> A. There are times.
>
> Q. That's — What you're supposed to do is list the time that something happened, as best you can estimate it or list it; true?
>
> A. Yes.
>
> Q. And that may be different than the time that you're actually at the keyboard; true?
>
> A. There are times.

Prior to trial, the district court ruled, over Anesthesia West's objection, that under the rule enunciated in *Momsen, supra*,

Clark's "earlier deposition which indicates that the entry was made at a time on or before the day of surgery or the specific words of her own testimony will be the testimony at trial as a matter of law." Such determination was incorporated into jury instruction No. 5, which provided that "[t]he Court has determined as a matter of law that the following fact exists and you must accept it as true: Nurse Joyce Clark entered her nursing note on the computer at 9:50 a.m. on August 16, 1994."

In *Momsen*, a defendant doctor made statements during a pretrial deposition which in effect admitted his negligence. However, during trial, he testified to new facts which contradicted his earlier statements. On appeal, this court considered "whether, under the circumstances of this case, the [doctor's deposition] admissions bind him or simply go to the issue of his credibility." *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 53, 313 N.W.2d 208, 212 (1981). We determined that a party who changes his or her testimony during the course of litigation is bound by his or her earlier statements upon proof "that the testimony pertains to a vital point, that it is clearly apparent the party has made the change to meet the exigencies of the pending case, and that there is no rational or sufficient explanation for the change in testimony." *Id.* at 55, 313 N.W.2d at 213. See, also, *Neill v. Hemphill*, 258 Neb. 949, 607 N.W.2d 500 (2000). Accordingly, we held that the doctor was bound by his earlier deposition testimony, since the changed testimony concerned the central issue of the doctor's negligence, it was clear the doctor deliberately changed his testimony to meet the exigencies of the trial, and the doctor could not explain the change in his testimony. *Momsen, supra.*

[17] This court has specifically declined to extend *Momsen, supra*, to instances of changed testimony by nonparty witnesses. *Ketteler v. Daniel*, 251 Neb. 287, 556 N.W.2d 623 (1996). A nonparty witness' changed testimony, even if made without reasonable explanation and in order to meet the exigencies of pending litigation, "is a factor to be considered by the jury when determining the weight and credibility to be given the witness' testimony." *Id.* at 295, 556 N.W.2d at 628. See, also, *State v. Osborn*, 241 Neb. 424, 490 N.W.2d 160 (1992); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986). We again decline to extend *Momsen* to nonparty witnesses.

Since *Momsen, supra*, does not apply to nonparty witnesses, the district court erred in giving jury instruction No. 5.

VIII. CONCLUSION

For the reasons stated herein, the matter is reversed, and the cause is remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

IN RE INTEREST OF JOSHUA R. ET AL., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. ANGELA R., APPELLANT.

657 N.W.2d 209

Filed February 28, 2003. Nos. S-02-253 through S-02-257.

1. **Juvenile Courts: Appeal and Error.** Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings.
2. **Evidence: Appeal and Error.** When the evidence is in conflict, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other.
3. **Parental Rights: Evidence: Proof.** Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests.
4. **Juvenile Courts.** Juvenile proceedings are civil rather than criminal in nature.
5. **Right to Counsel.** An individual has no constitutional right to effective assistance of counsel in a civil proceeding.
6. **Parental Rights: Due Process.** Due process is required in cases involving termination of parental rights.
7. **Parental Rights.** Children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity.

Appeals from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

Robert B. Creager and Jonathan M. Braaten, of Anderson, Creager & Wittstruck, P.C., for appellant.

Randy R. Stoll, York County Attorney, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On January 31, 2002, the York County Court, sitting as a juvenile court, entered an order terminating the parental rights of Angela R. to her five minor children, Joshua R., Glorianna R., Shaughnessy R., deChelly R., and Desmarais R., pursuant to Neb. Rev. Stat. § 43-292(2), (6), and (7) (Reissue 1998). In these consolidated cases, Angela appeals the termination of her parental rights. We affirm.

STATEMENT OF FACTS

Angela is the natural mother of the following five minor girls: Joshua, born on August 30, 1988; Glorianna, born on May 27, 1990; Shaughnessy, born on July 24, 1997; deChelly, born on July 24, 1998; and Desmarais, born on November 8, 1999. Angela is also the mother of a son who evidently died of an asthma attack in 1996 at the age of 10 and a daughter who was born after Desmarais and is not subject to these proceedings. According to the record, the five children in these proceedings have four different fathers, none of whom are parties to these appellate proceedings.

On November 30, 1999, all five children were removed from Angela's care and placed in protective custody with the Nebraska Department of Health and Human Services (DHHS) by the York Police Department due to allegations of neglect and lack of proper parental care. All five children have remained in foster care in the custody of DHHS since that date.

On December 1, 1999, five separate petitions were filed, one as to each of the above-named children, alleging that the subject child was a juvenile as described under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1998). The five proceedings were consolidated below and on appeal. An adjudication hearing was held on December 16. In the court's December 17 order, each child was adjudicated a juvenile within the meaning of § 43-247(3)(a). The court made numerous findings, including the following:

> [O]n November 24th, 1999, Officer Roger Wolfe of the York Police Department went to [Angela's] residence . . .

> at about 1:15 p.m. The Officer entered the house . . . . It was obvious to the Officer that the family was just getting out of bed . . . . The Officer asked [Angela] why Glorianna . . . was not in school that day. [Angela] advised the Officer that Joshua was supposed to go to the doctor that afternoon . . . and that the school knew about that. [The Officer] then contacted the school and was advised that the school had no idea why the child was not in school. The Officer was advised that Glorianna and Joshua missed the bus.
>
> . . . .
>
> The Officer and a [DHHS] representative . . . went to the home to check on the two younger children on November 29, 1999. They determined from the school that Joshua . . . had been taken out [of] school to go to the Clinic. The Officers [sic] found Joshua . . . at the Clinic waiting alone. The time period is disputed between [the] parties, but in any event [Joshua] was left alone for a period of time.
>
> Glorianna and Joshua . . . were interviewed. They indicated that they did most of the housework at their home and mixed all of the formula prior to going to bed at night. . . .
>
> The Officer determined that Joshua . . . had missed sixteen days of school during the current year all of which were unexcused absences. [Angela] advised the Officer that it was because the girls missed the bus ast [sic] they didn't get out there in time. [Angela] didn't feel that it was her problem that the children were not making the bus in time. . . .
>
> The Juveniles indicated that they rarely eat breakfast except on days that they don't have school. They also indicated that when they have school, the only meal that is served in the home is served late in the evening.
>
> When [a DHHS worker] checked Desmarais she found the juvenile had a terrible diaper rash. . . . Desmarais was five and half pounds at birth and one month later is now six pounds.

Based upon these and other factual findings as to each juvenile, the court adjudicated the five children. Angela did not appeal the adjudication order.

A hearing was held on January 27, 2000, and a disposition order was entered on February 7, setting forth a rehabilitation

plan for Angela and spelling out a number of goals, which can be summarized as including attending mental health counseling, acquiring anger management skills, acquiring parenting skills, and improving finances. The permanency objective was reunification. Angela did not appeal the disposition order establishing the rehabilitation plan. Periodic dispositional hearings were held. In orders filed on May 24 and December 15, the court continued the original plan and goals with minor changes.

A permanency hearing was held on December 13, 2000, and continued on January 18 and February 13, 2001. In an order filed on April 26, the court determined that based upon the evidence presented at the hearing, which included testimony from a family support worker and the DHHS caseworker assigned to the children, it was "inappropriate to continue to consider reunification with [Angela] and that the proper permanency plan [was for] the state [to file] a petition for termination of parental rights as to each of the [children]." The court concluded that "after more than 15 months, [Angela had] failed to show that she can or will acknowledge the situation or that she would cooperate in a reasonable way to solve the problems which brought about the cases concerning [the children]."

On May 29, 2001, Angela filed a notice of appeal in each of the cases, seeking to appeal the court's April 26 order changing the permanency objective from reunification to termination of parental rights. The Nebraska Court of Appeals dismissed the appeals as untimely, having been filed more than 30 days after the entry of the order appealed from. See *In re Interest of DeChelly R. et al.*, 10 Neb. App. xliv (Nos. A-01-685 through A-01-689, July 31, 2001).

On May 17, 2001, the State filed motions for termination of parental rights in each of the five children's proceedings. The motions were essentially identical, and each sought termination of Angela's parental rights under § 43-292(2), (4), (6), and (7). The motions also asserted that termination of parental rights was in each of the children's best interests.

Section 43-292(2) requires a finding that the parent has substantially and continuously or repeatedly neglected or refused to give the juvenile or a sibling of the juvenile necessary parental care and protection. Section 43-292(4) requires a finding that the

parent is unfit by reason of conduct which is seriously detrimental to the health, morals, or well-being of the juvenile. Section 43-292(6) requires a finding that following a determination that the juvenile is one as described in § 43-247(3)(a), reasonable efforts to preserve and unify the family under the direction of the court have failed to correct the conditions leading to the determination. Section 43-292(7) requires a finding that the juvenile has been in out-of-home placement for 15 or more of the most recent 22 months.

On December 20, 2001, and continuing on December 21, the State's motions for termination came on for hearing. Angela was present and represented by counsel. A total of 13 witnesses testified. Documentary evidence was received. Several witnesses testified on behalf of the State, including the children's DHHS caseworker; Angela's mental health therapist; and a family support worker. In general, the State's evidence can be summarized as establishing that Angela failed to attend therapy, was inattentive to her children during visits, and seemed unconcerned with matters concerning the children's health and welfare. One witness testified that Angela did not demonstrate a consistent pattern of behavior, discipline, or structure during her visits with her children. The State introduced evidence that during meetings with her children, Angela became distracted, and that her attention would frequently have to be redirected to her children.

Evidence was introduced with regard to each child, some of which we summarize below. The record reflects that Joshua has been diagnosed with "Post Traumatic Stress Disorder" and has a history of "Oppositional Defiant Disorder." Joshua's therapist testified that Joshua is intelligent, but when she became negative or depressed, her performance in her schoolwork went from an "A" to an "F." According to the therapist, Joshua reacted to adverse situations with anger, had issues with trust, tended to isolate herself, and had poor decisionmaking skills. Glorianna was described by a witness as being very bright but suffering from disorganization and an inability to stay on task, which characteristics were more severe than those typically exhibited by adolescents. Evidence was also adduced that both Joshua and Glorianna had been abused in the past by one of Angela's

boyfriends and that both girls had been removed from Angela's custody and placed under DHHS' care and supervision on three prior occasions.

With regard to Shaughnessy, the record reflects that she suffers from a hearing deficiency. According to evidence received by the court during the termination hearing, Shaughnessy was examined by a doctor on January 19, 2000, shortly after she was taken from Angela's custody. Shaughnessy was "found to have cockroaches embedded in her ears," and the cockroaches were subsequently removed. The doctor believed this condition may have led to Shaughnessy's hearing deficiency. As a result of her hearing deficiency, Shaughnessy suffers from substantial developmental problems. Her speech and gross motor skills are impaired, and she has been characterized as requiring a great deal of individual attention and care.

With regard to deChelly, the record reflects that Angela fails to relate to this child. For example, during deChelly's visits with Angela, Angela would ignore the child's requests to use the restroom, relying on support workers to take deChelly to the bathroom. On one occasion, Angela failed to react when the child followed an older sister into the street. A support worker had to respond and stop deChelly.

With regard to Desmarais, the youngest child subject to these proceedings, evidence introduced during the termination hearing indicated that when Desmarais was initially taken into custody, she was 1-month old and weighed 6 pounds. Approximately 6 weeks after she was removed from Angela's care, her weight had almost doubled. Desmarais' caseworker reported that when Desmarais was born, "she 'just shook from nicotine withdrawals.' "

Invoking the language of § 43-292, in a written order filed January 31, 2002, the court found that the State had proved by clear and convincing evidence the grounds for termination set forth in § 43-292(2), (6), and (7). The court further found that it was in the children's best interests that Angela's parental rights be terminated. Accordingly, the court terminated Angela's parental rights to Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais. Angela appeals.

ASSIGNMENTS OF ERROR

On appeal, Angela asserts several assignments of error, which we restate as four. Angela asserts, renumbered and restated, that (1) she was denied due process by virtue of ineffective assistance of counsel as a result of trial counsel's failure to perfect an appeal of the April 26, 2001, order which changed the permanency objective from reunification to termination of parental rights, (2) the court erred in finding that the State proved by clear and convincing evidence under § 43-292(2) that Angela had substantially and continuously or repeatedly neglected and refused to give the children or a sibling of the children necessary parental care and protection, (3) the court erred in finding that the State proved by clear and convincing evidence under § 43-292(6) that reasonable efforts had failed to correct the conditions leading to the adjudication of the children, and (4) the court erred in finding that the State proved by clear and convincing evidence that termination of Angela's parental rights was in the children's best interests. We note that Angela does not dispute the court's finding that the children had been in out-of-home placement "since November 30th, 1999," which fact would serve as a factual basis for termination under § 43-292(7). In our analysis, we consider assignments of error Nos. 2, 3, and 4 together.

STANDARDS OF REVIEW

[1-3] Juvenile cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the juvenile court's findings. *In re Interest of Ty M. & Devon M., ante* p. 150, 655 N.W.2d 672 (2003); *In re Interest of Phyllisa B., ante* p. 53, 654 N.W.2d 738 (2002). When the evidence is in conflict, however, an appellate court may give weight to the fact that the lower court observed the witnesses and accepted one version of the facts over the other. *Id.* Before parental rights may be terminated, the evidence must clearly and convincingly establish the existence of one or more of the statutory grounds permitting termination and that termination is in the juvenile's best interests. *In re Interest of Phyllisa B., supra.*

ANALYSIS

Due Process and "Effective Assistance of Counsel."

On appeal, Angela claims generally that she was denied due process by virtue of ineffective assistance of counsel. Her specific complaint relates to her trial attorney's failure to properly appeal from the court's April 26, 2001, order changing the permanency objective from reunification to termination of parental rights. Assuming without deciding that the April 26 order was an appealable order, see *In re Guardianship of Rebecca B. et al.*, 260 Neb. 922, 621 N.W.2d 289 (2000), and *In re Interest of Sarah K.*, 258 Neb. 52, 601 N.W.2d 780 (1999), we conclude that Angela was not denied due process, and accordingly, we find no merit to this assignment of error.

In support of her assignment of error, Angela notes that she was entitled to have counsel represent her in these juvenile proceedings under Neb. Rev. Stat. § 43-279.01(1)(b) (Reissue 1998), and because she is statutorily entitled to counsel, Angela asserts that it "necessarily follows" that such counsel should provide effective assistance and that she was denied due process by virtue of her trial attorney's failure to properly appeal. Brief for appellant at 32. Section 43-279.01 provides in pertinent part as follows:

> (1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) of section 43-247 and the parent or custodian appears with or without counsel, the court shall inform the parties of the:
>
> . . . .
>
> (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer.

[4-6] Initially, we observe that juvenile proceedings are civil rather than criminal in nature, see *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002), and that we have previously stated that an individual has no constitutional right to effective assistance of counsel in a civil proceeding, *Ernest v. Jensen*, 226 Neb. 759, 415 N.W.2d 121 (1987) (civil action involving license revocation). See, also, *State v. Gray*, 259 Neb. 897, 612 N.W.2d

507 (2000) (civil action involving petition for postconviction relief). In addition, we have ruled that a statutory right to the appointment of counsel does not give rise to an ineffective assistance of counsel claim in a civil postconviction case. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). We have, however, acknowledged that due process is required in cases involving termination of parental rights, and we analyze Angela's claim under due process principles.

We have recently addressed a parent's due process rights during termination proceedings. In *In re Interest of Ty M. & Devon M., ante* p. 150, 158, 655 N.W.2d 672, 681 (2003), we stated: "'[S]tate intervention to terminate the parent-child relationship must be accomplished by procedures meeting the requisites of the Due Process Clause.'" (Quoting with approval *In re Interest of Kantril P. & Chenelle P.*, 257 Neb. 450, 598 N.W.2d 729 (1999)). We also recognized:

> "Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decisionmaker."

In re Interest of Ty M. & Devon M., ante at 158, 655 N.W.2d at 681 (quoting *In re Interest of Kelley D. & Heather D.*, 256 Neb. 465, 590 N.W.2d 392 (1999)).

In the instant case, Angela claims in effect that because her counsel filed an untimely appeal of the court's order changing the permanency objective from reunification to termination of parental rights, she was denied due process. Angela's argument ignores, however, that she was given notice and a full opportunity to litigate the issue of the termination of her parental rights when the State's termination motions came on for trial on December 20 and 21, 2001.

The record reflects that Angela received proper notice of the termination hearing and that during the 2-day termination hearing, Angela appeared and was represented by counsel. Angela's counsel introduced evidence and cross-examined witnesses on

Angela's behalf. The record further reflects that Angela testified at the hearing in opposition to the State's motions to terminate parental rights. Finally, following the hearing, the court issued an eight-page order, detailing the court's findings of fact and conclusions of law with regard to the State's motions and determining that the State had proved by clear and convincing evidence that the grounds for termination set forth in § 43-292(2), (6), and (7) had been established as to each child. Based on this record, we conclude that Angela was afforded due process. See *In re Interest of Ty M. & Devon M., supra.* This assignment of error is without merit.

Statutory Basis for Termination of Parental Rights and Best Interests.

The court found that three of the grounds for termination alleged in the State's motions, § 43-292(2), (6), and (7), were proved by the State. The court concluded that the evidence did not support the State's allegation that Angela's parental rights should be terminated pursuant to § 43-292(4). Angela challenges the court's determinations that the State had established statutory bases for termination of her parental rights and further challenges the court's conclusion that termination is in the children's best interests. We find no merit to these arguments.

In order to terminate parental rights, the State must prove by clear and convincing evidence that one of the statutory grounds enumerated in § 43-292 exists and that termination is in the child's best interests. *In re Interest of Phyllisa B., ante* p. 53, 654 N.W.2d 738 (2002); *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Clifford M. et al.*, 261 Neb. 862, 626 N.W.2d 549 (2001). Because we conclude below that the propriety of termination of Angela's parental rights was sufficiently demonstrated pursuant to § 43-292(7), and we affirm on the basis of § 43-292(7), we need not consider Angela's assigned errors relating to the sufficiency of evidence under other statutory provisions identified by the court as grounds for termination of her parental rights. See, *In re Interest of DeWayne G. & Devon G., supra*; *In re Interest of Lisa W. & Samantha W.*, 258 Neb. 914, 606 N.W.2d 804 (2000).

The record reflects and Angela does not dispute that at the time of the termination hearing, all five of the children had been in continuous foster care for approximately 24 months, thereby satisfying the requirement under § 43-292(7) that they be in out-of-home placement for 15 of the last 22 months. The remaining issue is whether terminating Angela's parental rights is in the children's best interests.

In its December 17, 1999, order, the court determined that the children were juveniles within the meaning of § 43-247(3)(a). Due to Angela's inability to parent, the children's safety was in danger, and the court determined that the children were at risk, adjudicated the children, and ordered that the children should remain in DHHS' care and custody. Following the adjudication, in an order filed on February 7, 2000, the court approved a rehabilitation plan for Angela, which plan spelled out a number of goals for Angela, including attending mental health counseling, acquiring anger management skills, acquiring parenting skills, and improving finances. A dispositional order imposing a rehabilitation plan for parents in a juvenile case is a final, appealable order. *In re Interest of Tabatha R.*, 255 Neb. 818, 587 N.W.2d 109 (1998). Angela did not appeal the court's February 7 order. In subsequent orders, the court continued with the original rehabilitation plan and goals with minor changes. Eventually, the objective of the plan was changed from reunification to termination.

The obvious objective of the rehabilitation plan was to correct the deficiencies in parenting exhibited by Angela, which corrections would benefit the children. However, the record reflects that Angela failed to demonstrate improvement. For example, although individual therapy was made available to Angela, the record reflects that in 2000, she attended 15 percent of her scheduled counseling appointments, and in 2001, she failed to attend any appointments. In this connection, the court found that Angela "had failed to use . . . therapy to address the issue of her family" and that thus, Angela's ability to establish a healthy relationship with her children had not improved.

With respect to the financial support required to provide for her children, the record shows that Angela worked for five different employers in 2000 and three different employers in 2001. Her total earnings in 2000 were $4,162.51, and in 2001, she earned

$1,611.50. The court concluded that Angela had not shown an ability to keep steady employment and that thus, Angela had failed to demonstrate that she could provide basic financial support for her children.

During the period of time the children were removed from Angela's care, the record shows that Angela failed to improve her parenting skills. In 2001, Angela attended 29 percent of her scheduled visits with the children. The visits were held outside of Angela's residence due to unsanitary conditions, and during such visits, Angela was unable or unwilling to supervise or care for the children. According to the record, agency workers who accompanied the children on their visits with Angela found it necessary to

> continue to provide for the safety of the children during visitation. The workers also report[ed] Angela has demonstrated favoritism with her children. Joshua is talked to and Shaughnessy is played with. [Glorianna] will beg for attention and [Angela] will ignore her. [Desmarais] is rarely held by Angela. . . . During visitation the workers will be the ones cutting up the food, assisting with feeding and providing drinks. Angela continue[d] to leave the visits for smoke breaks and using the phone. She often does not tell the workers, she just disappears.

The totality of the record shows that Angela is unable to provide basic parental care for her children.

[7] We have stated that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. *In re Interest of DeWayne G. & Devon G.*, 263 Neb. 43, 638 N.W.2d 510 (2002); *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997). Based upon the foregoing evidence, we conclude that the record clearly and convincingly shows that at the time of the termination hearing, Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais had been in out-of-home placement for at least 15 of the most recent 22 months, and that termination of Angela's parental rights is in the children's best interests. Accordingly, we affirm the court's order terminating Angela's parental rights as to Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais pursuant to § 43-292(7).

CONCLUSION

We conclude that Angela was not denied due process. Based upon our de novo review of the record, there is clear and convincing evidence that Angela's parental rights to Joshua, Glorianna, Shaughnessy, deChelly, and Desmarais should be terminated pursuant to § 43-292(7) and that such termination is in the children's best interests. Accordingly, the judgment of the county court terminating such rights is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CLIFFORD J. DAVLIN, APPELLANT.

658 N.W.2d 1

Filed March 7, 2003. No. S-00-698.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Effectiveness of Counsel: Appeal and Error.** Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact.
3. **Supreme Court: Courts: Appeal and Error.** The Nebraska Supreme Court, upon granting further review which results in the reversal of a decision of the Nebraska Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach.
4. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
5. ____: ____. In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
6. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
7. **Right to Counsel.** Once a defendant asking for substitute counsel has raised a seemingly substantial complaint about counsel, the court has a duty to thoroughly inquire into the complaint.
8. **Postconviction: Effectiveness of Counsel: Presumptions: Proof.** Under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case.

9. **Effectiveness of Counsel: Presumptions.** Prejudice may be presumed only when surrounding circumstances justify a presumption of ineffectiveness.
10. **Right to Counsel: Presumptions.** Prejudice is presumed where an accused is completely denied counsel at a critical stage of the proceedings.
11. **Effectiveness of Counsel: Presumptions.** Prejudice is presumed where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

Petition for further review from the Nebraska Court of Appeals, HANNON, INBODY, and MOORE, Judges, on appeal thereto from the District Court for Sarpy County, RONALD E. REAGAN, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Peter K. Blakeslee, and, on brief, James R. Mowbray and Nancy K. Peterson, of the Nebraska Commission on Public Advocacy, for appellant.

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

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

WRIGHT, J.

I. NATURE OF CASE

Clifford J. Davlin was convicted of first degree sexual assault on a child and use of a weapon to commit a felony. He was subsequently determined to be a habitual criminal and sentenced to a total of 25 to 35 years' imprisonment. Davlin's convictions and sentences were affirmed by memorandum opinion on direct appeal. See *State v. Davlin*, 3 Neb. App. xiii (No. A-94-505, Feb. 28, 1995).

Thereafter, Davlin filed a motion for postconviction relief, which the district court denied, and he appealed. The Nebraska Court of Appeals reversed the judgment and remanded the cause for a new trial, concluding that Davlin's due process rights were violated by the trial court's refusal to inquire into his dissatisfaction with court-appointed counsel. See *State v. Davlin*, 10 Neb. App. 866, 639 N.W.2d 168 (2002). We granted the State's petition for further review.

II. SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[2] Appellate review of a claim of ineffective assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independently of the lower court's decision. See, *id.*; *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994).

III. FACTS

On November 20, 1993, 15-year-old M.D. left her home in Aurora, Nebraska, and hitchhiked to a truckstop near Lincoln. She took a taxi into Lincoln and eventually found herself walking down O Street as it was beginning to get dark. When a couple of males began chasing M.D. on O Street, Davlin pulled up in his car and asked M.D. if she needed a ride. M.D. told Davlin she was on her way to Omaha, and Davlin responded that he would take her there that night.

After M.D. got into Davlin's car, the two went to a Lincoln bar where Davlin bought alcoholic drinks for M.D. and himself. Davlin suggested to M.D. that she stay overnight at his apartment and that they would travel to Omaha the next morning. M.D. agreed, and the parties proceeded to Davlin's apartment, where M.D. showered and lay down to sleep on the couch. Three times during the night, Davlin stood naked in front of M.D., but she pretended to be asleep.

The next morning, Davlin and M.D. set out for Omaha. M.D. testified that they traveled on a highway and that they passed a sign for Syracuse and Nebraska City before turning off the highway onto a gravel road. Davlin stopped his car near an abandoned house and made an advance on M.D. She attempted to get out of the car, but Davlin wielded a knife, commanded M.D. to

get back into the car, and threatened to kill her if she got out. Davlin forced her to perform various sex acts, including fellatio and vaginal intercourse. He then drove M.D. to Bellevue and let her out of the car.

M.D. went to the nearest store and reported what had happened. A police officer arrived, and M.D. was taken to the hospital. The treating physician gave her a complete physical examination and took several samples for a sexual assault kit. M.D. reported pain in her lower abdomen, which the treating physician testified was consistent with aggressive sexual intercourse. M.D. then led a Sarpy County investigator to the site of the sexual assault and to Davlin's Lincoln apartment. A search warrant was obtained for Davlin's car and apartment. M.D. identified Davlin as being her assailant.

Davlin admitted to an investigating officer that he met M.D. on November 20, 1993, and took her to a bar and his apartment. He claimed that he drove M.D. to a truckstop west of Lincoln later that night. He denied having sexually assaulted M.D. He admitted keeping a knife in his car.

Davlin was charged with first degree sexual assault on a child and use of a weapon to commit a felony. The Sarpy County public defender was appointed to represent Davlin, and Davlin pled not guilty. On March 11, 1994, 3 days before trial, the trial court received a letter from Davlin, complaining about his representation by the public defender.

During a hearing on the State's motion to endorse witnesses, the trial court stated that it had received Davlin's four-page letter but that the court had not read the letter in its entirety and did not want to get into the content of the letter. Davlin was told that if the court discharged the public defender, another lawyer would not be appointed. Davlin chose to proceed to trial with the public defender as his counsel.

On March 15, 1994, a jury found Davlin guilty of first degree sexual assault on a child and use of a weapon to commit a felony. After an evidentiary hearing, the trial court found Davlin to be a habitual criminal, and he was sentenced to 25 to 35 years' imprisonment.

On direct appeal, Davlin was represented by an assistant public defender for Sarpy County. The Court of Appeals affirmed

the trial court's judgment by memorandum opinion. See *State v. Davlin*, 3 Neb. App. xiii (No. A-94-505, Feb. 28, 1995).

When Davlin filed his motion for postconviction relief, he was represented by attorneys from the Nebraska Commission on Public Advocacy. His operative motion alleged, inter alia, that the trial court (1) denied his right to due process of law and to effective assistance of counsel by denying his pretrial request for substitution of counsel and (2) denied his right to effective assistance of counsel at trial and on direct appeal.

In addition to the letter Davlin sent to the trial court, he testified by deposition that counsel had not met with him more than three times before trial. Although Davlin spoke with counsel via telephone on numerous occasions, counsel did not reply to letters from Davlin. After Davlin received certain laboratory reports, he asked for independent DNA testing. He claimed that counsel responded to his request with vulgar language, stating that counsel was not going to spend $40,000 to prove Davlin's innocence.

Additionally, Davlin testified that he had asked the public defender to investigate the odometer reading on his car because he had recently purchased the car and believed that the odometer reading would have shown that he could not have driven the route which was alleged. He also asked counsel to have the car inspected for semen which was claimed to have been deposited in the car in relation to the sexual assault.

The State presented no evidence at the hearing on Davlin's motion for postconviction relief.

The district court found that the public defender's failure to act on Davlin's requests fell below the minimum standard and that counsel's response to Davlin's request for independent DNA testing lacked the civility that even the most difficult client should expect. However, the court concluded that Davlin had "failed to establish grounds for relief under the Strickland prongs." Having separately concluded that Davlin's complaints of ineffective assistance of counsel during trial and appeal were without merit, the district court denied the motion. Davlin timely appealed.

On appeal, Davlin made the following assignments of error: (1) He was denied effective assistance of counsel and due process in the trial court's disposition of his request for substitute counsel and (2) he was denied effective assistance of counsel at trial and

on direct appeal. He argued that the trial court's failure to inquire into the factual basis of his dissatisfaction with the public defender denied him the right to effective assistance of counsel. He claimed this failure violated his 6th Amendment right to effective representation and his right to due process of law under the 14th Amendment.

The Court of Appeals concluded that the failure of the trial court to inquire into Davlin's dissatisfaction with counsel was a denial of due process which required a new trial. It did not address Davlin's claims that his trial and appellate counsel were ineffective.

IV. ASSIGNMENTS OF ERROR

In its petition for further review, the State asserts that the Court of Appeals (1) erroneously announced a rule, previously unknown to Nebraska law, that the failure of a trial court to hold a hearing into a pro se defendant's ex parte complaints about appointed counsel represents a per se violation of the Due Process Clause and (2) erroneously concluded that the question of whether Davlin suffered any prejudice as a result of the relationship between appointed counsel and Davlin was irrelevant to an analysis of the question.

V. ANALYSIS

1. Ineffective Assistance of Counsel

[3] We begin our analysis by addressing Davlin's claim that he was denied effective assistance of counsel at trial and on direct appeal. The Supreme Court, upon granting further review which results in the reversal of a decision of the Court of Appeals, may consider, as it deems appropriate, some or all of the assignments of error the Court of Appeals did not reach. *State v. Harrold*, 256 Neb. 829, 593 N.W.2d 299 (1999).

[4,5] Because Davlin was represented by the public defender's office at trial and on direct appeal, he is not procedurally barred from asserting a claim of ineffective assistance of counsel in his motion for postconviction relief. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must

show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

Davlin argues generally that he was denied effective assistance of counsel by his trial counsel's failure to subject the prosecution's case to meaningful adversarial testing. In *United States v. Cronic*, 466 U.S. 648, 659, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the U.S. Supreme Court explained that where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." The Court also noted:

> The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding. [Citations omitted.]
>
> Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. [Citations omitted.]

United States v. Cronic, 466 U.S. at 659 n.25, 26.

We conclude that the record does not support a claim that Davlin's counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, and therefore, prejudice will not be presumed.

We next proceed to analyze Davlin's ineffective assistance of counsel claims under the two prongs of *Strickland*. A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. See *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). Appellate review of a claim of ineffectiveness assistance of counsel is a mixed question of law and fact. When reviewing a claim of ineffective assistance of counsel, an appellate court reviews the factual findings of the

lower court for clear error. With regard to the questions of counsel's performance or prejudice to the defendant as part of the two-pronged test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), an appellate court reviews such legal determinations independent of the lower court's decision. See, *id.*; *State v. White*, 246 Neb. 346, 518 N.W.2d 923 (1994).

(a) Failure to Investigate

Davlin claims that his requests for further investigation were not acted upon by trial counsel and that counsel's failure to respond to these requests amounted to ineffective assistance. Davlin alleges that he asked both trial counsel and appellate counsel to retain an expert to screen his car in an effort to detect the presence of bodily fluids that would be evidence of a sexual encounter in the car. Davlin also alleges he requested that counsel investigate the odometer reading of his car to establish that it could not have been driven to Omaha based on the odometer reading of the car when it was purchased compared to when it was seized.

The district court found that Davlin's requests to have his car's odometer checked and to have his car screened for bodily fluids were met with refusals, silence, or inaction. The court also found that "Davlin's requests were reasonable and, absent some evidence showing a reasonable basis for refusing them, should have been followed. [Counsel's] failure to do so falls below the minimum standards expected, and his responses lack the civility even a most difficult client should expect from his counsel." The court pointed out, however, that it was Davlin's burden to show what the requested actions would have disclosed, and the court concluded Davlin failed to do so.

In his deposition testimony, Davlin claimed that an inspection of the odometer in his vehicle would have disclosed that relative to the incident in question, he could not have driven to the crime scene and back to his home based on the number of miles on the car when it was purchased and the number of miles on the car when it was seized. However, Davlin did not produce evidence of the mileage at the time the vehicle was purchased, at the time of its impoundment by police, or at any time relevant to the

occurrence. In the absence of any facts to support his claim regarding the significance of the mileage on the odometer, Davlin has not shown how or why counsel's refusal to check the odometer was prejudicial to his defense.

Davlin asserts that if the requests had been acted upon, the result of the trial would have been different. The district court found that Davlin's assertion was unfounded and that he failed to meet his burden of showing that but for counsel's deficient performance, the result of the proceeding would have been different. We conclude that the district court did not err in this determination.

(b) Failure to Object

Davlin alleges that his appointed counsel repeatedly failed to make appropriate objections to damaging information elicited from M.D. Specifically, Davlin asserts that counsel should have objected to testimony relating to his procuring alcohol for a minor.

The district court explained that this testimony came from M.D. and could be considered necessary to explain her contact with Davlin in the period preceding the sexual assault. The court found that the testimony was relevant to M.D.'s identification of Davlin and that any unfair prejudice to him was remote. The court concluded that Davlin failed to meet either prong of his burden under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We agree with the district court's conclusion.

(c) Failure to Question Expert on Cross-Examination

Davlin alleges trial counsel failed to properly question the State's expert forensic serologist on cross-examination. He asserts that counsel failed to question whether the findings of the microscopic examination of hair samples can be used to identify or exclude a suspect and that counsel failed to question the expert about alternative testing methods.

[6] In his operative motion for postconviction relief, Davlin argued that trial counsel failed to object to the expert forensic serologist's testimony; however, he did not argue that counsel failed to question the expert on cross-examination. When an issue is raised for the first time in an appellate court, it will be

disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). This issue was not presented to the district court, and therefore, we do not consider it.

(d) Failure to Obtain Independent Testing

Davlin alleges he requested that trial counsel obtain independent DNA testing of certain evidence. He claims counsel responded profanely and unprofessionally that independent testing was too costly. Davlin alleges that independent DNA testing was available at an affordable cost and that it was reasonable under the circumstances to pursue such testing. Davlin asserts that his counsel's failure to obtain independent DNA testing was unjustified and deficient.

The district court analyzed this issue together with Davlin's allegation of a failure to investigate. The court found that counsel's failure to appropriately respond to Davlin's request fell below the minimum standards expected. However, the court concluded that Davlin failed to meet his burden of showing what the independent testing would have disclosed. The court noted that the evidence samples had subsequently been destroyed but that there was no contention that such destruction was erroneous or wrongful in any manner. Thus, any issue relating to destruction of the evidence was not presented to the district court.

In his operative motion for postconviction relief, Davlin claimed that had independent DNA testing been conducted, he would have been able to show the jury that he was excluded as the donor of the semen collected from M.D. This conclusion cannot be supported by any facts because the DNA was destroyed. Davlin offered the deposition testimony of a deputy laboratory director employed by Cellmark Diagnostics in Maryland regarding the general nature of DNA testing being performed in late 1993 and early 1994. There was no evidence of what DNA testing would have revealed in this case. On appeal, Davlin now asserts that he was prejudiced because destruction of the evidence violated his due process rights. The destruction of the evidence was not an issue presented to the district court in Davlin's motion, and therefore, we do not consider it. The court

did not err in deciding the issue presented to it and in concluding that Davlin had failed to meet his burden of showing what independent testing would have disclosed.

(e) Jury Instruction No. 3

Davlin alleges his trial counsel's failure to object to jury instruction No. 3 and his appellate counsel's failure to raise the issue on appeal constitute ineffective assistance of counsel. Instruction No. 3 advised the jury of the material elements of first degree sexual assault. Instruction No. 3 stated that the State was required to prove that "[t]he defendant was 19 years of age or older and [M.D.] was *16 years of age or younger.*" (Emphasis supplied.)

Davlin was charged under Neb. Rev. Stat. § 28-319(1)(c) (Cum. Supp. 1994), which prohibited sexual penetration when "the actor [was] nineteen years of age or older and the victim [was] *less than sixteen years of age.*" (Emphasis supplied.) Davlin argues that the ages of the defendant and the victim are material elements in a first degree sexual assault case and that his counsel should have objected to the trial court's erroneous instruction. Davlin claims that because the error related to a material element of the crime, he does not have to prove prejudice. We disagree.

Davlin must show that there was a reasonable probability that but for counsel's alleged deficient performance, the result of the proceeding would have been different. See, *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002); *State v. George*, 264 Neb. 26, 645 N.W.2d 777 (2002).

Davlin argues that the instruction may well have confused the jury in light of M.D.'s testimony that she was 16 years old. Davlin claims that M.D. was never asked at trial how old she was at the time of the alleged sexual assault and that instruction No. 3 did little to clarify for the jury that the State had to prove she was less than 16 on the date of the alleged crime.

The district court did not err in concluding that Davlin failed to meet his burden of showing that his counsels' failure to object to instruction No. 3 and raise the issue on appeal prejudiced the outcome of this case. During trial, M.D. not only gave her birth date, which would establish that she was 15 years old at the time

of the assault, but she also testified that she told Davlin she was 15 years old.

We conclude that Davlin has failed to sustain his burden that he was denied effective assistance of counsel at trial or on direct appeal as required by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

2. Request for Substitute Counsel

We next proceed to address Davlin's request for substitute counsel. Davlin assigned as error on appeal to the Court of Appeals that the trial court's failure to make an inquiry into his dissatisfaction with counsel and subsequent failure to appoint substitute counsel (1) violated his 6th Amendment right to effective representation and (2) violated his right to due process of law under the 14th Amendment.

The Court of Appeals concluded that the failure of the trial court to inquire as to the basis for Davlin's dissatisfaction when he moved for substitution of counsel denied Davlin his right to due process and required that Davlin's convictions and sentences be set aside and a new trial ordered.

As noted above, Davlin wrote a letter to the trial court shortly before trial. Davlin's letter contained allegations that his appointed counsel had failed to take actions that he had requested, including a request for further testing of bodily fluids and a request for DNA testing, as well as complaints regarding counsel's attitude and his refusal to answer Davlin's correspondence. From the letter, the court concluded that Davlin was writing to express dissatisfaction with his counsel and to communicate a desire to have such representation terminated.

The trial court informed Davlin that whether he had been afforded meaningful representation was an issue that could not be decided in advance. Thus, the court did not conduct a formal inquiry into Davlin's dissatisfaction with appointed counsel.

Following the hearing on Davlin's motion for postconviction relief, the district court found that Davlin's pretrial requests to have his car's odometer checked, independent DNA testing conducted, and fluid screening done on evidence samples from his car were met with refusals, silence, or inaction. The court found that "Davlin's requests were reasonable and, absent some

evidence showing a reasonable basis for refusing them, should have been followed. [Counsel's] failure to do so falls below the minimum standards expected, and his responses lack the civility even a most difficult client should expect from his counsel."

It appears that the district court analyzed Davlin's complaints about counsel as part of the ineffective assistance of trial counsel and concluded that counsel's performance was deficient. It did not address whether the trial court erred in not having a hearing on Davlin's motion for substitution of counsel.

When the district court addressed Davlin's claim that the trial court erred in denying his pro se request to replace the public defender with another court-appointed counsel, it found that Davlin's reasons for wanting counsel replaced were all premised on actions by counsel with which Davlin disagreed or conversations between Davlin and counsel. The court concluded that Davlin had failed to establish grounds for relief under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

> Whether this case calls for a "presumption of prejudice" under United States v. Cronic, *supra*, and State v. Trotter, *supra*, — more particularly whether there has been a failure to subject the prosecution's case to a meaningful adversarial testing, or where the surrounding circumstances justify a presumption without inquiring into counsel's actual performance at trial — is a close call, but one I make in favor of the State. This conclusion, however, has no precedential value and should not be construed in any fashion as an approval of trial counsel's conduct.

The Court of Appeals interpreted the district court's order as a finding that the first prong of *Strickland* had been met with respect to trial counsel's performance at the time Davlin moved to dismiss counsel. The Court of Appeals held that the trial court's failure to inquire as to the basis for Davlin's dissatisfaction with appointed counsel deprived him of his right to counsel and denied him due process.

The Court of Appeals relied upon *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991), for the following propositions:

> When a defendant raises a seemingly substantial complaint about counsel, the judge "has an obligation to inquire

> thoroughly into the factual basis of defendant's dissatisfaction." [Citations omitted.] The trial court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust, or concern. [Citation omitted.] That inquiry should be on the record.

The Court of Appeals concluded that a showing of prejudice was not required in analyzing the failure of the trial court to adequately inquire into Davlin's dissatisfaction with counsel. It determined that neither *Lockhart* nor any of the other cases to which it had referred discussed the prejudice requirement, and it concluded that the cases did not discuss the prejudice requirement because the failure of a trial court to inquire is a denial of due process. The court stated:

> We conclude this is because the failure to inquire into a defendant's dissatisfaction with counsel is a denial by a court of the effective assistance of counsel, that is, a denial by a court of due process.
>
> . . . When a defendant is deprived of a pretrial opportunity to disclose any such shortcoming to the court, that defendant is being deprived of due process.

State v. Davlin, 10 Neb. App. 866, 885, 639 N.W.2d 168, 183 (2002).

It was this failure to inquire into Davlin's complaints concerning trial counsel that was the basis of the Court of Appeals' conclusion that Davlin was denied due process and therefore entitled to a new trial.

The court in *Lockhart* determined that Smith had been denied counsel at a critical stage of the proceeding and, therefore, that prejudice was presumed. *Lockhart* held that when a complete denial of counsel at a critical stage is shown, there is often no need to show prejudice and the resulting trial is presumed to be unfair. Because the appellate court found that Smith had been completely denied counsel at a critical stage of the proceeding, prejudice was presumed and the court ordered a new trial.

[7] We agree with the principle in *Lockhart* cited by the Court of Appeals. Once a defendant asking for substitute counsel has raised a seemingly substantial complaint about counsel, the court has a duty to thoroughly inquire into the complaint. However, we disagree with the Court of Appeals' analysis of the consequences

if the trial court fails to make such an inquiry. We conclude that the failure to make such an inquiry must be considered under the Sixth Amendment and not as a denial of due process.

Recently, in *Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002), the U.S. Supreme Court was presented with the issue of what a defendant must show in order to demonstrate a Sixth Amendment violation when the trial court failed to inquire into a potential conflict of interest between the defendant and counsel about which the court knew or reasonably should have known. The Court stated:

> The Sixth Amendment provides that a criminal defendant shall have the right to "the Assistance of Counsel for his defence." This right has been accorded, we have said, "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States v. Cronic*, 466 U.S. 648, 658 (1984). It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate, see *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984); and it also follows that defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. As a general matter, a defendant alleging a Sixth Amendment violation must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.
>
> There is an exception to this general rule. We have spared the defendant the need of showing probable effect upon the outcome, and have simply presumed such effect, where assistance of counsel has been denied entirely or during a critical stage of the proceeding. When that has occurred, the likelihood that the verdict is unreliable is so high that a case-by-case inquiry is unnecessary. See *Cronic, supra*, at 658-659; see also *Geders v. United States*, 425 U.S. 80, 91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963). But only in "circumstances of that magnitude" do we forgo individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict. *Cronic, supra*, at 659, n. 26.

Mickens v. Taylor, 535 U.S. at 166.

In *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the Court listed the exceptions to the general rule that a defendant must demonstrate a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. The exceptions apply only when the surrounding circumstances justify the presumption of ineffectiveness. See *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998).

These exceptions were set forth in *State v. Trotter*, 259 Neb. 212, 609 N.W.2d 33 (2000), where we stated that prejudice will be presumed: (1) where the accused is completely denied counsel at a critical stage of the proceedings, (2) where counsel fails to subject the prosecution's case to meaningful adversarial testing, and (3) where the surrounding circumstances may justify the presumption of ineffectiveness without inquiry into counsel's actual performance at trial. Prejudice will also be presumed where there is an actual conflict of interest among multiple defendants jointly represented by the same counsel. See, *United States v. Cronic, supra*; *State v. Trotter, supra*.

[8,9] In *Trotter*, we stated: "[T]his court has recognized in prior cases that under certain circumstances, the nature of counsel's deficient conduct in the context of the prior proceedings can lead to a presumption of prejudice, negating the defendant's need to offer evidence of actual prejudice in a postconviction case." 259 Neb. at 220, 609 N.W.2d at 39. Due to the instruction in *Cronic* that "prejudice may be presumed 'only when surrounding circumstances justify a presumption of ineffectiveness[,]' . . . courts have been appropriately cautious in presuming prejudice." *McGurk v. Stenberg*, 163 F.3d at 473 (quoting *United States v. Cronic, supra*).

[10] The circumstances surrounding Davlin's complaints do not justify a presumption of prejudice. Prejudice is presumed where the accused is completely denied counsel at a critical stage of the proceedings. *United States v. Cronic, supra*. That circumstance is not present here. Davlin was represented by counsel at all stages of the proceedings. Therefore, the presumption of prejudice is not to be applied.

[11] Prejudice is also presumed where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.

Id. As we have stated above, the record does not establish that counsel entirely failed to subject the prosecution's case to meaningful adversarial testing. Therefore, prejudice cannot be presumed on that basis.

The third instance under which prejudice is presumed is where the surrounding circumstances may justify a presumption of ineffectiveness without inquiry into counsel's actual performance at trial. See *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). In *Powell*, the surrounding circumstances made it so unlikely that any lawyer could provide effective assistance that ineffectiveness was properly presumed without inquiry into the actual performance at trial. We conclude that such circumstance is not presented here, nor are we presented with a circumstance where counsel was representing multiple defendants and therefore had a conflict of interest.

We conclude that the circumstances surrounding Davlin's complaints do not justify a presumption of prejudice. Since prejudice is not presumed, Davlin must show that but for counsel's deficiencies, there is a reasonable probability that the result of the proceeding would have been different.

In *U.S. v. Zillges*, 978 F.2d 369 (7th Cir. 1992), the court analyzed similar facts. The defendant sent the trial court a letter elaborating a number of objections to his retained counsel and requesting new counsel be appointed. The defendant asserted that his counsel had not spent enough time preparing the case, had declined to interview his witnesses, and had refused to meet with an investigator the defendant had hired. The trial court failed to respond to the letter until the opening of trial, which was over a month after the court had received the letter.

Following a trial and conviction, the defendant claimed on appeal that the trial court's failure to conduct a proper inquiry into his request for new counsel was reversible error. Although *Zillges* addressed the issue on the basis of whether an abuse of discretion required automatic reversal, the analysis is helpful. The appellate court concluded:

> The denial of a motion for substitution of counsel will be upheld, despite an abuse of discretion, if the district court's error was harmless. . . . Under *Strickland v. Washington* . . . an error is harmless if it does not result in

> a violation of a defendant's Sixth Amendment right to effective assistance of counsel. Thus, if a defendant is still afforded effective representation, an erroneous denial of a substitution motion is not prejudicial. By analogy, a district court's failure to conduct a sufficient inquiry into a substitution motion does not constitute reversible error unless it resulted in a denial of this Sixth Amendment right. Accordingly, in order to establish prejudice, [the defendant] must demonstrate that the performance of his attorney was not "within the range of competence demanded of attorneys in criminal cases" . . . and that "but for" counsel's deficiencies, "the result of the proceeding would have been different."

(Citations omitted.) *U.S. v. Zillges*, 978 F.2d at 372-73.

Davlin's assignment of error with regard to the trial court's failure to inquire about his dissatisfaction with trial counsel is without merit.

VI. CONCLUSION

The district court properly considered Davlin's claims concerning ineffective assistance of counsel and correctly concluded that Davlin had not met the burden of proof required by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Having found no error by the district court, we reverse the decision of the Court of Appeals and remand the cause thereto with directions to affirm the judgment of the district court that denied Davlin's motion for postconviction relief.

REVERSED AND REMANDED WITH DIRECTIONS.

JACQAUS L. MARTIN, APPELLANT, V.
BERNARD J. McGINN ET AL., APPELLEES.
657 N.W.2d 217

Filed March 7, 2003. No. S-01-1247.

1. **Affidavits: Appeal and Error.** A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court.

Appeal from the District Court for Lancaster County: JOHN A. COLBORN, Judge. Affirmed in part, and in part reversed and remanded.

Jacqaus L. Martin, pro se.

No appearance for appellees.

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

PER CURIAM.

NATURE OF CASE

This is an appeal from an order of the district court for Lancaster County which denied the appellant, Jacqaus L. Martin, leave to proceed in forma pauperis and dismissed his action.

BACKGROUND

Martin, an inmate at the Tecumseh State Correctional Institution, filed a pro se "Petition for Declaratory, Injunctive, and Other Equitable Relief/Damages" against several defendants.

On October 22, 2001, Martin filed an application to proceed in forma pauperis and an accompanying affidavit in support of his application. In an order filed November 1, the district court determined that Martin's action was frivolous. It denied his application to proceed in forma pauperis and dismissed the action.

Martin timely appealed from the November 1, 2001, order and also filed an application to proceed in forma pauperis on appeal. The district court denied Martin leave to proceed in forma pauperis on appeal, once again stating that his action was frivolous and was not brought in good faith. We moved the case to our docket on our own motion.

ASSIGNMENT OF ERROR

Martin assigns, rephrased, that the district court erred in finding that his action was frivolous and in dismissing his action.

STANDARD OF REVIEW

[1] A district court's denial of in forma pauperis status under Neb. Rev. Stat. § 25-2301.02 (Cum. Supp. 2002) is reviewed de novo on the record based on the transcript of the hearing or the

written statement of the court. § 25-2301.02(2); *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

ANALYSIS

Section 25-2301.02 provides:

> (1) An application to proceed in forma pauperis shall be granted unless there is an objection that the party filing the application: (a) Has sufficient funds to pay costs, fees, or security or (b) is asserting legal positions which are frivolous or malicious. . . . Such objection may be made by the court on its own motion or on the motion of any interested person. The motion objecting to the application shall specifically set forth the grounds of the objection. An evidentiary hearing shall be conducted on the objection unless the objection is by the court on its own motion on the grounds that the applicant is asserting legal positions which are frivolous or malicious. If no hearing is held, the court shall provide a written statement of its reasons, findings, and conclusions for denial of the applicant's application to proceed in forma pauperis which shall become a part of the record of the proceeding. If an objection is sustained, the party filing the application shall have thirty days after the ruling or issuance of the statement to proceed with an action or appeal upon payment of fees, costs, or security notwithstanding the subsequent expiration of any statute of limitations or deadline for appeal. . . .
>
> (2) In the event that an application to proceed in forma pauperis is denied and an appeal is taken therefrom, the aggrieved party may make application for a transcript of the hearing on in forma pauperis eligibility. Upon such application, the court shall order the transcript to be prepared and the cost shall be paid by the county . . . .

Martin filed an application to proceed in forma pauperis on October 22, 2001. The district court, in accordance with § 25-2301.02(1), objected to and denied his application. The district court's order regarding Martin's application to proceed in forma pauperis stated: "The petitioner, Jacquas [sic] L. Martin, has filed a motion to proceed in forma pauperis. Upon review of the petition, it is the determination of the court that this action is

frivolous. Therefore, the motion to proceed in forma pauperis is denied and the case is dismissed."

A district court's denial of in forma pauperis status under § 25-2301.02 is reviewed de novo on the record based on the transcript of the hearing or the written statement of the court. § 25-2301.02(2); *Cole v. Blum, supra.* From our de novo review of the transcript, we conclude that Martin's application to proceed in forma pauperis was properly denied. The transcript does not support his motion.

However, the district court erred in ordering dismissal. Section 25-2301.02(1) provides: "If an objection is sustained, the party filing the application shall have thirty days . . . to proceed with an action or appeal upon payment of fees, costs, or security . . . ." The trial court erred in entering a dismissal because under the existing statute, if an objection to in forma pauperis is sustained, the party filing the application has 30 days to proceed with an action or appeal upon payment of fees and costs. We reach no determination on the merits of the action or whether it too is frivolous. That issue is not before us.

CONCLUSION

That portion of the district court's order which denied Martin's application to proceed in forma pauperis is affirmed. That portion of the district court's order which dismissed Martin's action is reversed, and the cause is remanded.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

STATE OF NEBRASKA, APPELLEE, V.
DARYLE M. DUNCAN, APPELLANT.
657 N.W.2d 620

Filed March 7, 2003. No. S-01-1256.

1. **Rules of Evidence.** In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility.

2. **Trial: Courts.** Trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury.
3. **Trial: Proof: Appeal and Error.** To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant.
4. **Evidence: Waiver: Appeal and Error.** A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection.
5. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
6. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
7. **Hearsay: Words and Phrases.** Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive.
8. **Evidence: Impeachment.** Attempts at impeachment cannot be equated to charges of recent fabrication.
9. **Trial: Evidence: Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
10. **Trial: Rules of Evidence.** A trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial.
11. **Rules of Evidence: Hearsay: Proof.** Under Neb. Evid. R. 801(3), Neb. Rev. Stat. § 27-801(3) (Reissue 1995), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
12. **Rules of Evidence: Words and Phrases.** Pursuant to Neb. Evid. R. 801(1), Neb. Rev. Stat. § 27-801(1) (Reissue 1995), a statement is defined in part as an oral or written assertion.
13. **Criminal Law: Evidence: Appeal and Error.** An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
14. **Verdicts: Juries: Appeal and Error.** Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error.
15. **Effectiveness of Counsel: Appeal and Error.** When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter

necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

16. **Trial: Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
17. **Rules of Evidence: Expert Witnesses.** Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995); (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and admissible, should be excluded in light of Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).
18. **Trial: Expert Witnesses.** Whether a witness is qualified as an expert is a preliminary question for the trial court.
19. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.
20. **Trial: Expert Witnesses.** A person may qualify as an expert by virtue of either formal training or actual practical experience in the field.
21. **Evidence: Words and Phrases.** Evidence is relevant when it has 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.
22. **Trial: Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1995).

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Michael F. Maloney for appellant.

Don Stenberg, Attorney General, and Susan J. Gustafson for appellee.

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

MCCORMACK, J.

NATURE OF CASE

Daryle M. Duncan was convicted of first degree murder and use of a deadly weapon to commit a felony in connection with

the December 4, 1999, death of Lucille Bennett. Duncan received consecutive sentences of life in prison on the murder charge and 19 to 20 years' imprisonment for use of a deadly weapon to commit a felony. Duncan appeals.

BACKGROUND

Shortly before 10:30 a.m. on Sunday, December 5, 1999, the body of Bennett was found in her home in Omaha, Nebraska. Bennett died from a stab wound to the right side of the neck, which penetrated two major arteries in the neck. Duncan was later arrested and charged with first degree murder and use of a deadly weapon to commit a felony in connection with the crime.

One of the State's primary witnesses at trial was Jaahlay Liwaru, Duncan's ex-wife. At the time of Bennett's murder, Liwaru was living in a drug treatment center to treat her addiction to crack cocaine. Duncan and Liwaru had agreed that Duncan would cash Liwaru's government assistance check and bring the money to Liwaru on December 3, 1999. Duncan did not show up that day or the next day.

Liwaru testified that between 1 and 3 a.m. on December 5, 1999, she received a telephone call from Duncan. Duncan told Liwaru that he did not have her money from the assistance check, which Liwaru interpreted to mean that he had used the money to buy drugs. Duncan went on to tell Liwaru that the "lady across the street" had been murdered. Duncan and Liwaru had previously lived directly across the street from Bennett. Liwaru also testified that Duncan told her that the lady had "gotten sliced from . . . neck to neck . . . and she got stabbed up." Duncan also told Liwaru that he was going to go to hell. After Liwaru replied that he would not be going to hell for spending her money, Duncan replied, "[W]hat if I told you I killed Ms. Bennett." Immediately after the telephone call, Liwaru shared what Duncan had told her with Jennice Chanel, a patient at the treatment center. Chanel's testimony at trial of what Duncan told Liwaru was consistent with what Liwaru personally testified to.

Liwaru testified that she received another telephone call from Duncan shortly after 10 a.m. that same day. During the second telephone call, Duncan told Liwaru that he had seen Bennett being removed from her home. Other testimony from police and

other authorities at Bennett's home established that Bennett's body was not removed from her home until approximately 7 p.m. on December 5, 1999. Immediately following this call, Liwaru told Margaret Nocita, an employee of the center, that her neighbor had been murdered and robbed. The State later called Nocita, who verified Liwaru's testimony.

The State also called Bill Gartside, a criminologist in the DNA serology section of the Nebraska State Patrol laboratory. Gartside examined a number of hairs from Bennett's home and found that several were consistent with a reference sample of hairs collected from Duncan's dogs. Another hair found at Bennett's house possessed some similar characteristics as well as dissimilar characteristics with a reference sample of hairs from Duncan. Gartside testified that the major dissimilarity in the hair found at the scene and Duncan's reference hair sample was the manner in which it was cut. Duncan objected to Gartside's qualification as an expert in hair analysis and made a motion in limine to preclude Gartside from offering any testimony regarding hair analysis. Both the objection and motion were overruled.

At the conclusion of the trial, the jury found Duncan guilty of first degree murder and use of a deadly weapon to commit a felony. He received consecutive sentences of life in prison on the murder charge and 19 to 20 years' imprisonment for use of a deadly weapon to commit a felony.

Additional facts relevant to the resolution of each of Duncan's assignments of error are recited in detail below.

ASSIGNMENTS OF ERROR

Duncan first assigns that the district court committed prejudicial error when it commented to the jury panel that it was " '[t]he attorney for the defendant's job . . . to resist the State's case and prove his client innocent if necessary.' " Brief for appellant at 18.

Duncan also claims that the jury was allowed to consider inadmissible evidence due to either the district court's erroneous evidentiary rulings or trial counsel's ineffective assistance. Specifically, the evidence Duncan takes exception to is (1) William Jadlowski's testimony on the subject of hair transfer, (2) the testimony of Chanel and Nocita regarding statements made to them by Liwaru, (3) Steven Henthorn's testimony regarding

Crimestoppers tips received by the police, (4) Gartside's testimony in the field of hair analysis, (5) Jeffrey Harrington's testimony that Duncan's physical appearance had changed over the years and that it appeared Duncan's life had taken a different turn, and (6) Liwaru's testimony that a pot found in Bennett's home belonged to Duncan.

STANDARD OF REVIEW

[1] In proceedings where the Nebraska Evidence Rules apply, the admissibility of evidence is controlled by the Nebraska Evidence Rules; judicial discretion is involved only when the rules make discretion a factor in determining admissibility. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002).

ANALYSIS

DISTRICT COURT'S COMMENT

On March 26, 2001, jury selection in Duncan's trial began with the court's calling and swearing in a number of prospective jurors. Shortly after the State began questioning the panel, a prospective juror expressed concern about his ability to participate in a trial and return a guilty verdict which might later lead to a death sentence. The State responded by asking several questions of the prospective juror in an attempt to determine if the prospective juror could still act in a fair and impartial manner. The court also entered the discussion, stating:

> [L]et me put it another way. Everybody in the courtroom has a job to do. The prosecution is to prosecute the case. Her job is to prove the defendant guilty beyond a reasonable doubt. The attorney for the defendant's job is to resist the State's case and prove his client innocent if necessary. The court reporter's job is to write down everything that is said in the courtroom. It's my job to referee this affair, and if a verdict of guilty is returned, to set the penalty. That's all I can tell you. Everybody has a different job to do. Does that help?

In his first assignment of error, Duncan argues that the district court committed prejudicial error when it commented to the jury panel that " '[t]he attorney for the defendant's job is to resist the State's case and prove his client innocent if necessary.' " Brief

for appellant at 18. As a result, Duncan claims he is entitled to a new trial. Duncan characterizes the court's comment as a jury instruction. However, when viewed in context, it is clear that the district court was not attempting to instruct the jury panel on the applicable law. Instead, the court was merely commenting to one potential juror about the roles played by various participants in the trial.

[2,3] We have said that trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Red Kettle*, 239 Neb. 317, 476 N.W.2d 220 (1991). To establish reversible error, a defendant must demonstrate that a trial court's conduct, whether action or inaction during the proceeding against the defendant, prejudiced or otherwise adversely affected a substantial right of the defendant. *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996). While the inaccuracy of the district court's comment is obvious, the record fails to show that Duncan was prejudiced by the court's comment.

Throughout the daylong voir dire, both the State and defense made numerous mentions to the jury panel of the "presumption of innocence" to be applied in Duncan's favor or to the standard of "proof beyond a reasonable doubt." At one point, Duncan's trial counsel pointed out the district court's error and told the jury panel:

> I'm not sure when it was mentioned, but it was mentioned this morning that Mr. Duncan may have to prove himself innocent or something like that. That may not be the exact words, but all of you must understand that the burden is upon the State of Nebraska to prove him guilty.

After the jury was selected and sworn in, the district court issued its preliminary instructions to the jury. Those preliminary instructions correctly instructed that "[t]he Defendant is presumed to be innocent. This presumption of innocence is evidence in favor of the Defendant and continues throughout the trial, until he shall have been proved guilty beyond a reasonable doubt." The court also issued a preliminary instruction to the jury regarding reasonable doubt that closely resembled the approved instruction in *State v. McHenry*, 247 Neb. 167, 525 N.W.2d 620 (1995). Finally, the district court issued final, written instructions to the

jury at the close of the weeklong trial identical to those preliminary instructions mentioned above.

Viewing the erroneous comments at issue here in combination with the comments of the parties during jury selection, the accurate preliminary instructions, and the accurate final instructions, we conclude that Duncan suffered no prejudice as a result of the comment.

William Jadlowski

Jadlowski, a sergeant with the Omaha Police Department, was one of the investigating officers at Bennett's home and testified generally as to the evidence found at the scene. Among these pieces of evidence were several sheets from Bennett's bed, which were sent to the Nebraska State Patrol for examination for the presence of any hairs. On cross-examination, Duncan's trial counsel asked Jadlowski whether hairs could be transferred by a person's walking from room to room and across floors and carpet such as those found in Bennett's home. Jadlowski answered yes. On redirect, the State then asked the following questions of Jadlowski:

> Q. If you're walking along the floor, Detective Jadlowski, where will that hair — hair needs friction to adhere to something, doesn't it?
>
> A. Typically, yes.
>
> Q. All right. And so [i]f I'm walking on something and there happens to be a hair on the floor, in order for that hair to get on my bed, my foot with my shoe or sock or whatever is on my foot, has to come up and actually come in contact with the pillow, wouldn't it, to transfer it?
>
> A. I think that's reasonable.
>
> Q. I mean, there's not hairs floating around that just fall into a particular area, true?
>
> [Defense:] I object to the form of the question, speculation and leading.
>
> THE COURT: You may answer.
>
> [A.] I think that's reasonable, yes.
>
> Q. . . . It's like blood. It's transferred by contact, fair?
>
> A. Yes.

Duncan claims that the district court erred when it overruled his objection above because without foundation to show

Jadlowski to be an expert in the field, the question called for speculation. With respect to those questions above which were not objected to, Duncan also claims he received ineffective assistance of counsel. We note that Duncan's trial counsel was different than his current counsel on this direct appeal.

[4] A party who fails to make a timely objection to evidence waives the right on appeal to assert prejudicial error concerning the evidence received without objection. *State v. Harms*, 263 Neb. 814, 643 N.W.2d 359 (2002), *modified on other grounds* 264 Neb. 654, 650 N.W.2d 481. However, Duncan may assert his claim of ineffective assistance of counsel because of the failure of his counsel to object. See, generally, *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997).

[5,6] To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Dean*, 264 Neb. 42, 645 N.W.2d 528 (2002). A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002).

Duncan claims that each of the questions set forth above called for expert opinion under Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1995). Duncan claims the State did not lay the proper foundation to qualify Jadlowski as an expert on the "electro-magnetic properties of hair transfer." Brief for appellant at 25. The State admits that Jadlowski was not qualified as an expert, but argues that this step was unnecessary because his testimony did not consist of "scientific, technical, or other specialized knowledge" under rule 702. We agree. The fact that hairs may stick to a person and be moved to a new location is not of such a scientific, technical, or specialized nature as to require expert qualification. Rule 702 provided no basis on which to object to Jadlowski's testimony. Thus, the district court did not err in overruling Duncan's objection, and Duncan cannot prove his trial counsel's performance was deficient. This assignment of error is without merit.

JENNICE CHANEL AND MARGARET NOCITA

Duncan next claims that the district court erroneously overruled his hearsay objections when Chanel and Nocita testified as to what Liwaru said to them after the two telephone calls on December 5, 1999.

[7] The State argues that Liwaru's statements to Chanel and Nocita were not hearsay, and thus admissible, under Neb. Evid. R. 801(4), Neb. Rev. Stat. § 27-801(4) (Reissue 1995), which provides:

> A statement is not hearsay if:
>
> (a) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (ii) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive[.]

Prior consistent out-of-court statements are defined as nonhearsay and are admissible to rebut a charge of recent fabrication, improper influence, or improper motive only when those statements were made before the charged recent fabrication, improper influence, or improper motive. *State v. Lotter*, 255 Neb. 456, 586 N.W.2d 591 (1998).

[8] There is no dispute that Liwaru testified at trial and was subject to cross-examination concerning her statements to Chanel and Nocita. Those statements were also consistent with Liwaru's trial testimony. The issue remaining is whether Liwaru was expressly or impliedly charged with recent fabrication or improper influence or motive, or whether Duncan's cross-examination merely attempted to impeach Liwaru. We have said that attempts at impeachment cannot be equated to charges of recent fabrication. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). " 'One may impeach for lack of credibility without going so far as to charge recent fabrication. . . . We will not find abuse of discretion where . . . the impeachment is susceptible of either interpretation.' " *Id.* at 733, 572 N.W.2d at 70, quoting *Thomas v. U.S.*, 41 F.3d 1109 (7th Cir. 1994).

During Liwaru's cross-examination, the defense journeyed beyond mere impeachment and impliedly charged Liwaru with fabrication. The defense explored Liwaru's statements made

to police on December 10, 1999. Liwaru admitted on cross-examination that she told the police that her telephone calls with Duncan may have occurred on December 6 or on the evening of December 5. The defense asked Liwaru how many versions of the telephone calls she shared with the police, to which Liwaru replied "probably a couple." The defense also asked Liwaru if Duncan had ever told her that he was involved in the murder of Bennett. Liwaru answered that he had not. These questions exhibit the defense's implied charge that Liwaru had fabricated her trial testimony regarding the content of the two December 5 telephone calls from Duncan. Therefore, the State was entitled to offer the testimony of Chanel and Nocita to rebut such charge.

STEVEN HENTHORN

Next, Duncan argues that he was prejudiced by the district court's erroneous evidentiary rulings and trial counsel's ineffective assistance with regard to Henthorn's testimony of Crimestoppers telephone calls.

Henthorn was the lead investigator assigned to the case and testified generally as to the investigation of Bennett's murder. The specific portions of Henthorn's testimony on direct examination and redirect examination at issue here are set forth below.

> Q. Let me ask you, on December 5th or December 6th — and I don't want you to tell me anything about what was said — but on December 5th or 6th of 1999, were there Crime Stoppers reports coming in to the police department about this murder?
>
> [Defense]: I'll object on relevance. Calls for a hearsay response.
>
> [State]: I'm not asking him what was in them. I just wanted to know if they were coming in.
>
> [Defense]: Relevance.
>
> THE COURT: You may answer.
>
> [A.] No, we were not.
>
> . . . .
>
> Q. . . . On the 7th of December, did Crime Stoppers calls — did you have any Crime Stoppers calls?
>
> [Defense]: Objection, relevance. Calls for hearsay response.

[State]: Not what was in them.

THE COURT: Crime Stoppers calls in connection with what?

[State]: Regarding the murder of Lucille Bennett.

THE COURT: You may answer.

[A.] Yes, we did.

Q. . . . About what time was that?

A. I believe it was about 9:30 in the morning.

Q. Okay. And at some point in time did you begin investigating Mr. Duncan?

A. Yes.

Q. When was that?

A. About 9:30 in the morning —

Q. Okay.

A. — on the 7th of December.

Q. Okay. Did — what did you do after — at some point in time you got some information that Mr. Duncan — you started looking at him?

A. Yes.

. . . .

Q. . . . And did you get — in this particular case, did you get Crime Stoppers reports before — how many Crime Stoppers reports did you get before the 10th of December?

[Defense]: Objection, relevance, foundation.

THE COURT: You may answer.

[A.] Two.

[9,10] Duncan argues that the district court erred in overruling his relevance and hearsay objections above. Duncan further argues that this testimony was unfairly prejudicial because it allowed the jury to infer that someone called Crimestoppers and identified Duncan as a suspect. However, an objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground. *State v. Timmens*, 263 Neb. 622, 641 N.W.2d 383 (2002). A trial court is required to weigh the danger of unfair prejudice against the probative value of the evidence only when requested to do so at trial. *State v. Schrein*, 244 Neb. 136, 504 N.W.2d 827 (1993). Duncan did not object to any portion of Henthorn's testimony under Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue

1995), and we will not analyze the issue under that rule. Instead, we consider whether the evidence had 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 have been without the evidence, Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1995), and also whether Henthorn's testimony was inadmissible hearsay.

[11,12] We determine that the district court properly overruled Duncan's hearsay objections. Under § 27-801(3), hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. *State v. Pruett*, 263 Neb. 99, 638 N.W.2d 809 (2002). A statement is defined in part as an oral or written assertion. § 27-801(1). The two questions objected to by Duncan on hearsay grounds asked whether and when the police received any Crimestoppers calls. These questions did not call for an oral or written assertion made by an out-of-court declarant, and the content of those calls were never explicitly divulged.

[13,14] However, we conclude that the district court erred in overruling Duncan's relevance objections. An erroneous admission of evidence is considered prejudicial to a criminal defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v. Sheets*, 260 Neb. 325, 618 N.W.2d 117 (2000). See, also, *State v. Rieger*, 260 Neb. 519, 618 N.W.2d 619 (2000). Harmless error review looks to the basis on which the jury actually rested its verdict; the inquiry is not whether in a trial that occurred without the error a guilty verdict would surely have been rendered, but, rather, whether the actual guilty verdict rendered in the questioned trial was surely unattributable to the error. *State v. Brouillette, ante* p. 214, 655 N.W.2d 876 (2003).

Despite the court's erroneous admission of this evidence, we conclude, on these facts, that Duncan's conviction was surely unattributable to this error. The testimony of Liwaru, corroborated by Chanel and Nocita, established that Duncan was privy to details of Bennett's murder before Bennett's body was discovered and reported to police. Duncan also told Liwaru during one of the December 5, 1999, telephone calls that he murdered Bennett. This

evidence supports Duncan's conviction and renders the court's erroneous admission of Henthorn's testimony harmless.

[15] For those questions above where no objection was made, Duncan argues that he received ineffective assistance of counsel. Specifically, Duncan claims that counsel should have objected based on his confrontation rights under U.S. Const. amend. VI and XIV and Neb. Const. art. I, § 11, and on rules 401, 403, 801, and Neb. Evid. R. 802, Neb. Rev. Stat. § 27-802 (Reissue 1995). Duncan also claims his trial counsel was ineffective for failing to move for a mistrial. When the issue of ineffective assistance of counsel has not been raised or ruled on at the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). We determine that Duncan's argument of ineffective assistance of counsel regarding this issue requires an evidentiary hearing. Thus, we decline the opportunity to consider it here.

Bill Gartside

In this assignment of error, Duncan argues that the district court erred in finding, over Duncan's objection, that Gartside was an expert witness in the field of hair analysis and in receiving his testimony into evidence. Duncan claims that "[t]he only evidence that Gartside was an expert in the area of hair analysis was his own claim to expertise." Brief for appellant at 42. Duncan also claims that he received ineffective assistance of counsel to the extent that trial counsel failed to object to any portion of Gartside's testimony under rules 401, 402, 403, and 702.

[16,17] The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Buechler*, 253 Neb. 727, 572 N.W.2d 65 (1998). Four preliminary questions must be answered in order to determine whether an expert's testimony is admissible: (1) whether the witness qualifies as an expert pursuant to rule 702; (2) whether the expert's testimony is relevant; (3) whether the expert's testimony will assist the trier of fact to understand the evidence or determine a controverted factual issue; and (4) whether the expert's testimony, even though relevant and

admissible, should be excluded in light of rule 403. *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

[18-20] Whether a witness is qualified as an expert is a preliminary question for the trial court. *State v. Campbell*, 260 Neb. 1021, 620 N.W.2d 750 (2001). A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal. *Id.* A person may qualify as an expert by virtue of either formal training or actual practical experience in the field. *Id.*

Gartside testified that he has worked as a criminologist in the DNA serology section of the Nebraska State Patrol laboratory since January 1997. In that capacity, Gartside examines evidence for blood, body fluids, and hairs; analyzes that evidence; and writes reports and testifies in court as necessary. He received a bachelor of science degree from the State University of New York and has taken graduate level classes at the University of Nebraska in molecular biology, genetics, and biochemistry. Gartside testified that he has received specialized training in his field from the FBI, Royal Canadian Mounted Police, and others and has authored a number of published articles and papers related to his work. Gartside also stated that he has testified as an expert witness in the area of blood, DNA, and hair analysis on multiple occasions. Gartside described the procedures used to examine hair, including macroscopic and microscopic techniques, and testified that those procedures are recognized in the scientific community as valid. Gartside also testified that at the time of trial, he was the only hair examiner at the State Patrol laboratory. He estimated that he had probably looked at "thousands" of hairs in his career. Given this testimony, the district court was not clearly erroneous in finding that Gartside was qualified to testify as an expert witness in the field of hair analysis.

We have previously recognized the utility of scientific hair analysis in criminal cases. *State v. Harrison*, 218 Neb. 532, 357 N.W.2d 201 (1984). Gartside's testimony that several of the hairs found in Bennett's home were consistent with a sample of hairs obtained from Duncan's dogs could assist the jury in determining if Duncan were guilty of Bennett's murder. The district

court did not abuse its discretion in receiving Gartside's testimony, and trial counsel's failure to object to any portion of Gartside's testimony did not deprive Duncan of effective assistance of counsel. This assignment of error is without merit.

JEFFREY HARRINGTON

In this assignment of error, Duncan argues that the district court erred in overruling his objections to portions of Harrington's testimony. Harrington lived in the same neighborhood as Bennett and Duncan and had known Duncan for approximately 10 years. Harrington testified that he saw Duncan in that neighborhood on December 4, 1999, and that Duncan seemed "distant" during their brief conversation. The State asked Harrington if Duncan's physical appearance had changed over the time that Harrington had known Duncan. Over Duncan's relevance objection, Harrington testified that Duncan had previously been "handsome," "articulate," and "neat in his appearance." However, Harrington testified that after Duncan had moved into his present neighborhood, Duncan's appearance was "distinctly different . . . so different I remember thinking that his . . . life had taken a different turn." The defense objected to this answer on grounds that it was nonresponsive, called for speculation, and lacked foundation. The objection was overruled.

[21] Duncan argues that the district court erred in overruling these objections because the testimony was irrelevant. Evidence is relevant when it has 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. *State v. Davlin*, 263 Neb. 283, 639 N.W.2d 631 (2002). Having reviewed the record, we cannot conceive of any fact or consequence for which evidence of Duncan's changing appearance over the course of almost 10 years may have made more or less probable. However, for the same reasons we articulated above in regard to the court's erroneous receipt of portions of Henthorn's testimony, Duncan's conviction was unattributable to the court's erroneous evidentiary ruling here. See *State v. Brouillette, ante* p. 214, 655 N.W.2d 876 (2003). Duncan's assignment of error is without merit.

POT IN SINK

Finally, Duncan claims that his trial counsel provided ineffective assistance when he failed to object to Liwaru's testimony that a pot found in Bennett's home belonged to her and Duncan. During her testimony, Liwaru was asked by the State to examine exhibit 53, a photograph depicting Bennett's kitchen. Liwaru was asked if she recognized anything in the photograph. Liwaru replied that she recognized the pot in the sink and further testified that the pot belonged to her and Duncan.

Duncan argues that his trial counsel was ineffective for failing to object to this testimony under rule 403 and Neb. Evid. R. 602 and 901, Neb. Rev. Stat. §§ 27-602 and 27-901 (Reissue 1995). Rule 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the risk 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.

[22] Liwaru testified that she and Duncan would occasionally use their pots to get water from the side of Bennett's house. Liwaru also testified that she had never entered Bennett's kitchen and did not give Bennett the pot. Thus, Liwaru's testimony had probative value because it placed Duncan at Bennett's home. For the same reason, the testimony was prejudicial to Duncan. However, the fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under rule 403. *State v. Long*, 264 Neb. 85, 645 N.W.2d 553 (2002). Any rule 403 objection Duncan's trial counsel might have made would have been overruled by the court. Therefore, Duncan cannot show that his trial counsel's performance in this respect was deficient.

CONCLUSION

For the reasons set out above, the judgment of the district court is affirmed.

AFFIRMED.

CATHY L. JACKSON, APPELLANT, V. MORRIS COMMUNICATIONS CORPORATION, DOING BUSINESS AS YORK NEWS-TIMES, APPELLEE.

657 N.W.2d 634

Filed March 7, 2003. No. S-01-1355.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
3. **Employer and Employee: Public Policy: Damages.** Under the public policy exception to the at-will employment doctrine, an employee can claim damages for wrongful discharge when the motivation for the firing contravenes public policy.
4. **Workers' Compensation: Legislature: Intent.** The Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease.
5. **Workers' Compensation: Appeal and Error.** In light of the beneficent purpose of the Nebraska Workers' Compensation Act, the appellate courts give the act a liberal construction to carry out justly the spirit of the act.
6. **Workers' Compensation: Employer and Employee: Public Policy.** The Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception to the at-will employment doctrine.
7. **Actions: Workers' Compensation: Employer and Employee.** An action for retaliatory discharge is allowed when an employee has been discharged for filing a workers' compensation claim.

Appeal from the District Court for York County: ALAN G. GLESS, Judge. Reversed and remanded for further proceedings.

Stefanie J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellant.

Charles W. Campbell, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

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

CONNOLLY, J.

This case presents the question whether this court should recognize a cause of action for retaliatory discharge when an

employer discharges an employee for filing a workers' compensation claim. Cathy L. Jackson appeals the district court's dismissal of her petition based upon the failure to state a cause of action. The petition alleged that Morris Communications Corporation, doing business as York News-Times, terminated her employment because she filed a workers' compensation claim and that she suffered damages. The district court dismissed the petition because Nebraska law has not recognized a cause of action for wrongful discharge in retaliation for filing a workers' compensation claim.

We determine that a public policy exception to the at-will employment doctrine applies to allow a cause of action for retaliatory discharge when an employee is fired for filing a workers' compensation claim. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

Jackson filed a petition alleging the following: In November 1994, she was employed by the York News-Times to work in the mailroom division of its distribution department. Her initial wage was $4.50 per hour, with a schedule of 30.5 hours per week. In January 1995, she was promoted to bundle driver and her hourly pay was raised. In July 1996, she was promoted to cocirculation manager, with a salary of $15,000 per year and various benefits.

In March 1997, she injured her left wrist while operating a labeling machine. She reported the injury, and a report was filed in accordance with the workers' compensation laws. Jackson sought medical attention and was treated conservatively. By April, she was unable to perform some of her required duties because of the injury. As a result, her duties and pay were adjusted. In May, her supervisor began logging alleged problems with her performance and met with her three times between May 19 and 27 to criticize her performance.

On June 2, 1997, Jackson's physical therapist contacted her supervisor, recommending that Jackson not perform any repetitive duties with her left wrist. The York News-Times fired Jackson on June 16. At the end of July, Jackson's wrist was x-rayed and she learned that the wrist was fractured. Because of the delay in receiving treatment and because she had continued to perform her

duties at work for several months, she suffered bone loss and required a full fusion of the left wrist.

Jackson alleged that she was discharged because she was injured and had filed a workers' compensation claim. The petition stated that under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-101 et seq. (Reissue 1993 & Cum. Supp. 1996), it is the public policy of Nebraska that workers receive the benefits of the act. Jackson contended that this policy justified the recognition of a cause of action for wrongful discharge when an employee is discharged in retaliation for filing a workers' compensation claim.

The York News-Times demurred, alleging that the petition failed to state a cause of action and that the action was barred by the statute of limitations. The court sustained the demurrer and dismissed the petition, stating that the cause of action was not yet recognized by Nebraska law and that a trial court should not create a new cause of action. Jackson appeals.

ASSIGNMENT OF ERROR

Jackson assigns, rephrased, that the district court erred in failing to recognize a cause of action and dismissing her petition.

STANDARD OF REVIEW

[1] Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001).

ANALYSIS

Jackson urges this court to adopt a cause of action for retaliatory discharge when an employer discharges an employee for filing a workers' compensation claim. She argues that her discharge contravenes public policy and should be recognized as an exception to the at-will employment doctrine. York News-Times, however, contends that there is no clear pronouncement of public policy to allow the recognition of the cause of action.

Public Policy Exceptions to At-Will Employment Doctrine

[2,3] The clear rule in Nebraska is that unless constitutionally, statutorily, or contractually prohibited, an employer, without

incurring liability, may terminate an at-will employee at any time with or without reason. *Malone v. American Bus. Info., supra.* We recognize, however, a public policy exception to the at-will employment doctrine. *Id.* See, *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), *disapproved on other grounds, Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987). Under the public policy exception, we will allow an employee to claim damages for wrongful discharge when the motivation for the firing contravenes public policy. *Malone v. American Bus. Info., supra.*

This court has applied the public policy exception in several cases. In one case, an employee alleged that he was terminated because he refused to take a polygraph test. *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987). We noted that under the Licensing of Truth and Deception Examiners Act, Neb. Rev. Stat. § 81-1901 et seq. (Reissue 1999), an employer could not condition employment on a requirement that a person submit to a truth and deception examination. See, § 81-1932; *Ambroz v. Cornhusker Square Ltd., supra.* A violation of § 81-1932 is a Class II misdemeanor. See § 81-1933. As a result, we determined that the statutory provision constituted a pronouncement of public policy that clearly prohibited the use of a polygraph to deny employment. We then defined the circumstances in which the public policy exception would be recognized, stating:

> This is a case involving a discharge in violation of a clear, statutorily mandated public policy. We believe that it is important that abusive discharge claims of employees at will be limited to manageable and clear standards. The right of an employer to terminate employees at will should be restricted only by exceptions created by statute or to those instances where a very clear mandate of public policy has been violated. This case falls within that rule.

Ambroz v. Cornhusker Square Ltd., 226 Neb. at 905, 416 N.W.2d at 515.

We have also recognized a public policy exception when an employee claimed he was discharged for reporting his suspicions that his employer was violating state odometer fraud laws. *Schriner v. Meginnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755

(1988). Unlike *Ambroz*, there was no statute in *Schriner* that prohibited an employer from discharging an employee for reporting criminal conduct. We noted, however, that it was a crime to engage in odometer fraud in Nebraska. See Neb. Rev. Stat. § 60-132 et seq. (Reissue 1998). We then reasoned that the enforcement of the criminal code is a basic public policy and that the enactment of the criminal statute was a declaration of public policy against odometer fraud. But we then found that an action for wrongful discharge could lie only if the employee acted in good faith when reporting the violation of the criminal code. Because there was no evidence that the employee had reasonable cause to believe that his employer acted unlawfully, we affirmed the trial court's order granting the employer summary judgment. The Nebraska Court of Appeals has also found a public policy exception when an employee was discharged for refusing to drive a truck that had defective brakes, because to do so would be a violation of the criminal code. *Simonsen v. Hendricks Sodding & Landscaping*, 5 Neb. App. 263, 558 N.W.2d 825 (1997).

More recently, we refused to find a public policy exception when an employee was discharged for asserting a claim under the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue 1998). *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). We noted that unlike the act in *Ambroz*, the Nebraska Wage Payment and Collection Act did not contain a specific provision restricting an employer's right to discharge an at-will employee. We further noted that cases from other jurisdictions were of little guidance because of differences in statutory language. States that allowed a claim for retaliatory discharge had statutes that prohibited employers from discharging employees for making a claim or made such a discharge a crime. We stated that the act was primarily remedial in nature and provided specific procedures for the enforcement of substantive rights to compensation for work performed that arise not from the statute but from the employment relationship itself. We ultimately concluded that the Nebraska Wage Payment and Collection Act "does not represent a 'very clear mandate of public policy' which would warrant recognition of an exception to the employment-at-will doctrine." *Malone v. American Bus. Info.*, 262 Neb. at 739, 634 N.W.2d at 793.

NEBRASKA WORKERS' COMPENSATION ACT

Section 48-145(1) requires employers to carry insurance or provide money to the State Treasurer as a self-insurer. Section 48-145(3) then provides that an employer who fails to comply with the section will be required to respond in damages to an employee for personal injuries.

The Nebraska Workers' Compensation Act does not specifically prohibit an employer from discharging an employee for filing a claim, nor does it specifically make it a crime for an employer to do so. The statutes do, however, contain two other criminal provisions. Section 48-144.04 makes the failure to file a report required by the act a Class II misdemeanor. In addition, under § 48-145.01, it is a Class I misdemeanor for any employer to willfully fail to secure payment of compensation under the act as required by § 48-145.

Courts in other jurisdictions have recognized a statutory exception to the at-will employment doctrine when an employee is discharged in retaliation for filing a claim. But many of these jurisdictions have done so because of a statute that specifically prohibits discharge for the filing of a claim or makes such a discharge a crime. See, *Michaels v. Anglo American Auto Auctions*, 117 N.M. 91, 869 P.2d 279 (1994); *Lally v. Copygraphics*, 85 N.J. 668, 428 A.2d 1317 (1981); *Sventko v Kroger*, 69 Mich. App. 644, 245 N.W.2d 151 (1976). See *Brown v. Transcon Lines*, 284 Or. 597, 588 P.2d 1087 (1978) (statute prohibits discrimination against employee for filing claim). In addition, some courts have recognized an exception based on other statutes that are more detailed than Nebraska's act. See, *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987) (interpreting public policy statement in act); *Clanton v. Cain-Sloan Co.*, 677 S.W.2d 441, 443 (Tenn. 1984) (interpreting statutory language "all but identical" to that in *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973)); *Frampton v. Central Ind. Gas Co.*, 260 Ind. at 252, 297 N.E.2d at 427-28 (statute provided that no contract, rule, regulation, "'or *other device*'" could operate to relieve employer from workers' compensation obligation).

Some courts, however, recognize an exception, even in the absence of a specific statutory prohibition. For example, the

Supreme Court of Nevada adopted an exception in the absence of a clear statutory prohibition. *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984). The court noted that workers' compensation laws reflect a clear public policy favoring economic security for injured employees. The court stated:

> "Unquestionably, compensation laws were enacted as a humanitarian measure. The modern trend is to construe the industrial insurance acts broadly and liberally, to protect the interest of the injured worker and his dependents. A reasonably, liberal and practical construction is preferable to a narrow one, since these acts are enacted for the purpose of giving compensation, not for the denial thereof."

Id. at 63, 675 P.2d at 396. The Nevada court observed that if employers are permitted to penalize employees for filing workers' compensation claims, an important public policy would be undermined:

> Failure to recognize the cause of action of retaliatory discharge for filing a workmen's compensation claim would only undermine Nevada's Act and the strong public policy behind its enactment. . . .
>
> "The Act creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation—opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation."

Hansen v. Harrah's, 100 Nev. at 63-64, 675 P.2d at 396, quoting *Frampton v. Central Ind. Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973). See, also, *Murphy v. City of Topeka*, 6 Kan. App. 2d 488, 630 P.2d 186 (1981) (adopting exception even though legislature

had twice considered, and not adopted, amendments that would specifically prohibit discharge); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353, 23 Ill. Dec. 559 (1978) (adopting exception in absence of explicit statutory provision at time of discharge, but noting that explicit provision had been added by time of appeal).

A minority of courts has refused to recognize an exception, often with little analysis or explanation. See, e.g., *Federici v. Mansfield Credit Union*, 399 Mass. 592, 506 N.E.2d 115 (1987) (no specific statutory prohibition); *Smith v. Piezo Technology & Prof. Adm'rs*, 427 So. 2d 182 (Fla. 1983) (providing little analysis, and recognizing statutory claim); *Raley v. Darling Shop of Greenville, Inc.*, 216 S.C. 536, 59 S.E.2d 148 (1950) (providing no analysis). But, the refusal to recognize the exception generally is done in deference to the legislature. See *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

It is true that Nebraska has not specifically prohibited an employer from discharging an employee for filing a workers' compensation claim. Nor has Nebraska specifically made this a crime. Although the Nebraska Workers' Compensation Act contains some criminal provisions, these relate to the willful failure of an employer to carry insurance or make self-insurance payments under the act. They do not specifically apply to the discharge of an employee who has filed a claim. Thus, we are not presented with the same type of clear mandate of public policy as was present in *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987), and *Schriner v. McGinnis Ford Co.*, 228 Neb. 85, 421 N.W.2d 755 (1988). But we also recognize that the Nebraska Workers' Compensation Act has a much wider scope and purpose than does the Nebraska Wage Payment and Collection Act that we addressed in *Malone v. American Bus. Info.*, 262 Neb. 733, 634 N.W.2d 788 (2001). There, we noted that the Nebraska Wage Payment and Collection Act is largely remedial in nature and provides specific procedures for the enforcement of substantive rights to compensation for work performed that arise not from the statute but from the employment relationship itself. The Nebraska Workers' Compensation Act, however, creates a range of substantive rights that arise from the statute itself.

Unlike the Nebraska Wage Payment and Collection Act, the general purpose and unique nature of the Nebraska Workers' Compensation Act itself provides a mandate for public policy. In the early 1900's, state legislatures began enacting workers' compensation laws to provide employees with more effective remedies for work-related injuries than was available under tort law. See, Jean C. Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551 (1986). Tort law provided complete compensation, but required proof of negligence, and actions were often barred by affirmative defenses such as assumption of the risk and contributory negligence. *Id.* The result was a system that is often referred to as a "compromise" between employees and employers. *Id.* Employees gave up complete compensation in exchange for no-fault benefits that are received quickly and provide certain reimbursement for most economic losses. *Id.*

[4,5] We have recognized that the Legislature enacted the Nebraska Workers' Compensation Act to relieve injured workers from the adverse economic effects caused by a work-related injury or occupational disease. *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001). In light of this beneficent purpose of the act, we have consistently given the act a liberal construction to "'"carry out justly the spirit of the Nebraska Workers' Compensation Act."'" *Foote v. O'Neill Packing*, 262 Neb. at 473, 632 N.W.2d at 320, quoting *Phillips v. Monroe Auto Equip. Co.*, 251 Neb. 585, 558 N.W.2d 799 (1997).

Thus, unlike the Nebraska Wage Payment and Collection Act that we examined in *Malone*, the Nebraska Workers' Compensation Act is unique because of its overriding purpose and the substantive rights it creates for employees. As the court stated in *Hansen v. Harrah's*, 100 Nev. 60, 675 P.2d 394 (1984), the act creates a duty to provide compensation through insurance or self-insurance that would be seriously frustrated if employers were able to prevent employees from filing claims through the threat of discharge. We are cognizant of an employer's interest in having freedom to discharge at-will employees, but as one court has noted, the effect of the substitution of workers' compensation for the common law was to eliminate a cause of action by an employee against his or her employer for work-related injuries.

Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145, 9 Ill. Dec. 634 (1977). To hold that there is not a clear public policy warranting an exception to the at-will employment doctrine would ignore the beneficent nature of the Nebraska Workers' Compensation Act. This, in effect, would allow an employer to say to the employee: " 'Although you have no right to a tort action, you have a right to a workmen's compensation claim which, while it may mean less money, is a sure thing. However, if you exercise that right, we will fire you.' " *Id.* at 1024, 366 N.E.2d at 1147, 9 Ill. Dec. at 636.

[6,7] The Nebraska Workers' Compensation Act was promulgated to serve an important public purpose, and a rule which allows fear of retaliation for the filing of a claim undermines that policy. We are convinced that the unique and beneficent nature of the Nebraska Workers' Compensation Act presents a clear mandate of public policy which warrants application of the public policy exception. Thus, we recognize a public policy exception to the at-will employment doctrine and allow an action for retaliatory discharge when an employee has been discharged for filing a workers' compensation claim.

Here, Jackson filed a petition alleging that she was discharged in retaliation for filing a claim. The district court dismissed the petition because it did not recognize a cause of action for retaliatory discharge and did not address whether the petition would state a cause of action if it were recognized. Accordingly, we reverse, and remand for further proceedings. We note that to the extent that Jackson's petition states conclusions and lacks factual allegations, she should be given leave to amend. We also note that the district court did not address the York News-Times' allegation that the action is barred by the statute of limitations, and the York News-Times did not cross-appeal the issue. Thus, we do not address it on appeal. See, *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990); *Hays v. County of Douglas*, 192 Neb. 580, 223 N.W.2d 143 (1974).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RICHARD HARTMAN AND PATRICIA HARTMAN, HUSBAND AND WIFE, APPELLEES, V. CITY OF GRAND ISLAND, A POLITICAL SUBDIVISION, APPELLANT.

657 N.W.2d 641

Filed March 7, 2003. No. S-02-098.

1. **Arbitration and Award: Appeal and Error.** In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.
2. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
3. **Arbitration and Award: Appeal and Error.** Appellate review of an arbitrator's award is necessarily limited because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation. Strong deference is due an arbitrative tribunal; when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might arise from the process.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Affirmed.

Charles J. Cuypers, Grand Island City Attorney, and John R. Brownell, of Lauritsen, Brownell, Brostrom, Stehlik, Thayer & Myers, for appellant.

Vincent Valentino, of Angle, Murphy, Valentino & Campbell, P.C., for appellee.

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

STEPHAN, J.

This is an appeal from an order of the district court for Hall County confirming an arbitration award entered on July 20, 2001, in favor of Richard Hartman and Patricia Hartman and against the City of Grand Island, Nebraska, and entering judgment thereon. We affirm.

FACTS

The Hartmans claim that the city's operation of a coal-fired power plant near their property caused damage to their home

and outbuildings. In the summer of 2000, the parties decided to resolve their dispute through arbitration. The parties agreed upon an arbitration panel consisting of three members, with one appointed by the city, one appointed by the Hartmans, and one appointed jointly by the parties. They further agreed that the arbitration would be binding on all parties.

In a letter to the parties dated July 20, 2001, the arbitrators resolved the claim in favor of the Hartmans and awarded them $100,000. John Higgins, one of the arbitrators, prepared the award letter at the request of and in the presence of the other two panel members. The award was signed "THE BOARD OF ARBITRATORS By John R. Higgins, Jr.," but was not signed by the other two arbitrators.

In September 2001, the Grand Island City Attorney contacted Higgins and requested a letter of clarification based on his concern that the award letter did not include sufficient detail. Higgins independently drafted a letter explaining the methodology used to reach the award and setting forth the documents reviewed by the arbitrators. This letter was also signed only by Higgins.

The city council declined to treat the arbitration award as binding, and consequently, the Hartmans filed a petition for confirmation of arbitration award on October 22, 2001. In its answer, filed December 4, 2001, the city affirmatively alleged that the arbitration was not binding. The city also alleged that the award was "inequitable, grossly excessive, and will shock the conscience of the Court" and that it "is void for the reason that the award or decision was not signed by all arbitrators as required by law." On December 6, 2001, the Hartmans filed a reply alleging that the city had waived any right to challenge the decision or award of the arbitrators by failing to timely comply with Neb. Rev. Stat. § 25-2613(b) (Cum. Supp. 2002).

After an evidentiary hearing, the district court confirmed the award by entering judgment in conformity therewith in favor of the Hartmans and against the city in the amount of $100,000. The city then perfected this timely appeal.

ASSIGNMENTS OF ERROR

The city assigns that the district court erred (1) in determining that the arbitration award was valid despite the fact that all

of the arbitrators did not sign the agreement and (2) by not finding that the arbitration award was inequitable.

STANDARD OF REVIEW

[1] In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous. *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001).

[2] Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Egan v. Stoler, ante* p. 1, 653 N.W.2d 855 (2002); *Governor's Policy Research Office v. KN Energy*, 264 Neb. 924, 652 N.W.2d 865 (2002).

ANALYSIS

The district court determined that this case is governed by the Uniform Arbitration Act, Neb. Rev. Stat. §§ 25-2601 to 25-2622 (Reissue 1995 & Cum. Supp. 2000). Neither party has taken exception to this determination, and we agree that the arbitration at issue here is governed exclusively by state law.

The city's first assignment of error concerns the refusal of the district court to invalidate the award based upon the fact that it was signed by only one of the three arbitrators. Section 25-2609(a) provides in pertinent part that "[t]he award shall be in writing and signed by the arbitrators joining in the award." The record reflects that Higgins prepared the July 20, 2001, letter setting forth the award at the request of the other two arbitrators and in their presence. Higgins testified at the confirmation hearing that this letter constituted the award that the arbitrators intended to issue. With the specific consent and approval of the other two arbitrators, Higgins signed the award letter on behalf of the panel. It is thus clear from the record that the failure of two of the three arbitrators to sign the award in strict compliance with § 25-2609(a) constitutes a defect as to the form of the award, but not as to its substance.

The Uniform Arbitration Act provides a party with two alternative remedies applicable in this circumstance. First, § 25-2614(a) provides: "Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when: . . . (3) The award is imperfect in a matter of form, not affecting the merits of the controversy." Second, § 25-2610 provides that the arbitrators may modify or correct an award imperfect in a matter of form upon application of a party "made within twenty days after delivery of the award to the applicant." Because the city did not utilize either of these statutory procedures, the district court correctly determined that its attempt to assert the issue as a defense to confirmation of the award was improper and untimely.

The city also assigns that the district court erred in not determining that the award was inequitable. The district court viewed its power to vacate the arbitration award on substantive grounds as circumscribed by § 25-2613. This statute enumerates specific grounds upon which a court may vacate an arbitration award upon the application of a party filed within 90 days after delivery of a copy of the award to the applicant or if vacation is premised upon "corruption, fraud, or other undue means," within 90 days after such grounds are known or should have been known. § 25-2613(b). The city did not file an application to vacate the award pursuant to § 25-2613. However, the city argues that notwithstanding the provisions of the Uniform Arbitration Act, the district court had common-law authority to review the evidence submitted to the arbitrators to determine "whether or not the award is grossly inequitable." Brief for appellant at 5.

The city relies upon the general principle stated in *Simpson v. Simpson*, 194 Neb. 453, 456, 232 N.W.2d 132, 136 (1975), that "an arbitration award should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court." The city argues that our reiteration of this principle in *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 448 N.W.2d 168 (1989), represents "the common law of arbitration as it exists after the 1987 adoption of the Uniform Arbitration Act." Brief for appellant at 5. This is an incorrect interpretation of *Babb*. The Uniform Arbitration Act applies only to agreements made subsequently to August 30, 1987. § 25-2621. The agreement

to arbitrate which we considered in *Babb* was included in a merger agreement between two labor unions executed on August 12, 1983, and effective September 1 of that year. Although *Babb* was decided after the effective date of the Uniform Arbitration Act, the operative facts occurred prior to that date and the opinion makes no reference to the act.

The role of the court in the post-1987 arbitration process is specifically addressed and limited by the Uniform Arbitration Act. Section 25-2618(a) provides: "The term court shall mean any district court of this state. The making of an agreement described in section 25-2602.01 providing for arbitration in this state confers jurisdiction on the court to enforce the agreement under the Uniform Arbitration Act and to enter judgment on an award thereunder." Section 25-2612 provides: "Within sixty days of the application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614."

[3] As noted, in this case, the city did not file an application to modify or correct the award pursuant to § 25-2614, nor did it file an application to vacate the award pursuant to § 25-2613. Moreover, § 25-2613 does not include any authorization for a court to vacate an arbitration award on grounds that it is excessive or inequitable. Section 25-2613(a)(6) specifically provides: "The fact that the relief was such that it could not or would not be granted by a court of law or equity is not [a] ground for vacating or refusing to confirm the award." As we recently stated:

> Appellate review of an arbitrator's award is necessarily limited because "to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." . . . "[S]trong deference [is] due an arbitrative tribunal." . . . Furthermore, " '[w]hen . . . parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process.' "

(Citations omitted.) *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 798, 635 N.W.2d 267, 271 (2001). Furthermore, " '[w]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments

defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.' " *Id.* at 799, 635 N.W.2d at 272. The city's second assignment of error is without merit.

CONCLUSION

The record reflects that the parties entered into a valid and binding agreement to arbitrate their dispute which was governed by the provisions of Nebraska's Uniform Arbitration Act. The city did not file an application to vacate, modify, or correct the award pursuant to the act, and therefore the district court correctly concluded that the award should be confirmed. The district court's entry of judgment on the award in favor of the Hartmans and against the City of Grand Island in the amount of $100,000 is affirmed.

AFFIRMED.

MURIEL H. NYE AND CHARLES A. NYE, APPELLANTS, V. FIRE GROUP PARTNERSHIP, A NEBRASKA GENERAL PARTNERSHIP, APPELLEE.

657 N.W.2d 220

Filed March 7, 2003. No. S-02-543.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____. If a genuine issue of fact exists, summary judgment may not properly be entered.
3. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.
4. **Adverse Possession: Notice.** The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another.
5. **Adverse Possession.** If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious.

6. ____. Although enclosure of land renders the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious.
7. ____. Nonenclosing improvements to land, such as erecting buildings or planting groves or trees, which show an intention to appropriate the land to some useful purpose are sufficient to show open and notorious possession.
8. **Adverse Possession: Title.** Title cannot be acquired by adverse possession without the simultaneous and continuous existence of each element of adverse possession for the required 10-year period.
9. **Words and Phrases.** The term "continuous" means uninterrupted and stretching on without break or interruption.
10. **Adverse Possession.** The law of adverse possession does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership, and it is sufficient if the land is used continuously for the purposes to which it may be naturally adapted.
11. ____. Where both parties have used the property in dispute, there can be no exclusive possession on the part of one party.
12. ____. The law does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the property.
13. **Adverse Possession: Evidence.** Evidence of adverse possession must show the intention of the claimant to appropriate and use the property as his own to the exclusion of all others.
14. **Adverse Possession: Title.** Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Charles A. Nye, pro se, and for appellant Muriel H. Nye.

Ann M. Grottveit and Robert J. Becker, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellee.

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

CONNOLLY, J.

Muriel H. Nye and Charles A. Nye appeal from a district court order sustaining the motion for summary judgment filed by the appellee, Fire Group Partnership (Fire Group), on an adverse possession claim. The Nyes presented evidence showing that they mowed a tract of land and erected a snow fence on

the land for more than 10 years. The snow fence was removed seasonally, but the posts were permanently installed. The district court concluded that the Nyes did not adversely possess the property as a matter of law. We determine that there are issues of material fact whether the Nyes' use of the property was open and notorious, whether they exclusively and continuously possessed the property, and whether they possessed the property with permission. Accordingly, we reverse, and remand for further proceedings.

BACKGROUND

On June 9, 2000, the Nyes filed an amended petition seeking to quiet title in a tract of land referred to as "tract 2." Tract 2 is a 24-foot wide strip of land between the Nyes' home and a cornfield to the west of their home. The Nyes alleged that they owned the land because they adversely possessed it for over 10 years. Fire Group filed a motion for summary judgment.

The Nyes presented evidence that when they purchased their property in 1972, they believed that it ended at the edge of an adjacent cornfield and that tract 2 belonged to them. Between 20 and 30 years ago, they planted grass on tract 2. They also mowed the grass on tract 2 for the past 28 years and used part of the tract for collecting and burning dead limbs and grass for more than 10 years. In addition, they used part of it to erect a snow fence that used permanent stakes which were put in place about 20 years ago. The fence was taken down each year in the springtime, but the stakes remained. The record contains a photograph of the fence and of the stakes without the fence attached and shows that the fence was in place on November 7, 1990. The fence was installed near the crop line, and the stakes are about 5 feet high. The Nyes testified that they never saw farm equipment parked or driven on the property. They also testified that they were never asked to remove the snow fence.

Fire Group provided the affidavit of Mickey Gottsch, who farmed the land to the west of the Nyes' property under a lease from Gottsch Enterprises and a sharecrop agreement before it was sold to Fire Group. Although Gottsch testified that he farmed the land for 12 to 15 years, the record contains a deed showing that Gottsch Enterprises purchased the property in

April 1994. Gottsch averred that he deliberately left the grass in place to create a buffer zone between the crops and the Nyes' property so that herbicides would not drift onto the Nyes' property. At a deposition, Gottsch stated that the grass was already on tract 2 when he first began farming there. He stated that he had previously mowed a section of tract 2 both near the road and also up to the snow fence. He testified that once or twice a year, he used the area to park and store farm equipment such as tractors and combines and that the equipment would not make an imprint on the grass. But Gottsch also stated that he parked the equipment to the west of the fenceposts because it would upset the Nyes to park the equipment on the east side of the posts. He stated that he also used tract 2 for turning around his equipment when cultivating.

According to Gottsch, there was one time when the snow fence was still up when it was time to plant crops and the Nyes removed the fence at the request of Gottsch's father. Gottsch, however, at his deposition, stated that the fence was placed in the field and that after the Nyes were contacted, they moved the fence onto tract 2. Without providing details, Gottsch stated that the mowing and erection of the snow fence were done with permission and that these activities never interfered with his use of the land.

The court sustained Fire Group's motion for summary judgment and overruled a motion for summary judgment filed by the Nyes. The court concluded that the seasonal activities of mowing and placing a snow fence could not support a finding that the Nyes were in continuous, exclusive, and notorious possession of tract 2. The court further found that the Nyes used the tract with the permission of the record owners and did not interfere with the farming activities in a manner sufficient to put the record owners on notice of a claim of hostile possession. The Nyes appeal.

ASSIGNMENT OF ERROR

The Nyes assign, rephrased, that the district court erred by granting Fire Group's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine

issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Herrera v. Fleming Cos., ante* p. 118, 655 N.W.2d 378 (2003). If a genuine issue of fact exists, summary judgment may not properly be entered. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002).

ANALYSIS

The Nyes contend that the trial court improperly applied cases involving the seasonal use of property for grazing livestock and hunting to determine that they were not in continuous, exclusive, and notorious possession of tract 2. They further argue there is no evidence that they used tract 2 with permission.

[3] A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). The court sustained Fire Group's motion for summary judgment because it determined that the Nyes did not continuously, notoriously, or exclusively use the property, and it determined that they used the property with permission. Accordingly, we do not discuss the elements of actual and adverse possession under a claim of ownership.

NOTORIOUS

[4-7] The court concluded that the Nyes' possession was not notorious. The acts of dominion over land allegedly adversely possessed must, to be effective against the true owner, be so open, notorious, and hostile as to put an ordinarily prudent person on notice of the fact that the lands are in adverse possession of another. *Id.* If an occupier's physical actions on the land constitute visible and conspicuous evidence of possession and use of the land, that will generally be sufficient to establish that possession was notorious. *Id.* Although the enclosure of land renders the possession of land open and notorious, and tends to show that it is exclusive, it is not the only way by which possession may be rendered open and notorious; nonenclosing improvements to land, such as erecting buildings or planting

groves or trees, which show an intention to appropriate the land to some useful purpose, are sufficient. *Id.*

Here the Nyes' use of the land was apparent. They planted grass, mowed and maintained the property, erected a snow fence in the winter, and left the 5- to 6-foot-high fenceposts permanently in place. The record contains evidence that others were aware of the Nyes' use of the property. The court concluded that the Nyes did not interfere with farming activities in a manner sufficient to show hostile possession. But the test does not require a direct interference with activities. Instead, it asks whether there was visible and conspicuous evidence of possession and use of the land. Regardless, the Nyes' act of planting grass on the property necessarily meant that it was not being used for farming. The Nyes do not appeal the denial of their motion for summary judgment, and we do not decide as a matter of law that the Nyes' use of the property was open and notorious. Instead, we conclude that there is an issue of material fact whether the Nyes' use of the property was open and notorious.

CONTINUOUS

Applying *Hardt v. Eskam*, 218 Neb. 81, 352 N.W.2d 583 (1984), a case concerning the use of land for hunting, the court concluded that the Nyes were not in continuous possession of the property because the use of a snow fence and mowing were seasonal. The Nyes contend that the acts of planting the grass, mowing, burning branches, and erecting a snow fence show a continuous use of the property.

[8-10] Title cannot be acquired without the simultaneous and continuous existence of each element of adverse possession for the required 10-year period. See *Wanha v. Long, supra*. The term "continuous" means " 'uninterrupted . . . stretching on without break or interruption.' Webster's Third New International Dictionary, Unabridged 493-94 (1968)." *Hardt v. Eskam*, 218 Neb. at 82, 352 N.W.2d at 585. The law does not require the possession to be evidenced by persons remaining continuously upon the land and constantly from day to day performing acts of ownership. *Hardt v. Eskam, supra*. It is sufficient if the land is used continuously for the purposes to which it may be naturally adapted. *Id.*

In *Hardt*, the plaintiff hunted on a tract of land and eventually leased hunting rights to others, who built duck blinds on the property. He also grazed cattle in intermittent years on the property and had no records to show which years cattle were present on the property. We determined that the property was suitable for hunting, fishing, and livestock pasture year round. We then determined that because hunting was seasonal, the recreational use of the property was, at best, occasional and limited to a few weeks or months each year. As a result, the plaintiff's actions were not continuous and could not support a claim for adverse possession.

Here, the property is situated between both residential and agricultural land. Thus, the land may be adapted for either residential or agricultural uses. The Nyes used the land in a manner consistent with residential use year round. The Nyes planted grass in the area, which is consistent with the use of the property as part of the yard of their residence. The Nyes then cared for the property by mowing the grass during warm weather, storing and burning tree limbs in the area, and erecting a snow fence. Although mowing and the erection of a snow fence are seasonal activities, unlike in *Hardt v. Eskam, supra*, where activity was intermittent for only a few weeks or months of the year, the Nyes used tract 2 as residential property year round. The mowing of the grass during summer and the erection of a snow fence in winter left the property in a continuous state of use for purposes of determining adverse possession. We conclude there is an issue of fact whether the Nyes' use of the property was continuous.

EXCLUSIVE

The court also concluded that Fire Group was entitled to summary judgment because the Nyes did not exclusively use the property. The court's decision appears to rely on Gottsch's testimony that he occasionally parked farm equipment on the property and occasionally used part of the property to turn his machinery around.

[11-13] We have said that where both parties have used the property in dispute, there can be no exclusive possession by one party. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993). But the law also does not require that adverse possession be evidenced by complete enclosure and 24-hour use of the

property. See, *Rush Creek Land & Live Stock Co. v. Chain*, 255 Neb. 347, 586 N.W.2d 284 (1998); *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985). It is sufficient if the land is used continuously for the purposes to which it may be adapted. *Id.* Evidence must show the intention of the claimant to appropriate and use the property as his own to the exclusion of all others. *Young v. Lacy, supra.*

Here, the record contained evidence that Gottsch occasionally parked farm equipment on tract 2, but never to the east of the fenceposts because that would upset the Nyes. He also may have used part of the property on occasion when he turned his machinery around. The Nyes presented evidence that they never saw Gottsch use the property and that they continuously used the property as part of their yard. Thus, the Nyes presented evidence of exclusive use of the property. Whether Gottsch used part of the tract is an issue of material fact relevant to the determination of exclusivity. Further, even if Gottsch occasionally parked machinery on the property and used part of it as a turnaround, the frequency of the use affects a determination of exclusivity. That Gottsch stated that he did not park to the east of the fenceposts because that would upset the Nyes could also lead to the finding that the Nyes adversely possessed part, if not all, of the tract. Under these circumstances, there are issues of material fact affecting the question whether the Nyes exclusively used the property. Finally, the Nyes presented evidence indicating that they might have adversely possessed the property for 10 years before Gottsch began farming it, which would make Gottsch's testimony irrelevant. We conclude that there is an issue of material fact whether the Nyes exclusively possessed the property.

PERMISSION

[14] The court also sustained Fire Group's motion for summary judgment because it determined that the Nyes used the property with permission. Permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of possession brought to the attention of the owner in some plain and unequivocal manner that the person in possession is claiming adversely thereby. *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998).

Here, the only evidence that the Nyes were given permission to use the disputed property was a statement made by Gottsch in which he said the Nyes had permission; but he provided no details. We also read one of Fire Group's arguments to be that Gottsch's occasional use of the property showed that the Nyes were using the property with permission. The Nyes deny that they knew the property belonged to someone else and that they were using it with permission. The record contains a statement that Gottsch's father once asked that the snow fence be removed, but this alone does not constitute an express permission for the Nyes to use the property. The record also contains a statement from Gottsch that the fence was in the field when the Nyes were asked to remove it. Further, the Nyes deny that they were ever asked to remove the fence. Likewise, although evidence shows that Gottsch occasionally parked or drove equipment on the property, the Nyes presented evidence to dispute that. An occasional use of the property by Gottsch does not equate with Gottsch's giving the Nyes permission to use the property. Instead, the occasional use is more relevant to the issue of whether the Nyes exclusively used the property. We conclude there is an issue of material fact whether the Nyes used the property with permission. Thus, the court erred when it granted summary judgment on that determination.

CONCLUSION

We conclude that there are issues of material fact about whether the Nyes' use of the property was open and notorious, whether they exclusively and continuously possessed the property, and whether they possessed the property with permission. We reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. BYRON MARCH, APPELLANT.

658 N.W.2d 20

Filed March 14, 2003. No. S-01-755.

1. **Judgments: Appeal and Error.** When dispositive issues on appeal present questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **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.
3. **Motions to Suppress: Notice: Time.** After a ruling granting a motion to suppress has been appealed, the single-judge opinion on the ruling is binding on the trial court and the parties as a determination of the suppression issue in a subsequent trial. However, if the defendant wishes to reopen the motion to suppress, the defendant must (1) put the State and trial court on notice of such intention by filing a new motion to suppress at least 10 days before trial or (2) make a showing that the existence of one of the exceptions provided in Neb. Rev. Stat. § 29-822 (Reissue 1995) excuses the 10-day requirement.
4. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.
5. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause.
6. **Search Warrants: Affidavits: Evidence: Appeal and Error.** In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.
7. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits: Probable Cause.** Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained.
8. **Search and Seizure: Search Warrants: Probable Cause: Proof.** A search conducted pursuant to a search warrant supported by probable cause is generally considered to be reasonable, and it is a defendant's burden to prove that the search or seizure was unreasonable.
9. **Search Warrants: Affidavits: Probable Cause.** The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether,

> given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Petition for further review from the Nebraska Court of Appeals, IRWIN, Chief Judge, and INBODY and CARLSON, Judges, on appeal thereto from the District Court for Scotts Bluff County, RANDALL L. LIPPSTREU, Judge. Judgment of Court of Appeals affirmed.

James R. Mowbray and Kelly S. Breen, of Nebraska Commission on Public Advocacy, for appellant.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

Byron March was convicted in the district court for Scotts Bluff County of two counts of first degree assault and one count of burglary. March was sentenced to 8 to 16 years' imprisonment on one first degree assault conviction, 2 to 4 years' imprisonment on the second first degree assault conviction to be served consecutively, and 1 to 2 years' imprisonment on the burglary conviction to be served concurrently with the other sentences. During the early stages of the proceedings, the trial court granted March's motion to suppress evidence located during execution of a search warrant, but such ruling was reversed by a single judge of the Nebraska Court of Appeals pursuant to the authority contained in Neb. Rev. Stat. § 29-824 (Cum. Supp. 2002). Following trial, March appealed his convictions and the denial of his motion to suppress to the Court of Appeals. The Court of Appeals affirmed, and we granted March's petition for further review. We affirm.

STATEMENT OF FACTS

In the early hours of November 30, 1999, Officer Ken Webber and another officer were called to a Scottsbluff motel to deal

with a noise disturbance. They discovered a loud party going on in room 243. Upon entering the room, the officers noticed March arguing with another man. They told the occupants of the room that the party was over and directed the occupants to cease making noise. The officers then left the motel.

Within 2 hours, the officers and two additional officers were called back to the motel to investigate a report of a "dead woman" in room 132. They observed that the door to room 132 was damaged and appeared to have been forced open. Inside the room, they found a male victim on the floor with blood around his head. Upon examining the man's head, they noted an impression of a shoe sole with a "Nike Air" trademark. The officers also found a female victim who was not dead but had a large amount of blood around her head, was nude from the waist down, and appeared to have been sexually assaulted.

The officers spoke with three individuals who said they had been partying in room 132 with the two victims. One of the three individuals was a man who had earlier been seen arguing with March at the party in room 243. The three said they left the motel to get cigarettes and returned approximately 20 minutes later to find the two victims bleeding on the floor. The officers observed no bloodstains on the three witnesses' clothing.

The officers decided to search for a shoe with a sole pattern similar to the impression on the male victim's head and focused their search on people who were at the party in room 243. While questioning occupants of room 243 and others who had been at the party, Webber inquired as to the whereabouts of the "big white guy," later identified as March, who had been arguing at the party. He was told March was staying in room 258.

Webber and two other officers went to room 258 to question March. When they arrived, they noticed the door was partially open. When Webber knocked on the door, the door opened 6 to 8 inches, and another officer observed someone, later identified as March, lying on the bed. Webber shouted " 'police department' " into the room a couple times and received no response. Fearing another possible victim, the officers entered the room. As the facts evolved, March proved not to be a victim.

Sometime after entering the room, Webber noticed that the shower area was wet and saw a blood smear on the shower

curtain. In ruling on the motion to suppress, the trial court found that these observations were made after March's well-being had been ascertained, whereas the single judge of the Court of Appeals determined that such observations occurred before March's condition was assessed. Webber testified that he approached March and noticed his hair was wet and he had a cut on his hand.

After attempting to rouse March, Webber observed an unzipped duffelbag containing a pair of white underwear which appeared to be bloodstained. Another officer saw a shoe that appeared to be bloodstained. The officer picked up the shoe and showed the sole pattern to a third officer who said the pattern looked similar to the impression on the male victim's head. The second officer took the shoe to room 132 to show it to the fourth officer who agreed that the sole pattern was similar to the impression on the male victim's head. The second officer returned to March's room and placed March under arrest. An affidavit for a search warrant was prepared, essentially containing the facts recited above. On the basis of the affidavit, a search warrant was subsequently issued for a search of March's room and numerous items of evidence were found which linked March to the crimes committed in room 132.

March was charged with first degree sexual assault, two counts of first degree assault, and burglary. Prior to trial, March moved to suppress evidence obtained from his motel room pursuant to the search warrant. The trial court granted the motion. The State filed an interlocutory appeal to a single judge of the Court of Appeals pursuant to the provisions of § 29-824, and the single judge reversed. *State v. March*, No. A-00-445, 2000 WL 1252056 (Neb. App. Sept. 5, 2000) (not designated for permanent publication).

The single judge and the trial court both determined that the officers had lawfully entered March's room under the emergency exception to the warrant requirement. They also both agreed that once the officers discovered that no emergency existed, they had a duty to retreat, and that therefore, the subsequent search of March's duffelbag and the seizure of his shoes were illegal and must be excised from the affidavit in support of the search warrant. In our analysis below regarding

the sufficiency of the affidavit, we treat the evidence of the contents of the duffelbag and the shoes as having been excised.

The trial court and the single judge diverged in their determinations regarding when Webber observed the wet shower area and the blood smear on the shower curtain. The trial court had found that the observations had been made sometime after the initial entry and assessment of March's condition and that thus, the product of those observations was not properly obtained. In contrast, the single judge determined that the evidence from the hearing on the motion to suppress "conclusively establishe[d]" that the observations of the bathroom area were made as Webber entered the room and was headed toward March. *State v. March*, No. A-00-445, 2000 WL 1252056 at *9. Because the trial court excised these observations from the affidavit, it found no probable cause for the issuance of the search warrant and had therefore ruled to suppress the evidence obtained from the execution of the search warrant. The single judge, however, determined that Webber's observations of the wet shower and the blood smear on the shower curtain as well as the cut on March's hand could be used in assessing the sufficiency of the affidavit in support of the search warrant and that with the inclusion of these facts, probable cause for issuance of the search warrant existed. According to the single judge, the evidence located as a result of execution of the search warrant was properly obtained. The single judge therefore reversed the trial court's order which had granted the motion to suppress.

At this point, March filed a motion for a rehearing in the Court of Appeals. The Court of Appeals concluded that a motion for a rehearing is permitted only where the underlying opinion is by "the court," that a single-judge opinion is not an opinion of "the court," and that therefore, the motion for rehearing was not authorized. The motion for rehearing was stricken. *State v. March*, 9 Neb. App. 907, 622 N.W.2d 694 (2001). See, also, *State v. Chambers*, 242 Neb. 124, 493 N.W.2d 328 (1992).

During the subsequent bench trial, March attempted to raise the issues first raised in his motion to suppress. In this connection, March offered exhibit 64, consisting of two pages from a multipage police report prepared by Webber on November 30, 1999. While making the offer, counsel for March stated that

exhibit 64 was not offered as evidence for trial but solely in connection with the issues encompassed by the motion to suppress and represented that "[t]his report wasn't available to the defense at the — on the date of the Motion to Suppress hearing, it was later provided." Contrary to Webber's testimony at the suppression hearing and at trial, the report indicated that Webber had not observed the wet shower and the blood smear on the shower curtain until some time after he had approached March and tried to rouse March. The timing of these observations is not explicit in the affidavit in support of a search warrant. The trial court refused to admit the report into evidence, stating, "I'm going to overrule the Motion to Suppress and I'm going to show that the Exhibit 64 was not received because, as I understand it, [March is] offering it just in support of the Motion to Suppress."

The trial court subsequently convicted March of two counts of first degree assault and one count of burglary but dismissed the count of first degree sexual assault due to insufficient proof. March was sentenced to 8 to 16 years' imprisonment on one assault conviction, 2 to 4 years' imprisonment on the second assault conviction to be served consecutively to the first, and 1 to 2 years' imprisonment on the burglary conviction to be served concurrently with the other sentences.

March appealed to the Court of Appeals and argued (1) that both the trial court and the single judge of the Court of Appeals erred in determining that the emergency doctrine justified the officers' warrantless entry into March's room, (2) that the single judge of the Court of Appeals erred in ruling that the trial court's factual findings regarding the timing of Webber's observations of the wet shower and the blood smear were clearly erroneous, and (3) that the trial court erred in refusing to admit exhibit 64 into evidence at trial in connection with March's earlier motion to suppress.

In an unpublished opinion, *State v. March*, No. A-01-755, 2002 WL 31300046 (Neb. App. Oct. 15, 2002) (not designated for permanent publication), the Court of Appeals concluded (1) that neither the trial court nor the single judge erred in finding that the warrantless entry was justified by the emergency exception, (2) that the single judge did not err in determining that the

trial court's finding regarding the timing of Webber's observations of the bathroom was clearly erroneous, and (3) that because March failed to file a second motion to suppress following the single judge's ruling at least 10 days before trial as required under Neb. Rev. Stat. § 29-822 (Reissue 1995), March was not entitled to present new evidence at trial in support of the motion to suppress. March petitioned this court for further review, and we granted his petition.

ASSIGNMENTS OF ERROR

In petitioning for further review, March assigns two errors to the Court of Appeals, which we restate as follows: (1) that the Court of Appeals erred in affirming the denial of the motion to suppress based on the reasoning of the single judge of the Court of Appeals and (2) that the Court of Appeals erred in affirming the trial court's refusal to admit exhibit 64 and further erred by holding that March was required but failed to file a new motion to suppress at least 10 days before trial in order to present new evidence in support of the suppression issue.

STANDARD OF REVIEW

[1] When dispositive issues on appeal present 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. Birge*, 263 Neb. 77, 638 N.W.2d 529 (2002).

ANALYSIS

Necessity to Renew Motion to Suppress Under § 29-822: Exclusion of Exhibit 64.

We first address March's second assignment of error in which he claims that the Court of Appeals erred in holding that under § 29-822, he was required to file a second motion to suppress at least 10 days before trial in order to present the additional evidence of exhibit 64 in support of the suppression issues raised in his original motion to suppress. We agree with the Court of Appeals that under § 29-822, March waived reconsideration of the suppression issue at trial when he failed to file a new motion to suppress at least 10 days before trial and further failed to demonstrate good cause or surprise to excuse such failure. Thus, the trial court's refusal to admit exhibit 64, as affirmed by the

Court of Appeals, was not error, and we reject this assignment of error on further review.

After the trial court originally granted March's motion to suppress in this case, the State appealed the trial court's decision to a single judge of the Court of Appeals pursuant to § 29-824. The single judge reversed the trial court's order of suppression. Section 29-824(2) provides that upon trial following the order of a single judge "the parties and the trial court shall be bound by such order."

With regard to a felony charge, § 29-822 provides that a motion to suppress evidence obtained by an allegedly unlawful search and seizure "must be filed at least ten days before trial or at the time of arraignment, whichever is the later, unless otherwise permitted by the court for good cause shown." The statute further provides that

> the court may entertain such motions to suppress after the commencement of trial where the defendant is surprised by the possession of such evidence by the state, and also may in its discretion then entertain the motion where the defendant was not aware of the grounds for the motion before commencement of the trial.

This court has previously held that "[i]t is clearly the intention of section 29-822 . . . that motions to suppress evidence are to be ruled on and finally determined before trial, even to permit an appeal before trial from an order suppressing evidence unless within the exceptions contained in the statute." *State v. Smith*, 184 Neb. 363, 369, 167 N.W.2d 568, 572 (1969). In *Smith*, this court noted that the finality indicated by § 29-822 was not "paramount to the long-recognized right of trial courts to correct their errors during term time" and therefore stated that § 29-822 "intends, unless within the exceptions contained in the statute, that motions to suppress evidence should be finally determined before trial, but that a trial court is not precluded from correcting errors at the trial." 184 Neb. at 369-70, 167 N.W.2d at 572.

[2,3] 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. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364

(2001). Sections 29-822 and 29-824 are part of a series of statutes pertaining to motions to suppress. Section 29-822 provides, with certain exceptions, that motions to suppress be finally determined before trial, and § 29-824 provides that single-judge rulings on motions to suppress are binding on the trial court and parties in a subsequent trial. Construing these statutes together, we conclude that after a ruling granting a motion to suppress has been appealed, the single-judge opinion on the ruling is binding on the trial court and the parties as a determination of the suppression issue in a subsequent trial. However, if the defendant wishes to reopen the motion to suppress, the defendant must (1) put the State and trial court on notice of such intention by filing a new motion to suppress at least 10 days before trial or (2) make a showing that the existence of one of the exceptions provided in § 29-822 excuses the 10-day requirement.

In the present case, following the single judge's order, contrary to § 29-822, March failed to file a new motion to suppress at least 10 days before trial. At trial, March made no showing of good cause to excuse his failure to file a new motion prior to trial, nor did he demonstrate surprise. March merely requested that exhibit 64 be admitted for consideration in connection with his original motion to suppress.

We note that exhibit 64 identified at trial consists of pages 9 and 10 of the investigative report prepared by Webber on November 30, 1999. We further note that at the suppression hearing conducted nearly 1½ years prior to trial, March used exhibit 5, consisting in part of pages six, seven, and eight of the same investigative report, to refresh Webber's memory. Given March's awareness of pages six, seven, and eight of the report at the time of the suppression hearing, we cannot say that March was "surprised by the [State's] possession of" pages 9 and 10 of the same report or that March "was not aware of the grounds for the motion before commencement of the trial," and we therefore cannot say that March showed good cause under § 29-822 to excuse his failure to file a new motion to suppress at least 10 days before trial. We therefore conclude that the Court of Appeals did not err in determining that the trial court did not err in refusing to admit exhibit 64 into evidence at trial, because March failed to timely file a new motion to suppress.

Denial of Motion to Suppress.

Although, as concluded above, March waived reconsideration of the suppression issue at trial, the single-judge opinion denying his motion to suppress was open to review before the Court of Appeals in connection with the appeal of March's convictions. Section 29-824(2) provides that "[u]pon conviction after trial the defendant may on appeal challenge the correctness of the order by the judge." In the context of § 29-824, we read "the order by the judge" to refer to the ruling of the single judge. It was therefore appropriate on appeal to the Court of Appeals for March to challenge the single judge's reasoning directing the denial of his motion to suppress. On further review, March claims that the Court of Appeals erred in affirming the denial of his motion to suppress. Albeit for reasons different from those expressed by the Court of Appeals, we conclude that the denial of the motion to suppress, as affirmed by the Court of Appeals, was correct, and we reject this assignment of error.

In the instant case, the protections of the Fourth Amendment to the U.S. Constitution to be free from unreasonable search and seizure extended to March's motel room. See *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889, 11 L. Ed. 2d 856 (1964). Under the facts of this case, the initial entrance of the police into March's room without a warrant was proper due to exigent circumstances. See *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991). In ascertaining March's condition, the officers legitimately observed that March had a cut on the knuckle of his right hand. This fact was properly included in the affidavit in support of the search warrant. Upon discovering that March was not injured, the justification for the officers' presence in March's room ceased to exist.

On appeal to the Court of Appeals and on further review to this court, March takes issue with the single judge's finding that Webber saw the wet shower area and the blood smear on the shower curtain before he ascertained March's condition and that such observations were properly included in the affidavit. With such observations included, the single judge determined that the affidavit supported the issuance of the search warrant. March disagrees with the determination of the Court of Appeals and argues that the trial court correctly found that the observations regarding the bathroom occurred after Webber had ascertained

March's condition and that therefore such observations should have been excised from the affidavit.

The affidavit in support of the search warrant gives a lengthy account of the events at the motel on November 29 and 30, 1999. Included are details regarding the disturbances, the threatened altercation, the individuals involved, and the discovery of the victims and their conditions. Properly included in the affidavit is the specific information regarding the fresh cut to March's knuckle. We evaluate the sufficiency of the affidavit to determine if it supports issuance of the search warrant of March's room.

[4] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. *State v. Faber*, 264 Neb. 198, 647 N.W.2d 67 (2002). Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.*

[5,6] In reviewing the strength of an affidavit submitted as a basis for finding probable cause to issue a search warrant, an appellate court applies a "totality of the circumstances" test. The question is whether, under the totality of the circumstances illustrated by the affidavit, the issuing magistrate had a substantial basis for finding that the affidavit established probable cause. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). In evaluating the sufficiency of an affidavit used to obtain a search warrant, an appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit, and evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *State v. Myers*, 258 Neb. 272, 603 N.W.2d 390 (1999).

[7,8] Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained. *State v. Faber, supra.* A search conducted pursuant to a search warrant supported by probable cause is generally considered to be reasonable, and it is a defendant's burden to prove that the search or seizure was unreasonable. *State v. Ortiz, supra.*

We have reviewed the affidavit in support of the search warrant, and we conclude that even if we excise the statements

regarding the bathroom and shower curtain, as March suggests, the remaining information contained in the affidavit was sufficient to support issuance of the search warrant for March's motel room. As reflected in the affidavit, before the police entered March's room, they had gathered evidence that March had been involved in an argument with a man who was staying in the same room as the victims. They also had gathered evidence which indicated that the perpetrator of the assaults was likely one of the people who had been at the party earlier in the night. The police had also gathered evidence which indicated that other people who were at the party had not committed the assaults. During the time the officers' presence in March's room was covered by the emergency doctrine, Webber observed that March had a cut on his knuckle.

[9] The magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). Excluding the observations of the bathroom, the recitations properly included in the affidavit indicated a fair probability that evidence of a crime would be found in March's motel room, and the affidavit was sufficient to support the issuance of the search warrant. We therefore conclude that the Court of Appeals did not err in affirming the denial of the motion to suppress.

CONCLUSION

We conclude that March waived reconsideration of the suppression issue at trial when, contrary to § 29-822, he failed to file a new motion to suppress at least 10 days before trial and failed to demonstrate either good cause or surprise to excuse his failure. We further conclude that, even excising the information regarding the officers' observations of March's motel bathroom, the affidavit in support of the search warrant in this case was sufficient to justify issuance of the warrant and that the denial of March's motion to suppress evidence obtained thereby was proper. We

therefore affirm the Court of Appeals' decision which affirmed the denial of March's motion to suppress and March's convictions.

AFFIRMED.

NATALIE K. SCHUMAN, APPELLANT AND CROSS-APPELLEE, V. BRADLEY W. SCHUMAN, APPELLEE AND CROSS-APPELLANT.

658 N.W.2d 30

Filed March 14, 2003. No. S-01-904.

1. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
2. **Divorce: Appeal and Error.** In a review de novo on the record of an action for dissolution of marriage, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue.
3. **Divorce: Property Division: Taxes.** In assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.
4. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
5. **Appeal and Error.** When evidence is in conflict, an appellate court may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Corporations: Valuation.** A trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle.
7. **Property Division: Proof.** The burden of proof to show that property is a nonmarital asset remains with the person making the claim.
8. **Divorce: Property Division: Joint Tenancy: Case Disapproved.** To the extent that *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), can be interpreted to mean that nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset in an action for dissolution of marriage, such interpretation is expressly disapproved.
9. **Property Division: Alimony.** How property inherited by a party before or during a marriage will be considered in determining the division of property or an award of alimony must depend upon the facts of the particular case and the equities

involved. If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded with directions.

Abbie J. Widger and Stefanie J. Flodman, of Johnson, Flodman, Guenzel & Widger, for appellant.

Karin O'Connell for appellee.

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

WRIGHT, J.

NATURE OF CASE

Natalie K. Schuman appeals from a decree entered by the district court for Lancaster County which dissolved her marriage to Bradley W. Schuman and divided the marital estate. Bradley cross-appeals. Both parties assert that the court erred in its valuation and division of the marital estate.

SCOPE OF REVIEW

[1] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Pawlusiak v. Pawlusiak*, 264 Neb. 1, 645 N.W.2d 773 (2002).

[2] In a review de novo on the record of an action for dissolution of marriage, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. See *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

FACTS

Bradley and Natalie were married on September 14, 1984. Four children were born during the marriage, all of whom were minors at the time of the dissolution proceedings. During the marriage, Natalie home-schooled the children and was not employed outside the home. Since 1982, Bradley has owned Hruska-Schuman Company, Inc. (Hruska-Schuman), a business

which sells and installs gutters, wood-burning stoves, and fireplace parts and accessories.

Natalie filed a petition for dissolution of the marriage, and the parties entered into a partial property settlement agreement. Custody of the children was to be awarded to Natalie subject to rights of "parenting time" for Bradley. The parties agreed to the valuation and division of various items of property. The present value of Hruska-Schuman and the real estate upon which it is located and the premarital value of the business were decided by the district court. The court also awarded Natalie possession of 30.57 acres of property in Saunders County.

Bradley purchased Hruska-Schuman for $150,000 on March 31, 1982. He made a $35,000 downpayment on the business with personal funds and a loan from his parents. He financed the balance of the purchase price with a small business loan. In 1994, Hruska-Schuman suffered a fire and was the victim of an embezzlement, which left the business with little to no value. Bradley built Hruska-Schuman back to its present value, and at the time of the dissolution proceedings, he managed the business and installed gutters and fireplaces.

The building in which the business is located has a total area of 6,800 square feet, including 1,020 for an office and reception area and 5,780 for a service and warehouse area. Wayne Kubert, Natalie's real estate appraiser, considered the building as containing retail space and a showroom. Kubert used three approaches in his appraisal: the cost approach, the income approach, and the sales comparison approach. Using these three approaches, Kubert valued the real estate at $225,000.

Gary Hassebrook, Bradley's real estate appraiser, used the same three basic approaches. However, Hassebrook evaluated the property as being used primarily as a warehouse rather than for retail. Hassebrook concluded that valuing the property as retail space would overstate the value. He valued the property at $160,000.

James Watts, a certified public accountant, testified to the value of Hruska-Schuman. Watts reviewed the corporate income tax returns, the workpapers of the accountant who prepared the returns, the accountant's analysis and income tax considerations, and the personal income tax returns of the parties. He utilized a

historical analysis of the trends of Hruska-Schuman's income for the past 3 years, reviewed the real estate appraisal, examined the income tax returns, and determined the normalized earnings. In his valuation, Watts used the excess earnings method of valuation. Relying in part on the real estate appraisal of Kubert, Watts valued Hruska-Schuman at $308,000. He did not consider the income tax consequences of a future sale of Hruska-Schuman.

Bradley's accountant, Dennis Stara, used Watts' valuation to calculate the estimated income taxes that would result from a future sale of Hruska-Schuman. Relying in part on Kubert's real estate appraisal, Stara concluded that Hruska-Schuman had a value of $161,872 after taxes. Relying in part on Hassebrook's real estate appraisal, Stara concluded that the business had a value of $135,024 after taxes.

The district court determined the value of Hruska-Schuman to be $135,000. In determining the value of the business, the court assumed a future sale and the tax consequences of such sale. The court further reduced the value of the business by $35,000 to account for the funds Bradley put into the business prior to the marriage.

In 1994, the parties purchased 30.57 acres of land in Saunders County for $60,000. The acreage was held in joint tenancy by the parties. At trial, Natalie testified that she wanted the acreage so she and the children could eventually live there. Both parties testified that they spent time at the acreage with the children. Natalie said she raised bees and harvested hay on the property. Bradley stated that he spent time at the acreage fishing with the children. Bradley said he had made various improvements, including installing a gate, repairing a fence, removing stones, filling badger holes, and helping the children build a treehouse. The district court found that the acreage was part of the marital estate and awarded the acreage to Natalie. In order to equalize the division of marital assets and debts, the court ordered Natalie to pay Bradley $11,399.50.

ASSIGNMENTS OF ERROR

Natalie assigns, restated, that the district court erred in (1) considering the tax consequences of the sale of Hruska-Schuman, (2) reducing the value of the marital estate for taxes that may have to

be paid at some date in the future, (3) not considering a certain loan due and owing to Bradley, (4) finding the value of Hruska-Schuman should be reduced by $35,000 as the amount Bradley contributed to the business prior to the marriage, (5) determining the real estate on which Hruska-Schuman is located has a value of $160,000, (6) finding the marital value of Hruska-Schuman to be $100,000, and (7) ordering Natalie to pay Bradley $11,399.50.

On cross-appeal, Bradley assigns, restated, that the district court erred in (1) failing to award the real property in Saunders County to him and (2) failing to set off $53,000 as separate property which Bradley paid to purchase the acreage and which was an inheritance from his mother.

ANALYSIS

We first consider (1) whether the district court erred in considering the tax consequences of the sale of the business, thereby reducing the value of the business by the amount of taxes that might have to be paid at some date in the future, and (2) whether the court erred in determining the value of the loan which it assigned as an asset to Bradley.

As a part of our analysis, we have concluded that the district court used the values contained in the "Joint Property Statement" which was marked and received as exhibit 7. Based on our review of exhibit 7, the partial property settlement agreement, and the decree of dissolution, we determine that the district court awarded and valued the property as follows:

PROPERTY	NATALIE	BRADLEY
Duplex	$123,500	
Hruska-Schuman		$100,442
Personal property	2,000	2,000
1995 Suburban	14,500	
Horse, donkey, and related items	500	
1997 Charger boat		14,000
30.57 acres	60,000	
Hruska-Schuman loan		7,259
Mortgage on duplex	(54,000)	
TOTALS	$146,500	$123,701

The court found that the difference in value of the property was $22,799. It divided this amount in half and ordered Natalie to pay $11,399.50 to Bradley in three equal annual installments.

Natalie claims that the district court erred by considering the tax consequences of the sale of Hruska-Schuman. She argues that it was inappropriate to consider such tax consequences when Bradley did not intend to sell the business, the court did not order the sale of the business, and the record did not indicate that the sale of the business would occur within a short period of time. She claims that any tax consequences from such sale are speculative and not reasonably predictable.

The district court found that the tax consequences of a future sale of the business should be taken into account when determining its present value. The court reasoned it would not be equitable to allow Natalie to derive only the benefits of the growth of the business and not assume her share of the risks involved in the growth of the business throughout the marriage.

The district court relied on *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988), to support its decision to reduce the marital estate for taxes that would eventually have to be paid as a result of the sale of the business. *Buche* involved the valuation of an IRA in the division of marital property. We concluded that income tax would eventually have to be paid on the IRA and that, therefore, it was proper to consider the future tax consequences in determining the present value of the IRA.

Natalie argues that *Buche* is distinguishable because we also determined it was improper to consider a penalty which would have had to be paid if the respondent withdrew the IRA. We concluded that since the IRA was not going to be withdrawn, the penalty was to be disregarded. However, since it was certain that income tax would eventually have to be paid on the IRA, we considered the future tax consequences in our valuation. Natalie argues in the instant case that there is no evidence that Hruska-Schuman is going to be sold and that, therefore, we should not consider the tax consequences of the sale for the same reasons we did not consider the penalty consequences in *Buche*.

We have not previously addressed whether tax consequences resulting from the sale of a business should be considered in the division of marital property. The majority of courts that have

addressed this issue have generally refused to consider the tax consequences of the sale of a business unless there is evidence that a sale is contemplated or reasonably certain to occur. See *Bidwell and Bidwell*, 170 Or. App. 239, 12 P.3d 76 (2000).

In *Mathew v. Palmer*, 8 Neb. App. 128, 589 N.W.2d 343 (1999), the Nebraska Court of Appeals concluded that a deduction in value for income tax on stock which was not due to be sold in the foreseeable future was clearly speculative. See, also, *In re Marriage of Fonstein*, 17 Cal. 3d 738, 552 P.2d 1169, 131 Cal. Rptr. 873 (1976) (holding trial court erred by taking into account tax consequences which might result to husband in event he subsequently decided to convert his interest in law partnership into cash, in absence of any indication that husband was withdrawing from partnership, was required to withdraw, or intended to withdraw); *England v. England*, 626 So. 2d 330 (Fla. App. 1993) (finding trial court abused its discretion by considering tax consequences of sale of business when there was no evidence that sale of business was imminent or even contemplated); *Cohen v. Cohen*, 73 S.W.3d 39 (Mo. App. 2002) (concluding trial court did not abuse its discretion by failing to consider tax consequences of sale of parties' art business when evidence did not support necessity of such sale and court did not order such sale); *Kudela v. Kudela*, 277 A.D.2d 1015, 716 N.Y.S.2d 231 (2000) (stating trial court is not required to consider tax consequences of sale of business property when there is no evidence that business property would have to be sold); *Arbuckle v. Arbuckle*, 22 Va. App. 362, 470 S.E.2d 146 (1996) (holding tax consequences of hypothetical sale of husband's dental practice were too speculative without evidence that sale would occur in near future); *In re Hay*, 80 Wash. App. 202, 907 P.2d 334 (1995) (holding that if tax consequences of sale of parties' real estate partnership are imminent, or arise directly from trial court's property disposition, and amount is not speculative, such consequences are properly considered in valuing marital assets).

[3] We conclude that in assigning a value to a business for purposes of dividing the property in an action for dissolution of marriage, a trial court should not consider the tax consequences of the sale of the business unless there is a finding by the court that

the sale of the business is reasonably certain to occur in the near future. However, the court may consider such tax consequences if it finds that the property division award will, in effect, force a party to sell his or her business in order to meet the obligations imposed by the court.

[4] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Pawlusiak v. Pawlusiak*, 264 Neb. 1, 645 N.W.2d 773 (2002). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *McLaughlin v. McLaughlin*, 264 Neb. 232, 647 N.W.2d 577 (2002). We will, therefore, review the district court's consideration of the tax consequences for an abuse of discretion.

[5,6] In a review de novo on the record of an action for dissolution of marriage, an appellate court reappraises the evidence as presented by the record and reaches its own independent conclusions with respect to the matters at issue. See *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). However, when evidence is in conflict, the appellate court 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. See *Noonan v. Noonan*, 261 Neb. 552, 624 N.W.2d 314 (2001). The trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle. *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988).

At trial, Bradley testified that he had received an offer to purchase the assets of Hruska-Schuman. He also testified that he could not "honestly say" whether he intended to sell the business. Bradley later testified that his decision whether to remain in business or sell would depend on his financial position after the divorce.

The district court commented that it agreed with Natalie that there was no evidence that the business was going to be sold in the near future. Nevertheless, the court considered the tax

consequences of such sale in its valuation of the business. The record does not support a conclusion that the sale of Hruska-Schuman was reasonably certain to occur in the near future or that the court's property division award would require Bradley to sell Hruska-Schuman in order to meet the obligations imposed by the court. We conclude that under the facts of this case, the court abused its discretion in considering the tax consequences of the sale of Hruska-Schuman and reducing the value of the business by such amount.

Natalie next argues that the district court erroneously valued a loan from Bradley to Hruska-Schuman at $7,259 rather than $36,166, as was indicated on the income tax returns, and that as a result, Bradley received a double benefit. We conclude that the court erred in assigning a value of $7,259 to the loan. In the valuation of the business, the loan from Bradley was listed as a liability to the business. Since this liability reduced the value of the business by a comparable amount, the sum of $36,166 should have been assigned as an asset to Bradley rather than the $7,259. Therefore, the property assigned to Bradley was undervalued by $28,907.

We next consider Natalie's claim that the district court erred in determining the value of the real estate on which Hruska-Schuman is located. Both parties presented expert testimony concerning the value of the real estate. Hassebrook opined the market value of the real estate to be $160,000, and Kubert opined the market value of the real estate to be $225,000. Natalie asserts that Kubert's appraisal more accurately reflects the best use of the real estate owned by Hruska-Schuman. The court found Hassebrook's value of the real estate to be more persuasive than Kubert's for the reason that Kubert did not use comparable land sales that are accepted by the Uniform Standards of Professional Appraisal Practice. The court also found that Kubert had used many adjustments to his comparables to arrive at his values when there were available comparables that needed no adjustments. The court further reasoned that Kubert's appraisal was more than $100,000 over the current tax value of the real estate as calculated in the most recent countywide assessment. Our de novo review of the record indicates that the district court did not abuse its discretion in its valuation of the property.

Having determined that the district court abused its discretion in considering the tax consequences of the sale of Hruska-Schuman and that the court did not abuse its discretion in finding Hassebrook's valuation more persuasive, we conclude that the business should have been valued at $243,000.

We next consider whether the $35,000 downpayment that Bradley allegedly used to purchase the business prior to the marriage was nonmarital property and should be deducted as a nonmarital asset. Bradley claims that he paid $35,000 toward the purchase of the business in March 1982 and that the parties were not married until September 1984. Natalie argues that the $35,000 used to purchase the business should be considered a part of the marital estate because at one time during the marriage, the business had no value at all.

[7] The burden of proof to show that property is a nonmarital asset remains with the person making the claim. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001). We conclude that Bradley has met his burden of demonstrating that the $35,000 represented a premarital contribution to the business and that, therefore, the district court did not err in determining that this amount should be deducted from the value of the business.

In his cross-appeal, Bradley argues that the district court erred in failing to award him the Saunders County acreage or, in the alternative, that the court erred in failing to set off as separate property the payments made toward the acreage from Bradley's inheritance. We conclude the district court did not abuse its discretion by awarding the Saunders County acreage to Natalie.

Bradley argues in the alternative that the $53,000 he inherited from his mother should be awarded to him as nonmarital property because the proceeds from the inheritance can be traced to the purchase of the Saunders County acreage. The district court found that any inheritance Bradley may have used to purchase the acreage was marital property because the acreage was placed in joint tenancy with Natalie. Relying on *Gerard-Ley v. Ley*, 5 Neb. App. 229, 558 N.W.2d 63 (1996), Natalie argues that when the acreage was placed in joint tenancy, it became marital property regardless of whether proceeds from Bradley's inheritance were used to purchase the acreage.

The question in *Gerard-Ley* was whether a residence held in joint tenancy by a husband and wife was part of the marital estate for purposes of property division in a dissolution of marriage. During the marriage, the husband obtained just under $1,750,000 in proceeds from the sale of bank stock he received from his parents through inheritance and gifts. He used $140,000 of the proceeds to pay the balance due on the residence. In analyzing whether the proceeds paid toward the residence were to be set off as nonmarital property, the Court of Appeals concluded:

> [B]ecause [the husband] took title to the property along with [his wife] as joint tenants, it is appropriate to presume that he intended to make a gift to [his wife] of a one-half interest in the property. Recognizing that this presumption is rebuttable, we find no testimony or evidence in the record to rebut the presumption. . . . The district court did not abuse its discretion in including the [parties'] property in the marital estate.

Id. at 237, 558 N.W.2d at 68. In arriving at its conclusion, the Court of Appeals adopted the following principle:

> The Nebraska Supreme Court has held that "when a husband and wife take title to a property as joint tenants, even though one pays all the consideration therefor, a gift is presumed to be made by the spouse furnishing the consideration to the other . . . ." *Brown v. Borland*, 230 Neb. 391, 395, 432 N.W.2d 13, 17 (1988). See, also, *Marco v. Marco*, 196 Neb. 313, 242 N.W.2d 867 (1976); *Hein v. W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W.2d 185 (1958); *Peterson v. Massey*, 155 Neb. 829, 53 N.W.2d 912 (1952). This presumption is a rebuttable presumption. *Brown v. Borland, supra*; *Marco v. Marco, supra*.

Gerard-Ley, 5 Neb. App. at 235, 558 N.W.2d at 67.

[8] The Court of Appeals erred in applying the aforementioned principle in *Gerard-Ley*. None of the cases cited in the quote above involved a dispute between spouses over property distribution following a dissolution of marriage. The manner in which property is titled or transferred by the parties during the marriage does not restrict the trial court's determination of how the property will be divided in an action for dissolution of marriage. As a general rule, all property accumulated and acquired

by either spouse during the marriage is part of the marital estate, unless it falls within an exception to the general rule. *Heald v. Heald*, 259 Neb. 604, 611 N.W.2d 598 (2000). To the extent that the Court of Appeals' opinion in *Gerard-Ley* can be interpreted to mean that nonmarital property which during a marriage is titled in joint tenancy cannot be considered as a nonmarital asset in an action for dissolution of marriage, such interpretation is expressly disapproved.

[9] How property inherited by a party before or during the marriage will be considered in determining the division of property or an award of alimony must depend upon the facts of the particular case and the equities involved. *Tyma v. Tyma*, 263 Neb. 873, 644 N.W.2d 139 (2002). If the inheritance can be identified, it is to be set off to the inheriting spouse and eliminated from the marital estate. *Id.*

Bradley testified that he made a $20,000 downpayment on the Saunders County acreage. Natalie testified that the downpayment funds came from an account which contained a portion of Bradley's inheritance from his mother. Natalie testified that the account was jointly held by the parties and that there were other deposits to and withdrawals from the account from other sources. Bradley also testified that he made a loan to Hruska-Schuman from some of the same inheritance. Hruska-Schuman eventually paid back the loan, and Bradley testified he used those funds to pay the balance due on the acreage. However, Bradley did not testify as to the amount of the inheritance he loaned to his business and subsequently used to pay the balance due on the acreage.

The record supports a conclusion that $19,000 of Bradley's inheritance was eventually used to purchase the Saunders County acreage. The parties purchased the land for approximately $60,000. Approximately $20,000 of Bradley's inheritance was deposited into the joint savings account. The downpayment was a certified check of approximately $19,000, and the money for the check came from this joint account. We conclude that the district court erred in not setting aside $19,000 from the Saunders County acreage as a part of Bradley's inheritance.

We now proceed to divide the property between Natalie and Bradley. Because appeals in domestic relations matters are

heard de novo on the record, an appellate court is empowered to enter the order which should have been made as reflected by the record. See *Bowers v. Lens*, 264 Neb. 465, 648 N.W.2d 294 (2002). The value of the assets received by Bradley should be increased to reflect the value of Hruska-Schuman at $243,000 and the value of his loan to the business at $36,166. The $35,000 used to purchase the business was a nonmarital asset, and the district court correctly deducted that amount from the value of the business.

In addition, $19,000 of the value of the Saunders County property should be assigned to Bradley as nonmarital property. The net result is that Bradley received property valued at approximately $241,000 and Natalie received property valued at $146,500. The difference in such distribution of property is $94,500. Bradley is therefore ordered to pay one-half of this amount ($47,250) in 10 equal annual installments of $4,725. The first payment shall be due 1 year from the date the mandate of this court is spread on the records of the district court. The subsequent annual payments shall be due each year thereafter until the balance is paid in full. The judgment amount shall accrue interest at the legal rate for judgments from the date the mandate is spread on the records of the district court until said judgment is paid in full.

CONCLUSION

We affirm in part, and in part reverse, and remand with directions that the district court is to divide the marital estate in accordance with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.