REPORTS OF CASES

DECIDED BETWEEN

SEPTEMBER 2, 1997 and MAY 11, 1998

IN THE

Nebraska Court of Appeals

VOLUME VI

PEGGY POLACEK

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AND THE COURT OF APPEALS

For the benefit of the State of Nebraska

COURT OF APPEALS
DURING THE PERIOD OF THESE REPORTS

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

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

TABLE OF CASES REPORTED

LIST OF CASES DISPOSED OF BY MEMORANDUM OPINION AND JUDGMENT ON APPEAL

No. A-95-811: **Tecton Corp. v. Greater Omaha Packing Co.** Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-95-1349: **Fitch v. Knudsen.** Affirmed in part, and in part reversed and remanded with direction. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-006: **Medical Management Consultants, Inc. v. Reitz.** Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-152: **Provencher v. Magee.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-167: **Charron v. Byington.** Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-96-215: **Millard Warehouse v. Philadelphia Bar & Grill #4.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-367: **Floyd v. Abramson.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Inbody, Judges.

No. A-96-375: **Nebraska Pub. Power Dist. v. Boswell.** Reversed and remanded with directions. Mues, Irwin, and Sievers, Judges.

No. A-96-376: **In re Estate of Pettegrew.** Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-96-397: **McKinsey v. Fritz.** Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-404: **Daniels v. Breiner.** Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-434: **Larsen v. Severa.** Reversed and remanded with directions. Hannon, Irwin, and Inbody, Judges.

No. A-96-459: **Rahe v. Severa.** Reversed and remanded for a new trial. Hannon, Irwin, and Inbody, Judges.

No. A-96-507: **Schade v. County of Cheyenne.** Reversed and remanded. Mues, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-550: **Crawford v. Crawford**. Affirmed as modified. Hannon, Irwin, and Inbody, Judges.

Nos. A-96-553, A-96-554: **State v. Golden**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-559: **Russo v. Department of Corr. Servs.** Affirmed. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-96-577: **Airport Auth. v. Hanson**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

Nos. A-96-578, A-96-827: **Olsen v. Olsen**. Judgment in No. A-96-578 affirmed. Judgment in No. A-96-827 vacated and remanded with directions to dismiss. Inbody, Sievers, and Mues, Judges.

No. A-96-589: **Speedway Transp. v. Anderbery**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-612: **Borland v. Wichman**. Reversed and remanded. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-96-656: **Austin v. State Farm Mut. Auto. Ins. Co.** Reversed and remanded. Inbody, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-667: **State v. Peterson**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-673: **American Fam. Ins. Group v. Menges**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-706: **Koch v. Martin**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-717: **Janousek v. Janousek**. Affirmed. Inbody, Hannon, and Mues, Judges.

Nos. A-96-745, A-96-746, A-96-747: **Ahlman et al. v. City of Hastings**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-754: **Filips v. Stianson**. Affirmed. Irwin, Sievers, and Inbody, Judges.

No. A-96-757: **PCM, Inc. v. Credit Bureau of Fremont**. Affirmed in part, and in part reversed and vacated. Inbody, Hannon, and Irwin, Judges.

No. A-96-776: **Lakeview Acres v. Central Neb. Pub. Power & Irr. Dist.** Reversed and remanded for further proceedings. Inbody, Hannon, and Irwin, Judges.

No. A-96-780: **Wruk v. Hamilton Chevrolet Cadillac.** Affirmed. Irwin, Hannon, and Inbody, Judges.

Nos. A-96-782, A-96-783, A-96-784, A-96-785: **Schwab et al. v. Accountability and Disclosure Comm.** Judgment in No. A-96-782 affirmed. Judgments in Nos. A-96-783, A-96-784, and A-96-785 affirmed in part and in part reversed, and cause remanded with directions. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-96-789: **Bayer v. Kavan Construction Corp.** Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-96-792: **Tyler v. Kloss.** Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-96-797: **County of Sarpy v. Hansen.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-96-799: **Sheehy v. Pearson.** Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-96-828: **State ex rel. Vanosdall v. Lewis.** Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-835: **Cimpl v. Methodist Richard Young Corp.** Affirmed. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-96-837: **Olsen v. Olsen.** Affirmed. Mues, Sievers, and Inbody, Judges.

Nos. A-96-842, A-96-843: **Meyer v. Brown.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-96-850: **Eitzmann v. Eitzmann.** Reversed and remanded with directions. Sievers, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-868: **Treu v. Civil Service Comm.** Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-879: **Renner v. Renner.** Affirmed in part, and in part reversed and remanded with directions. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-898: **Steel v. Steel**. Reversed and remanded with directions. Miller-Lerman, Chief Judge, and Sievers and Inbody, Judges.

No. A-96-903: **In re Estate of Krause**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-904: **Ramaekers v. Taylor**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-908: **Stevens v. Post Medical, Inc**. Reversed and remanded for further proceedings. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-924: **El-Tabech v. Department of Corr. Servs**. Affirmed. Hannon, Irwin, and Mues, Judges.

No. A-96-953: **Davenport v. Byington**. Affirmed in part, and in part reversed and remanded with directions. Irwin, Hannon, and Mues, Judges.

No. A-96-955: **Owen v. Owen**. Affirmed. Miller-Lerman, Chief Judge, and Sievers and Inbody, Judges.

No. A-96-957: **Spalding v. Reinke's Farm and City, Inc**. Affirmed as modified. Inbody, Hannon, and Sievers, Judges.

No. A-96-963: **Quick v. Dirkschneider**. Reversed. Miller-Lerman, Chief Judge, and Sievers and Inbody, Judges.

No. A-96-970: **Bandur v. McCauley**. Reversed and remanded for further proceedings. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-96-983: **Fritsch v. Fritsch**. Reversed and remanded. Inbody, Hannon, and Irwin, Judges.

No. A-96-993: **Blum v. Nowicki**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-96-997: **Mollner v. United Parcel Serv**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-1000: **Erdman v. Department of Soc. Servs**. Appeal dismissed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-1011: **Yohe v. Wright**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-1021: **Meents v. Walker**. Reversed and remanded. Mues, Sievers, and Inbody, Judges.

No. A-96-1022: **Schramm v. LeGrande**. Reversed and remanded for further proceedings. Mues, Hannon, and Irwin, Judges.

No. A-96-1039: **Krupicka v. Stauffer**. Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-96-1043: **McAllister v. Carter**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-96-1064: **Matlock v. Papio-Missouri River NRD**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

Nos. A-96-1067, A-96-1068: **State v. Peterson**. Judgment in No. A-96-1067 affirmed. Judgment in No. A-96-1068 reversed, and cause remanded with direction. Hannon, Sievers, and Mues, Judges.

No. A-96-1075: **Ostwald v. Boyce**. Reversed and remanded for a new trial. Sievers, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-1076: **State v. Powelson**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-1093: **Waite v. Brown**. Affirmed. Per Curiam.

No. A-96-1095: **Credit Bureau of North Platte v. Garrick**. Affirmed. Inbody, Sievers, and Mues, Judges.

Nos. A-96-1097, A-96-1106: **Nebraska State Bank v. Carlson**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-96-1105: **Malik v. Pulitzer Broadcasting Co**. Affirmed. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-96-1114: **T.O. Haas Tire Co., Inc. v. Futura Coatings, Inc**. Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-96-1127: **County of Cherry v. Tetherow**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-1128: **Arias v. Arias**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-1130: **Carr v. Clarke**. Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-96-1137: **Purucker v. Purucker**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-1138: **Bohaty v. CH LTD**. Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-96-1168: **State v. Beltran-Uritae**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-96-1187: **Riveros v. Gonzalez**. Reversed and vacated. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-96-1190: **In re Application of DonMark, Inc**. Affirmed. Hannon, Mues and Inbody, Judges.

No. A-96-1235: **State v. Sherrell**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-96-1239: **Vogt v. Myers**. Affirmed. Mues, Sievers, and Inbody, Judges.

Nos. A-96-1244, A-96-1245, A-96-1246: **Wagner v. Bunker Hill Cattle Co**. Affirmed. Miller-Lerman, Chief Judge, and Sievers and Inbody, Judges.

No. A-96-1256: **State v. Garcia**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-96-1282: **McEwen v. McEwen**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-96-1291: **Eastroads, L.L.C. v. City of Omaha**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-96-1297: **State v. Requejo**. Affirmed. Irwin, Hannon, and Sievers, Judges.

No. A-96-1308: **Luangaphy v. Monfort, Inc**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

Nos. A-96-1312, A-96-1313, A-96-1314: **In re Interest of Cameron M. et al**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

Nos. A-96-1320, A-96-1321: **In re Interest of Mark N. & Samuel N**. Reversed and remanded. Sievers, Mues, and Inbody, Judges.

No. A-96-1323: **State v. Williams**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-97-001: **Gonnerman v. Champion Home Builders Co**. Affirmed. Hannon, Irwin, and Inbody, Judges.

No. A-97-004: **State v. Beckby**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-97-008: **Federal Deposit Ins. Corp. v. Slangal**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-009: **Federal Deposit Ins. Corp. v. Slangal**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-012: **Williams v. Williams**. Affirmed as modified. Sievers, Mues, and Inbody, Judges.

No. A-97-014: **In re Guardianship of Bell**. Reversed and remanded with directions. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-97-016: **State v. Searcey**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-97-018: **State v. Bush**. Affirmed. Hannon, Irwin, and Inbody, Judges.

No. A-97-020: **Holcomb v. Knoblauch**. Reversed and remanded with directions. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-97-027: **State v. Garcia-Russell**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-97-035: **In re Estate of Marten**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Mues, and Inbody, Judges.

No. A-97-055: **LaCost v. Nova Southeastern Univ.** Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-97-057: **Meyerhoffer v. Meyerhoffer**. Affirmed in part, and in part reversed and remanded with directions. Sievers, Mues, and Inbody, Judges.

No. A-97-064: **State v. Terry**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-97-068: **In re Interest of Nicole L. et al**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-97-074: **Beck v. Beck**. Affirmed as modified. Sievers, Mues, and Inbody, Judges.

No. A-97-078: **State v. Gifford**. Affirmed. Mues, Sievers, and Inbody, Judges.

No. A-97-084: **Powell v. Powell**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-092: **DeBruce Grain, Inc. v. Teten Hog Farm**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-97-094: **Bayliss v. Bayliss**. Reversed and remanded. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-97-103: **State v. Ruzicka**. Affirmed in part, and in part reversed and remanded for resentencing. Inbody, Sievers, and Mues, Judges.

No. A-97-104: **State v. Fox**. Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-97-108: **Axt v. Lockwood Corp**. Affirmed in part, and in part reversed and remanded with directions. Inbody, Hannon, and Irwin, Judges.

No. A-97-117: **In re Interest Ariel L. et al**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-121: **Fassler v. Fassler**. Affirmed as modified. Irwin, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-97-135: **State v. Whiteley**. Affirmed in part, and in part reversed and remanded for resentencing. Inbody, Hannon, and Irwin, Judges.

No. A-97-137: **In re Interest of Timothy W. & Troy W**. Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-97-139: **Kramer v. Kramer**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

Nos. A-97-140, A-97-141: **State v. Lee**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-97-145: **State v. Swartz**. Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-97-160: **Shaw v. Shaw**. Affirmed. Miller-Lerman, Chief Judge, and Sievers and Inbody, Judges.

No. A-97-174: **Bove v. Golden**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-185: **In re Interest of Ashley M. & Autumn B**. Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-97-193: **State v. Shafer**. Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-203: **In re Interest of Robert F.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-207: **Dean v. Mock.** Affirmed. Inbody, Hannon, and Sievers, Judges.

No. A-97-230: **Paden v. Catholic Health Corp.** Affirmed. Hannon, Irwin, and Inbody, Judges.

No. A-97-231: **Morrison v. Campbell Soup Co.** Affirmed. Irwin, Hannon, and Inbody, Judges.

No. A-97-232: **State v. Schaefer.** Affirmed in part, and in part dismissed. Inbody, Hannon, and Irwin, Judges.

Nos. A-97-256, A-97-257: **State v. Harris.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-258: **Boman v. Schmoldt.** Affirmed in part, and in part reversed and remanded. Mues, Sievers, and Inbody, Judges.

No. A-97-265: **In re Interest of Ashley B.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-97-268: **State v. Baublitz.** Affirmed. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-97-270: **Berry v. Berry.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-97-278: **State v. Hirales-Ayon.** Affirmed. Inbody, Hannon, and Irwin, Judges.

No. A-97-286: **In re Interest of Justin A.** Affirmed as modified. Miller-Lerman, Chief Judge, and Sievers and Mues, Judges.

No. A-97-287: **State v. Mason.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-301: **In re Interest of Caitlin L.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-97-303: **Glantz v. Clarke.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-97-307: **State v. Shields.** Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-311: **Barta v. Rigel Corp.** Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-97-335: **Placek v. Placek.** Affirmed. Mues, Hannon, and Inbody, Judges.

No. A-97-336: **State v. Hemeter.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-344: **State v. Mays**. Reversed and remanded with directions. Mues, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-97-358: **State v. Schaffert**. Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-97-363: **In re Interest of Adam J.** Affirmed. Sievers, Mues, and Inbody, Judges.

No. A-97-364: **State v. Sigfrid**. Affirmed. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges.

No. A-97-375: **In re Interest of Amanda C.** Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-376: **State v. Schemper**. Affirmed. Inbody, Hannon, and Mues, Judges.

No. A-97-397: **In re Interest of Troy S.** Affirmed. Hannon, Sievers, and Inbody, Judges.

No. A-97-406: **State v. Huston**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-97-407: **In re Interest of Dickson**. Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-97-411: **Ala-Rab v. Excel Corp**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-97-423: **State v. Nietfeld**. Affirmed in part, and in part reversed and remanded with directions. Mues, Hannon, and Irwin, Judges.

No. A-97-435: **State v. Mirzakhanov**. Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-97-448: **State v. Jones**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

No. A-97-457: **Donovan v. Nebraska Motor Vehicle Indus. Licensing Bd**. Affirmed. Mues, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-97-466: **Gray v. Draper**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-97-470: **Converse v. Converse**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-97-472: **Rice v. Sta-Rite Indus**. Affirmed. Miller-Lerman, Chief Judge, and Irwin and Mues, Judges.

Nos. A-97-484, A-97-485: **State v. Lange**. Reversed and remanded with directions. Miller-Lerman, Chief Judge, and Hannon and Irwin, Judges. Hannon, Judge, concurring.

No. A-97-495: **State v. Graves**. Affirmed. Per Curiam.

No. A-97-513: **State v. Harsh**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-97-528: **State v. Arenas**. Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-97-538: **State v. Bartos**. Affirmed. Inbody, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-97-539: **State v. Bennett**. Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-97-542: **State v. Dettman**. Affirmed in part, and in part reversed and remanded for resentencing. Mues, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-97-543: **In re Interest of Angela S.** Affirmed. Sievers, Hannon, and Inbody, Judges.

No. A-97-547: **Cleveland v. Snyder**. Reversed and remanded. Miller-Lerman, Chief Judge, and Sievers and Inbody, Judges.

No. A-97-549: **State v. Davis**. Affirmed. Mues, Hannon, and Inbody, Judges.

No. A-97-571: **Catron v. Browns Creek Irrigation**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-610: **State v. Bush**. Affirmed. Irwin, Hannon, and Mues, Judges.

No. A-97-630: **State v. Jones**. Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Mues, Judge.

No. A-97-638: **Schall v. Champion Enters**. Affirmed. Sievers, Hannon, and Inbody, Judges. Hannon, Judge, dissenting.

No. A-97-639: **Yekel v. Western Valley Processing**. Affirmed. Inbody, Hannon, and Sievers, Judges.

Nos. A-97-650, A-97-651, A-97-652: **State v. Burns**. Judgments in Nos. A-97-650 and A-97-651 affirmed. Judgment in No. A-97-652 reversed, and cause remanded for a new trial. Sievers, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-661: **Anderson v. Omaha Pub. Sch. Dist.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Hannon, Judge.

No. A-97-705: **State v. Fuentes.** Affirmed. Hannon, Mues, and Inbody, Judges.

No. A-97-719: **Pietrantoni v. Pietrantoni.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-97-722: **State v. Neujahr.** Affirmed in part, and in part reversed. Mues, Hannon, and Sievers, Judges.

No. A-97-740: **In re Interest of Alison A.** Affirmed. Sievers, Hannon, and Mues, Judges.

No. A-97-744: **Melroy v. Kawasaki Motors.** Reversed and remanded for further proceedings. Irwin, Hannon, and Mues, Judges.

No. A-97-758: **State v. Basey.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Sievers, Judges.

No. A-97-759: **State v. Heath.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2). Per Curiam.

No. A-97-779: **In re Interest of Odom.** Affirmed. Sievers, Judge, and Miller-Lerman, Chief Judge, and Inbody, Judge.

No. A-97-803: **In re Interest of Joey S.** Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-97-830: **In re Interest of William S.** Affirmed. Irwin, Hannon, and Mues, Judges.

No. A-97-833: **State v. Montoya.** Affirmed. Irwin, Judge, and Miller-Lerman, Chief Judge, and Sievers, Judge.

No. A-97-871: **In re Interest of Paige R.** Affirmed. Mues, Hannon, and Irwin, Judges.

No. A-97-962: **Vaughn v. Western Cafe.** Affirmed. Miller-Lerman, Chief Judge, and Irwin and Inbody, Judges.

No. A-97-963: **Wilson v. Plant Operations Personnel, Inc.** Affirmed. Mues, Hannon, and Sievers, Judges.

No. A-97-969: **In re Interest of Addy J.** Affirmed. Hannon, Sievers, and Mues, Judges.

No. A-97-973: **In re Interest of Dickson.** Affirmed. Hannon, Judge, and Miller-Lerman, Chief Judge, and Irwin, Judge.

No. A-97-975: **State v. Cain.** Affirmed. Per Curiam.

No. A-97-1029: **Johnson v. Gustafson**. Affirmed. Per Curiam.

No. A-97-1034: **State v. Acosta**. Affirmed. Inbody, Sievers, and Mues, Judges.

No. A-97-1118: **Cross v. Perreten**. Appeal dismissed. Hannon, Sievers, and Mues, Judges.

No. A-97-1149: **State v. Lewis**. Appeal dismissed. Hannon, Sievers, and Mues, Judges.

No. A-97-1252: **Cotton v. Houston**. Affirmed. Hannon, Sievers, and Mues, Judges.

LIST OF CASES DISPOSED OF WITHOUT OPINION

No. A-91-905: **Dorn v. Lane**. Appeal dismissed.

No. A-94-676: **Burns v. Hartley**. Appeal dismissed for want of prosecution.

No. A-96-563: **In re Equal. of Real Property of Sioux Cty**. Stipulation allowed; appeal dismissed.

No. A-96-931: **State v. Hunt**. Affirmed. See rule 7A(1).

No. A-96-973: **City of Lincoln v. Lowe**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1020: **McDaniel v. McDaniel**. Stipulation allowed; appeal dismissed.

No. A-96-1054: **State v. Hunt**. Affirmed. See rule 7A(1).

No. A-96-1115: **In re Estate of Lemke**. Stipulation allowed; appeal dismissed.

No. A-96-1161: **General Service Bureau, Inc. v. Grant**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-2721 (Reissue 1995).

No. A-96-1197: **State v. Kisela**. Stipulation allowed; appeal dismissed at cost of appellant.

No. A-96-1198: **In re Interest of Kersenbrock**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-96-1215: **State v. Hanus**. Appeal dismissed. See rule 7A(2).

No. A-96-1218: **State v. Streff**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-96-1330: **Koster v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-007: **State v. Cole**. Affirmed. See rule 7A(1).

No. A-97-023: **McCarty v. Nimmer**. Appeal dismissed.

No. A-97-026: **Lindell v. Kay**. Affirmed. See rule 7A(1).

No. A-97-063: **Bd. of Educ. Lands & Funds v. Enron Corp. N. Natural Gas**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-079: **State v. Lincoln**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-091: **Brown v. Brown**. Stipulation allowed; appeal dismissed.

No. A-97-122: **State v. Akin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-123: **State v. Cloud**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-126: **State v. Moore**. Appeal dismissed.

No. A-97-127: **State v. Zaritz**. Affirmed. See rule 7A(1).

No. A-97-143: **State v. Reyes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-150: **Hecker v. The Ravenna Bank**. Motion to dismiss appeal granted and matter remanded to district court for further proceedings in accordance with joint motion of parties filed in this court.

No. A-97-151: **Hecker v. The Ravenna Bank**. Motion to dismiss appeal granted and matter remanded to district court for further proceedings in accordance with joint motion of parties filed in this court.

No. A-97-152: **Hecker v. The Ravenna Bank**. Motion to dismiss appeal granted and matter remanded to district court for further proceedings in accordance with joint motion of parties filed in this court.

No. A-97-153: **Mercer v. Abramson**. Motion of appellee for summary dismissal sustained. Appeal dismissed as filed out of time.

No. A-97-170: **State v. Poe**. Affirmed. See rule 7A(1).

No. A-97-181: **State v. Livingston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-201: **State v. Renschler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-202: **State v. Brennauer**. Affirmed. See rule 7A(1).

No. A-97-206: **State v. Smith**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-234: **State v. Scott**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-238: **Gibraltar Constr. v. HEP, Inc.** Motion of appellee for summary affirmance sustained. See rule 7B(2). See, also, *Daehnke v. Nebraska Dept. of Soc. Servs.*, 251 Neb. 298, 557 N.W.2d 17 (1996) (errors argued but not assigned will not be considered by an appellate court).

No. A-97-239: **State v. Florez.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-247: **State v. SapaNajin.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-259: **Trusler v. GLS Direct, Inc.** Affirmed. See rule 7A(1).

No. A-97-260: **Fitzgerald v. Hopkins.** Appeal dismissed as moot.

No. A-97-269: **In re Conservatorship of Wlaschin.** Appeal dismissed for lack of jurisdiction because notice of appeal filed before final order was entered.

No. A-97-289: **Umland v. Umland.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-295: **State v. Clason.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-296: **Fry v. Nebraska Dept. of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-314: **Petersen v. Jeffrey.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-328: **Harpham v. Clark.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-330: **Bell v. Lancaster Cty.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-341: **State v. LaPorte.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-347: **State v. Osborn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-362: **State v. Buggi.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-371: **State v. Ravenscroft**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-372: **State v. Vetter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-374: **Wetherell v. Rowan**. Appeal dismissed on court's motion.

No. A-97-382: **State v. Gatto**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-386: **State v. Porter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-389: **State v. Blankenfeld**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-390: **State v. Blankenfeld**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-395: **Billups v. Vervaecke**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-399: **Jaeger v. Jaeger**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-402: **State v. Tyler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-404: **State v. Hover**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-413: **State v. Vanackeren, Jr**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-414: **State v. Kurtzhals**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-418: **State v. Hardesty**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-420: **State v. Arnold**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-421: **State v. Winters**. Affirmed. See rule 7A(1).

No. A-97-426: **State v. Lewis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-427: **In re Interest of Looby**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-429: **Telenational Communications Ltd. Part. v. Gateway Communications**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-431: **State v. Webster**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-434: **State v. Metcalf**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-438: **Malcom v. Nebraska Dept. of Corr. Servs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-439: **Kalec v. Kalec**. Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. A-97-441: **County of Fillmore v. Hall**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-443: **State v. Reed**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-444: **State v. Honeywell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-458: **State v. Keefer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-459: **State v. Clemens**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-460: **Burchard v. Boone**. Affirmed. See rule 7A(1).

No. A-97-465: **Meis v. Meis**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-468: **State v. Salvador**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-469: **State Farm Mut. Auto. Ins. Co. v. Rawley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-475: **State v. Walton**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-476: **State v. Lampkin**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-477: **State v. Wilcox**. Affirmed. See rule 7A(1) and *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994).

No. A-97-479: **State v. Barzar**. Appeal dismissed as moot.

No. A-97-483: **Smallfoot v. Weber**. Stipulation allowed; appeal dismissed with prejudice.

No. A-97-490: **State v. Castor**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-493: **In re Estate of Stevens**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-496: **State v. Gomez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-497: **State v. Hill**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-500: **Taylor v. Taylor**. Appeal dismissed for mootness. See rule 7A(2).

No. A-97-503: **H.R. Bookstrom Constr. v. City of Lincoln**. Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-97-505: **O'Connell v. Omaha Police Dept**. Appeal dismissed for failure to file replacement brief as ordered on September 22, 1997.

No. A-97-506: **State v. Douglas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-515: **State v. Bergeron**. Affirmed. See rule 7A(1).

No. A-97-516: **State v. Life**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-517: **State v. Armstrong**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-518: **State v. Long**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-521: **In re Interest of Perkins**. Stipulation considered; appeal dismissed.

No. A-97-529: **In re Interest of Harig**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-536: **State v. Clark**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-541: **State v. Dettman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-550: **State v. Jackson**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-552: **Frenchman Valley Farmers Co-op v. Garner**. Appeal dismissed. See rule 7A(2).

No. A-97-553: **State v. Greene**. Sentence vacated, and cause remanded with directions.

No. A-97-555: **Taylor v. Taylor**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-556: **State v. Hughes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-557: **State v. Hughes**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-558: **State v. Cook**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-567: **State v. Williams**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-577: **Allen v. Allen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-587: **State v. Dumas**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-591: **State v. Jozaitis**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-601: **Abdullah v. State**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-604: **Selman v. Selman**. Stipulation allowed; appeal dismissed.

No. A-97-606: **State v. Claussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-607: **State v. Claussen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-608: **Escamilla v. Panhandle N. Am. Van Lines**. Stipulation allowed; appeal dismissed.

No. A-97-613: **In re Interest of Kobus**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-614: **Byrne v. State Farm Mut. Auto. Ins. Co**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-97-620: **State v. Wagner**. Affirmed.

No. A-97-623: **State v. Felder**. Affirmed. See rule 7A(1).

No. A-97-626: **Lynch v. Department of Corr. Servs. Appeals Bd**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-627: **Owen v. Owen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-635: **State v. Vazquez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-640: **Bradshaw v. Bradshaw**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-644: **Moore v. Nebraska Dept. of Corr. Servs**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-645: **Jones v. Jones**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-646: **Ross v. Ross**. Stipulation allowed; appeal dismissed.

No. A-97-649: **State v. Stenberg**. Stipulation allowed; appeal dismissed.

No. A-97-653: **State v. Felmley**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-654: **Coulson v. Nebraska Bd. of Parole**. State's motion to dismiss per rule 7B(1) is granted due to lack of subject matter jurisdiction.

No. A-97-655: **Tyler v. Hord**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-663: **Wagner v. Hopkins**. Appeal dismissed.

No. A-97-664: **State v. Salazar**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-665: **State v. Emrich**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-668: **State v. Scott**. Affirmed. See rule 7A(1).

No. A-97-669: **State v. Wysocki**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-671: **Sikora v. Higley**. Appeal dismissed for lack of jurisdiction. See rule 7A(2).

No. A-97-674: **In re Interest of Looby**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-686: **State v. Montoya**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-687: **State v. Witherspoon**. Affirmed. See rule 7A(1).

No. A-97-689: **Kremkoski v. Omaha Door & Window Co**. Stipulation allowed; appeal dismissed.

No. A-97-690: **In re Interest of Martinez**. Affirmed. See rule 7A(1)d.

No. A-97-695: **State v. Friedrichsen**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-696: **Warren v. Warren**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-699: **Kuhlman v. U S West Dex, Inc**. Appeal dismissed. See rule 7A(2).

No. A-97-700: **Kuhlman v. U S West Dex, Inc**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-97-702: **State v. Shell**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-703: **State v. Holland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-704: **State v. Holland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-706: **State v. Paez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-707: **Rodehorst v. Department of Water Resources**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-710: **McCaslin v. McBride**. Affirmed. See rule 7A(1).

No. A-97-711: **State v. Butters**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-712: **State v. Malesker**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-714: **Rosen's Inc. v. Darling**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-718: **Laughlin v. Garcia**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rules 7A and 7B(2).

No. A-97-723: **Adams v. Department of Corr. Servs**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-724: **State v. Sypho**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-725: **Mendosa v. University Hosp**. Motion of Commissioner of Labor for summary dismissal sustained. See rule 7B(1); *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995).

No. A-97-730: **State v. Sunderland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-731: **State v. Sunderland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-732: **State v. Sunderland**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-737: **Morehead v. Moravec**. Appeal dismissed. See rule 7A(2).

No. A-97-738: **Houle v. Moravec**. Appeal dismissed. See rule 7A(2).

No. A-97-739: **Kubik v. Moravec**. Appeal dismissed. See rule 7A(2).

No. A-97-741: **State v. Cabrera**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-742: **State v. Cabrera**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-747: **Egan v. Egan**. Appeal dismissed. See rule 7A(2).

No. A-97-748: **State v. Burnett**. Affirmed. See rule 7A(1).

No. A-97-749: **State v. Gonzalez**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-751: **Tyler v. Stenberg**. Appeal dismissed. See rule 7A(2).

No. A-97-754: **State v. Running Shield**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-755: **State v. Riley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-756: **Cerny v. Custer Cty. Bd. of Equal**. Appeal dismissed. See *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb. App. 781, 567 N.W.2d 794 (1997).

No. A-97-757: **Mendoza v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-760: **Dewey v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2). See, also, *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-97-764: **Tyler v. Outback Steakhouse**. Affirmed. See rule 7A(1); *Niklaus v. Abel Construction Co.*, 164 Neb. 842, 83 N.W.2d 904 (1957); and *Waite v. Carpenter*, 1 Neb. App. 321, 496 N.W.2d 1 (1992).

No. A-97-767: **Chapman v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-767: **Chapman v. Department of Motor Vehicles**. Motion of appellant for rehearing sustained. Dismissal vacated and appeal reinstated.

No. A-97-768: **Negley v. Negley**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-775: **Tharnish v. Black**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-776: **State v. Villareal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-781: **State v. Talamantes**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-786: **Jones v. Jones**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-790: **State v. Moyer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-795: **State v. Kammerer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-801: **State v. Hosch**. The case meets the standards for rule 7A(1) affirmance, and the district court's decision is hereby affirmed.

No. A-97-804: **In re Estate of Robinson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-805: **State v. Wahrman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-806: **Tyler v. Johnson**. Motion of appellee for summary affirmance sustained. See *Hernandez v. Coughlin*, 18 F.3d 133 (2d Cir. 1994), *cert. denied* 513 U.S. 836, 115 S. Ct. 117, 130 L. Ed. 2d 63, relying on *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). See, also, *Ayers v. Rone*, 852 F. Supp. 18 (E.D. Mo. 1994), *aff'd* 36 F. 3d 1100 (8th Cir.).

No. A-97-809: **State v. Wells**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-810: **State v. Kimball**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-813: **State v. Brown**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-814: **In re Interest of Preissnitz**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-817: **Cole v. Kiewit Constr. Co**. Motion of appellee for summary dismissal sustained.

No. A-97-820: **State v. Arzapalo**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-823: **State v. Alva**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-824: **State v. Suggett**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-824: **State v. Suggett**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-828: **State v. Jones**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-832: **State v. Limley**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-836: **Hoven v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-97-840: **State v. Avery**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-843: **State v. Neal**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-844: **Niemier v. Niemier**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-846: **Christensen v. Christensen**. Appeal dismissed. See rule 7A(2).

No. A-97-848: **In re Interest of Roland**. Affirmed. See rule 7A(1).

No. A-97-853: **Cram v. Redland Ins. Co.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-856: **In re Estate of Ross**. Stipulation allowed; appeal dismissed.

No. A-97-868: **State v. Leviston**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-869: **State v. Kernell**. Cause having not been shown, appeal dismissed as moot.

No. A-97-870: **Langemeier v. Urwiler Oil & Fertilizer, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-874: **State v. Reed**. Appeal dismissed. See rule 7A(2).

No. A-97-878: **State v. Ridgeway**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-881: **Briggs, Inc. of Omaha v. Walsh**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-883: **State v. Stennis**. Affirmed. See rule 7A(1).

No. A-97-888: **State v. Hansen**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-889: **State v. Laack**. Affirmed. See rule 7A(1).

No. A-97-894: **Stewart v. Department of Corr. Servs.** Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-896: **Brewer v. Brewer**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-897: **Logan v. Nebraska Dept. of Corr. Servs.** Appeal dismissed. See rule 7A(2).

No. A-97-898: **State v. Henderson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-899: **Chessmore v. Einspahr**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-901: **State v. Query**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-902: **State v. Lucius**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-903: **State v. Lyons**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-906: **Sniffles, Inc. v. People's City Mission Home**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-907: **Vorel v. Vorel**. Stipulation allowed; appeal dismissed.

No. A-97-908: **State v. Johnson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-909: **State v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-910: **State v. Tyler**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-912: **State v. Critel**. Affirmed. See rule 7A(1).

No. A-97-913: **State v. Todd**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-918: **Rediger v. Clarke**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-922: **In re Guardianship of Diaz-McMullin**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-924: **State v. Lafler**. Appeal dismissed. See rule 7A(2).

No. A-97-925: **State v. Rodenbaugh**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-926: **Hoffman v. Alwin**. Stipulation allowed; appeal dismissed; each party to pay own costs.

No. A-97-928: **Polfus v. Nebraska Dept. of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-929: **In re Interest of Hunter**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-930: **In re Interest of Johnson**. Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-932: **Stack v. Fremont First Cent. Fed. Cred. Union**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-936: **State v. Cotton**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-937: **State v. Bandur**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Reissue 1995).

No. A-97-938: **State v. Nitzsche**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-939: **State v. Bossow**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-940: **Preuit v. Preuit**. Affirmed. See rule 7A(1).

No. A-97-943: **State v. Jessepe**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-947: **James E. Bachman, P.C. v. Kevin M. Kean Co.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-949: **Soule v. Smagacz.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-951: **People's Natural Gas Co. v. Kubicek.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-97-953: **State v. Otten.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-955: **Tyler v. Hopkins.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-957: **Faeller v. Nebraska Dept. of Corr. Servs.** Affirmed. See rule 7A(1).

No. A-97-961: **State v. Hulit.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-97-966: **Peterson v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-972: **State v. Watson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-974: **State v. Green.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-979: **Anderson v. Hopkins.** Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-980: **State v. Ryan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-981: **State v. Moore.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-982: **State v. Beckley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-990: **State v. Hoffman.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-991: **State v. Schweiger.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-997: **Peterson v. Peterson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-999: **Podoll v. Department of Corrections.** Appeal dismissed. See rule 7A(2). See, also, *Dittrich v.*

Nebraska Dept. of Corr. Servs., 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-97-1000: **State v. Ihde**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1004: **State v. Tiedeman**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1009: **Welsh v. Mlinar**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1010: **Ritz v. Ritz**. Notice of appeal untimely filed. See Neb. Rev. Stat. § 25-1912 (Reissue 1995). Appeal dismissed. See rule 7A(2).

No. A-97-1011: **State v. Rezac**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

Nos. A-97-1014 through A-97-1019: **State v. Pinney**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1020: **Shockley v. Vanevery**. Appeal dismissed for failure to file a timely poverty affidavit. See rule 7A(2). See, also, *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-97-1021: **Yager v. Martinez**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1022: **State v. Tatreau**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1023: **State v. Brown**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1024: **State v. Padron**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1026: **State v. Graeter**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1027: **State v. Sterling**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1032: **State v. Howells**. District court did not err in denying defendant's plea in bar. See, *State v. Martinez*, 250

Neb. 597, 550 N.W.2d 655 (1996); *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984). Affirmed. See rule 7B(2).

No. A-97-1038: **Twiss v. Twiss**. Appeal dismissed for lack of jurisdiction. See *Williams v. Williams*, 146 Neb. 383, 19 N.W.2d 630 (1945).

No. A-97-1043: **State v. Figures**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1044: **State v. Keltner**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1048: **In re Interest of Gonzales**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1050: **State v. Campos**. Appeal dismissed for lack of jurisdiction. Overruling of plea in abatement is not final order from which there can be direct appeal. See *State v. Franklin*, 194 Neb. 630, 234 N.W.2d 610 (1975).

No. A-97-1051: **Tyler v. Hopkins**. Appeal dismissed. See rule 7A(2).

No. A-97-1052: **Tyler v. Department of Corrections Appeals Bd.** Appeal dismissed for lack of jurisdiction because order of August 18, 1997, is conditional and therefore not final and appealable.

No. A-97-1054: **Ash Grove Cement Co. v. Nebraska Dept. of Revenue**. Affirmed. See rule 7A(1).

No. A-97-1058: **State v. Marquez**. Appeal dismissed. See rule 7A(2).

No. A-97-1060: **State v. Molina**. Appeal dismissed for lack of jurisdiction. Poverty affidavit filed out of time. See Neb. Rev. Stat. § 25-1912 (Reissue 1995). See, also, *In re Interest of Noelle F. & Sarah F.*, 249 Neb. 628, 544 N.W.2d 509 (1996).

No. A-97-1061: **Amwest Properties, Inc. v. Lancaster Cty. Bd. of Equal.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1062: **Tyler v. Greater Bethelehem Temple Church**. Appeal dismissed for lack of a final, appealable order. See *Brozovsky v. Norquest*, 231 Neb. 731, 437 N.W.2d 798 (1989).

No. A-97-1063: **State v. Pannell**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1064: **State v. Muck**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1066: **Klabenes v. Klabenes**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1068: **Befort v. Department of Motor Vehicles**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1072: **Sikora v. State**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1077: **Holmbeck v. Holmbeck**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1079: **State v. Donnermeyer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1080: **State v. Cabela**. Appeal dismissed. See rule 7A(2).

No. A-97-1082: **State v. Brody**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1083: **State v. Mader**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1088: **Amerus Leasing v. Countryside Veterinary Clinic**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1090: **Coash v. Coash**. Motion of appellee for summary dismissal sustained.

No. A-97-1093: **State v. Gugat**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1094: **State v. Davlin**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-1095: **State v. Felix**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1096: **Tyler v. Department of Corr. Servs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1099: **Roseberry v. Roseberry**. Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912(2)(b) (Supp. 1997).

No. A-97-1111: **State v. McCaslin**. Motion of appellee for summary dismissal sustained because appeal was filed out of time.

No. A-97-1113: **State v. Raven**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1116: **State v. Hopper**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1122: **Tyler v. Lichtenfield**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1124: **Tyler v. Keefe Kitchens**. Affirmed. See rule 7A(1).

No. A-97-1128: **State v. Altaminy**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1130: **Woodworth v. Woodworth**. Stipulation allowed; appeal dismissed.

No. A-97-1134: **State v. Grayer**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1139: **State v. Jauken**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1143: **Brentano v. Brentano**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1145: **Tyler v. Chandler**. Affirmed. See rule 7A(1).

No. A-97-1146: **State v. Ward**. Appeal dismissed for lack of a final, appealable order. See *State v. Engleman*, 5 Neb. App. 485, 560 N.W.2d 851 (1997).

No. A-97-1155: **State v. Cole**. Affirmed. See rule 7A(1). See, also, *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

No. A-97-1157: **State v. Hadan**. Affirmed in part, and in part dismissed.

No. A-97-1158: **State v. Hadan**. Affirmed in part, and in part dismissed.

No. A-97-1163: **Tyler v. Sheain**. Affirmed. See rule 7A(1).

No. A-97-1180: **Collection Assocs., Inc. v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1181: **Meints v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1182: **State ex rel. Meints v. Meints**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1188: **Tyler v. Stenberg**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1190: **Lewis v. Lewis**. Appeal dismissed for lack of a final, appealable order. See, *Jessen v. Jessen*, 5 Neb. App. 914, 567 N.W.2d 612 (1997); *Hammond v. Hammond*, 3 Neb. App. 536, 529 N.W.2d 542 (1995).

No. A-97-1191: **Stout v. Abramson**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1205: **Biltoft v. Biltoft**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1211: **State v. Tyler**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1226: **Schram v. Schram**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1232: **Clark v. Farmers Mut. Home Ins. Co**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1236: **In re Interest of Gant**. Stipulation allowed; appeal dismissed.

No. A-97-1244: **McGeorge v. McGeorge**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1245: **State v. Manzer**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1253: **Reznicek v. Reznicek**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-97-1254: **Haworth v. Dingle**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-1256: **Cole v. Kiewit Constr. Co**. Motion of appellee for summary affirmance sustained; judgment affirmed.

No. A-97-1257: **Smith v. Jerry's Sheet Metal, Heating & Cooling**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1260: **State on behalf of Klein v. Vesely**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1266: **Swieczka v. Cloutier**. Appeal dismissed. See rule 7A(2) and *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-97-1278: **State v. Stevenson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1281: **Klusman v. Swanson**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-1282: **State v. Roberts**. Appeal dismissed for lack of proper poverty affidavit. See *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-97-1283: **State v. Seberger**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-1284: **State v. Beebe**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1290: **Norland International, Inc. v. Lonien**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1294: **Goeser v. Goeser**. Motion sustained; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-1298: **Bancorp Group, Inc. v. Sprague**. Motion of appellee for summary dismissal under rule 7B(1) sustained because notice of appeal was not filed in time. See Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-97-1300: **Tyler v. Department of Corr. Servs.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1302: **State v. Pryor**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-97-1303: **State v. Pryor**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-97-1304: **State v. Pryor**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-97-1307: **Pokorney v. Roberts & Oake, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1308: **State v. Critel**. Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-97-1312: **State v. Pearce**. Appeal dismissed.

No. A-97-1313: **State v. Pearce**. Appeal dismissed.

No. A-97-1314: **State v. Rice**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1316: **State v. Gray**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1317: **State v. Gray**. By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1318: **State v. Gray**. Appeal dismissed. See rule 7A(2).

No. A-97-1319: **State v. Lebsock**. Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No. A-97-1322: **Primrose v. Gulland**. Appeal dismissed. See rule 7A(2).

No. A-97-1327: **Hopping v. Gulland**. Appeal dismissed. See rule 7A(2).

No. A-97-1332: **Smith v. Smith**. Motion of appellee for summary dismissal under rule 7B(1) sustained because order appealed from was not final order.

No. A-97-1333: **Ross v. State**. Appeal dismissed for lack of jurisdiction as appeal to district court was filed out of time. See *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994).

No. A-97-1343: **In re Interest of Bilek**. Guardian ad litem appeals juvenile court's order in connection with appointment of counsel. Order is not an appealable order. See, *State v. Schlund*, 249 Neb. 173, 542 N.W.2d 421 (1996); *State on behalf of Garcia v. Garcia*, 238 Neb. 455, 471 N.W.2d 388 (1991).

No. A-97-1344: **Drey v. Thomasville Ltd. Partnership**. Appeal dismissed. See rule 7A(2) and *Molt v. Lindsay Mfg. Co.*, 248 Neb. 81, 532 N.W.2d 11 (1995).

No. A-97-1345: **State v. Incontro**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1346: **State v. Incontro**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-97-1348: **State v. Picket Pen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1349: **Salkin v. N.P. Dodge Real Estate Sales.** Appeal dismissed. See rule 7A(2) and *State ex rel. Fick v. Miller*, 252 Neb. 164, 560 N.W.2d 793 (1997).

No. A-97-1351: **Doty v. Pickenpaugh.** Appeal dismissed for lack of a final, appealable order. See *Enterprise Co. v. Americom Corp.*, 1 Neb. App. 1125, 510 N.W.2d 537 (1993).

No. A-97-1355: **Nelsen v. University Place-Lincoln Assocs.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-97-1357: **Stuefer v. Stuefer.** By order of the court, appeal dismissed for failure to file briefs.

No. A-97-1358: **Bush v. Old Fashioned Enterprises, Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-1359: **Marion v. Johnson-Corbino.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. A-97-1360: **State v. Anderson.** Appeal dismissed for failure to file a timely and adequate poverty affidavit. See, Neb. Rev. Stat. § 29-2306 (Reissue 1995); *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995). See, also, rule 7A(2).

No. A-97-1361: **State v. Gerbig.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-98-002: **Gubbels v. Martinson.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-98-003: **Gubbels v. Koehler.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-98-010: **State on behalf of Box v. Smith.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-011: **State on behalf of Gay v. Smith.** Appeal dismissed. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-021: **Pratt v. Nebraska Parole Bd.** Appeal dismissed. See rule 7A(2).

No. A-98-023: **State v. Thompson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-98-025: **State v. Matz**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-026: **State ex rel. Anderson v. Hopkins**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. A-98-041: **State v. Poole**. Appeal dismissed for lack of a proper poverty affidavit. See rule 7B(2). See, also, *In re Interest of T.W. et al.*, 234 Neb. 966, 453 N.W.2d 436 (1990).

No. A-98-049: **Hunter v. Hunter**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-98-054: **In re Estate of Billingsley**. Motion of appellee to dismiss appeal sustained without prejudice.

No. A-98-056: **Casados v. Casados**. Motion of appellant to dismiss appeal considered; appeal dismissed.

No. A-98-059: **State v. Wergin**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-060: **State v. Trotter**. Appeal dismissed for lack of proper poverty affidavit. See Neb. Rev. Stat. § 25-1912 (Supp. 1997). See, also, *State v. Schmailzl*, 248 Neb. 314, 534 N.W.2d 743 (1995).

No. A-98-063: **Allied National v. Citron**. Motion of appellant to dismiss appeal considered; appeal dismissed at cost of appellant.

No. A-98-071: **State v. O'Malley**. Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. A-98-085: **Williams v. Clarke**. Appeal dismissed as filed out of time. See rule 7A(2). See, also, Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-089: **Cullen v. Bryson Properties XVIII**. Stipulation allowed; appeal dismissed.

No. A-98-095: **Malone v. Safeco Ins. Co**. Stipulation allowed; appeal dismissed.

No. A-98-097: **Norwest Bank Neb. Nat. Assn. v. Summers.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice.

No. A-98-107: **In re Interest of Harper.** Motion of appellee for summary dismissal sustained. See rule 7B(1).

No. A-98-110: **In re Guardianship & Conservatorship of Vaness.** Appeal dismissed. See rule 7A(2). See, also, Neb. Rev. Stat. §§ 25-1912(2) and 30-1601 (Supp. 1997).

No. A-98-122: **Saxton v. Saxton.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-98-133: **Oreskovich v. McConahay.** Stipulation allowed; appeal dismissed at cost of appellant.

No. A-98-152: **Roseberry v. Roseberry.** Appeal dismissed. See rule 7A(2).

No. A-98-153: **State ex rel. Crawford v. Crawford.** Appeal dismissed. See rule 7A(2).

No. A-98-164: **State v. Smith.** Appeal dismissed pursuant to rule 7A(2) as being filed out of time. See Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-165: **State v. Smith.** Appeal dismissed pursuant to rule 7A(2) as being filed out of time. See Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-168: **Arnold v. Clarke.** Appeal dismissed. See rule 7A(2).

No. A-98-184: **Tyler v. Keefe Kitchens.** Appeal dismissed for lack of a proper poverty affidavit or the statutory docket fee pursuant to Neb. Rev. Stat. § 25-1912 (Supp. 1997). See rule 7A(2).

No. A-98-230: **Cole v. Green.** Appeal dismissed for lack of jurisdiction. Review of disciplinary cases is allowed only when disciplinary action involves disciplinary isolation or loss of good-time credit. Neb. Rev. Stat. § 83-4,123 (Reissue 1994). Room restriction does not constitute isolation. *Dittrich v. Nebraska Dept. of Corr. Servs.*, 248 Neb. 818, 539 N.W.2d 432 (1995).

No. A-98-235: **McGreer v. Adams.** Appeal dismissed for lack of jurisdiction. See Neb. Rev. Stat. § 25-1912(2) (Supp. 1997).

No. A-98-242: **Tyler v. Stennis.** Appeal dismissed for lack of a final, appealable order. See rule 7A(2).

No. A-98-250: **State v. Pond.** Appeal dismissed for lack of proper poverty affidavit. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-305: **State v. Davis.** Appeal dismissed as filed out of time. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-306: **State v. Ruzicka.** Appeal dismissed as filed out of time. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

No. A-98-307: **State v. Ginn.** Appeal dismissed as filed out of time. See rule 7A(2) and Neb. Rev. Stat. § 25-1912 (Supp. 1997).

LIST OF CASES ON PETITION FOR FURTHER REVIEW

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

No. A-95-811: **Tecton Corp. v. Greater Omaha Packing Co**. Petition of appellant for further review overruled on November 12, 1997.

No. A-95-811: **Tecton Corp. v. Greater Omaha Packing Co**. Petition of appellee Tecton Corp. for further review overruled on November 12, 1997.

Nos. A-95-874, A-95-1166: **Chicago Title Ins. Co. v. Nelson**. Petition of appellant for further review overruled on November 26, 1997.

No. A-95-1267: **Lahm v. Burlington Northern RR. Co.**, 6 Neb. App. 182 (1997). Petition of appellant for further review overruled on January 16, 1998, as premature.

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

Nos. A-95-1271, A-95-1272: **International Bhd. of Elec. Workers v. Moy**, 97 NCA No. 32. Petition of appellant for further review overruled on October 22, 1997.

Nos. A-95-1271, A-95-1272: **International Bhd. of Elec. Workers v. Moy**, 97 NCA No. 32. Petition of appellee for further review overruled on October 22, 1997.

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

No. A-95-1309: **State v. Schmailzl**. Petition of appellant for further review overruled on September 24, 1997.

Nos. S-95-1380, S-95-1388: **Johnson Lakes Dev. v. Central Neb. Pub. Power**, 5 Neb. App. 957 (1997). Petitions of appellees for further review sustained on October 29, 1997.

No. S-95-1392: **Lange v. Crouse Cartage Co**. Petition of appellant for further review sustained on September 4, 1997.

No. S-96-063: **Teters v. Scottsbluff Public Schools**, 5 Neb. App. 867 (1997). Petition of appellee for further review sustained on September 17, 1997.

No. A-96-099: **State v. Miller**, 5 Neb. App. 635 (1997). Petition of appellant for further review overruled on September 17, 1997.

No. A-96-130: **Sedivy v. State**, 5 Neb. App. 745 (1997). Petition of appellant for further review overruled on September 17, 1997.

No. A-96-154: **State v. Schlondorf**, 97 NCA No. 37. Petition of appellant for further review overruled on January 28, 1998.

No. A-96-160: **Tracy Corp. IV v. Western Nebraska Community College**. Petition of appellee Western for further review overruled on September 4, 1997.

No. A-96-167: **Charron v. Byington**, 97 NCA No. 39. Petition of appellant for further review overruled on November 14, 1997.

No. A-96-171: **Jeffrey Lake Dev. v. Central Neb. Pub. Power**, 5 Neb. App. 974 (1997). Petition of appellee for further review overruled on January 14, 1998.

No. S-96-197: **In re Estate of Andersen**. Petition of appellee for further review sustained on September 4, 1997.

No. S-96-313: **Bonge v. County of Madison**, 5 Neb. App. 760 (1997). Petition of appellant for further review sustained on October 22, 1997.

No. A-96-316: **United Neb. Bank v. Schutt**. Petition of appellant for further review overruled on October 16, 1997.

No. A-96-336: **Schmucker v. Larson**. Petition of appellant for further review overruled on September 24, 1997.

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

No. A-96-368: **Urbach v. Industrial Chem. Labs.**, 97 NCA No. 34. Petition of appellee for further review overruled on November 19, 1997.

No. A-96-379: **Suiter v. Epperson**, 6 Neb. App. 83 (1997). Petition of appellant for further review overruled on November 19, 1997.

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

No. A-96-437: **In re Application of Borders**. Petition of appellant for further review overruled on September 24, 1997.

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

No. S-96-491: **Cavanaugh v. City of Omaha**, 5 Neb. App. 827 (1997). Petition of appellee for further review sustained on September 4, 1997.

No. S-96-497: **In re Estate of Foxley**, 6 Neb. App. 1 (1997). Petition of appellant for further review sustained on October 29, 1997.

No. S-96-507: **Schade v. County of Cheyenne**. Petition of appellee for further review sustained on November 26, 1997.

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

No. A-96-543: **Midwest First Fin. v. Smith**. Petition of appellant for further review overruled on September 4, 1997.

Nos. A-96-553, A-96-554: **State v. Golden**. Petition of appellant for further review overruled on December 17, 1997.

No. S-96-557: **Mandalfo v. Chudy**, 5 Neb. App. 792 (1997). Petition of appellees for further review sustained on September 17, 1997.

No. A-96-559: **Russo v. Department of Corr. Servs.** Petition of amicus for further review overruled on November 12, 1997.

No. S-96-562: **Springer v. Kuhns**, 6 Neb. App. 115 (1997). Petition of appellant for further review sustained on December 17, 1997.

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

No. A-96-571: **Hassenstab v. Hassenstab**, 6 Neb. App. 13 (1997). Petition of appellant for further review overruled on January 28, 1998.

No. A-96-576: **Andersen v. Ganz**, 6 Neb. App. 224 (1997). Petition of appellant for further review overruled on January 22, 1998.

No. A-96-579: **In re Estate of Dobrovolny**, 97 NCA No. 40. Petition of appellee for further review overruled on December 17, 1997.

No. A-96-580: **Paus Motor Sales v. Western Surety Co.**, 6 Neb. App. 233 (1997). Petition of appellee for further review overruled on January 14, 1998.

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

No. A-96-588: **Andersen v. American Red Cross**, 97 NCA No. 38. Petition of appellee for further review overruled on November 26, 1997.

No. A-96-611: **Affiliated Foods Co-op v. Meyer**. Petition of appellant for further review overruled on September 17, 1997.

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

No. A-96-667: **State v. Peterson**. Petition of appellant for further review overruled on January 22, 1998.

No. A-96-673: **American Fam. Ins. Group v. Menges**. Petition of appellant for further review overruled on January 14, 1998.

No. A-96-681: **State v. Bassette**, 6 Neb. App. 192 (1997). Petition of appellant for further review overruled on January 22, 1998.

No. A-96-701: **State v. Love**. Petition of appellant for further review overruled on October 1, 1997.

No. A-96-703: **Longoria v. State**. Petition of appellant for further review overruled on October 1, 1997.

No. A-96-706: **Koch v. Martin**. Petition of appellant for further review overruled on January 28, 1998.

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

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

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

No. A-96-754: **Filips v. Stianson**. Petition of appellant for further review overruled on January 14, 1998.

No. A-96-776: **Lakeview Acres v. Central Neb. Pub. Power & Irr. Dist**. Petition of appellee for further review overruled on January 28, 1998.

No. A-96-779: **Svehla v. Beverly Enterprises**, 5 Neb. App. 765 (1997). Petition of appellant for further review overruled on September 4, 1997.

Nos. A-96-783, A-96-784, A-96-785: **Zier v. Accountability and Disclosure Comm**. Petition of appellees for further review overruled on January 14, 1998.

No. A-96-792: **Tyler v. Kloss**. Petition of appellant for further review overruled on November 26, 1997.

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

No. S-96-804: **State v. Krutilek**, 5 Neb. App. 853 (1997). Petition of appellant for further review sustained on October 29, 1997.

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

No. S-96-827: **Olsen v. Olsen**. Petition of appellant for further review sustained on December 24, 1997.

No. A-96-828: **State ex rel. Vanosdall v. Lewis**. Petition of appellant for further review overruled on November 26, 1997.

No. A-96-832: **State v. Brown**, 5 Neb. App. 889 (1997). Petition of appellee for further review overruled on September 24, 1997.

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

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

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

No. A-96-890: **Butcher v. A Bridal Affair**, 97 NCA No. 32. Petition of appellant for further review overruled on September 17, 1997.

No. A-96-896: **In re Interest of Michael B. et al.** Petition of appellant for further review overruled on October 16, 1997.

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

No. A-96-920: **State v. Moore.** Petition of appellant for further review overruled on November 12, 1997.

No. A-96-930: **State v. Pitt.** Petition of appellant for further review overruled on September 17, 1997.

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

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

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

No. A-96-964: **In re Interest of Natasha H.**, 97 NCA No. 28. Petition of appellant for further review overruled on September 17, 1997.

No. A-96-974: **State v. Snider.** Petition of appellant for further review overruled on September 4, 1997.

No. A-96-985: **Kepler v. County of Morrill.** Petition of appellant for further review overruled on September 4, 1997.

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

No. A-96-992: **Demedici v. Alberti.** Petition of appellee for further review overruled on October 1, 1997.

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

No. A-96-997: **Mollner v. United Parcel Serv.** Petition of appellant for further review overruled on December 3, 1997.

No. S-96-1012: **State v. Parks**, 5 Neb. App. 814 (1997). Petition of appellant for further review sustained on September 4, 1997.

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

No. A-96-1021: **Meents v. Walker**. Petition of appellee for further review overruled on January 28, 1998.

No. A-96-1023: **State v. Harmelink**. Petition of appellant for further review overruled on September 4, 1997.

No. A-96-1024: **State v. Flynn**. Petition of appellee for further review overruled on October 1, 1997.

No. A-96-1026: **State v. Allen**. Petition of appellant for further review overruled on September 17, 1997.

No. A-96-1044: **Wilson v. Larkins & Sons**, 97 NCA No. 27. Petition of appellee for further review overruled on September 24, 1997.

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

No. A-96-1071: **State v. Ott**. Petition of appellant for further review overruled on September 17, 1997.

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

No. A-96-1080: **State v. Kinney**, 6 Neb. App. 102 (1997). Petition of appellant for further review overruled on December 3, 1997.

Nos. A-96-1097, A-96-1106: **Nebraska State Bank v. Carlson**. Petition of appellant for further review overruled on January 28, 1998.

No. A-96-1111: **Randoja v. United Parcel Serv**. Petition of appellee for further review overruled on September 4, 1997.

No. A-96-1128: **Arias v. Arias**. Petition of appellant for further review overruled on November 19, 1997.

No. A-96-1132: **State v. Hatch**, 97 NCA No. 28. Petition of appellant for further review overruled on September 9, 1997.

No. A-96-1135: **State v. Wilford**, 97 NCA No. 31. Petition of appellee for further review overruled on October 1, 1997.

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

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

No. A-96-1168: **State v. Beltran-Uritae**. Petition of appellant for further review overruled on November 26, 1997.

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

No. A-96-1215: **State v. Hanus**. Petition of appellant for further review overruled on December 24, 1997.

No. A-96-1270: **State v. Pryjmak**. Petition of appellant for further review overruled on September 17, 1997.

No. A-96-1277: **Wagner v. Department of Corr. Servs.** Petition of appellant for further review overruled on September 17, 1997.

No. A-96-1302: **State v. Rivers**. Petition of appellant for further review overruled on September 4, 1997.

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

No. A-96-1307: **Sea v. Union Pacific RR. Co**. Petition of appellant for further review overruled on October 1, 1997.

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

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

No. S-96-1330: **Koster v. State**. Petition of appellant for further review overruled on October 1, 1997.

No. A-96-1337: **State v. Fisher**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-007: **State v. Cole**, 97 NCA No. 44. Petition of appellant for further review overruled on January 22, 1998.

No. S-97-011: **State v. Jenkins**. Petition of appellant for further review sustained on September 17, 1997.

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

No. A-97-016: **State v. Searcey**. Petition of appellant for further review overruled on November 12, 1997.

No. S-97-018: **State v. Bush**. Petition of appellant and appellee for further review sustained on December 24, 1997.

No. A-97-028: **State v. Fuller**, 6 Neb. App. 177 (1997). Petition of appellant for further review overruled on January 14, 1998.

No. A-97-031: **Bitterman v. Bitterman**. Petition of appellant for further review overruled on September 17, 1997.

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

No. A-97-034: **Fullerton v. Douglas Cty. Hosp**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-035: **In re Estate of Marten**. Petition of appellant for further review overruled on January 28, 1998.

No. A-97-055: **LaCost v. Nova Southeastern Univ**. Petition of appellant for further review overruled on November 26, 1997.

No. A-97-100: **State v. Nelson**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-104: **State v. Fox**. Petition of appellant for further review overruled on January 14, 1998.

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

No. A-97-109: **State v. Turner**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-110: **State v. Birdhead**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-126: **State v. Moore**. Petition of appellant for further review overruled on October 17, 1997.

No. A-97-133: **State v. Garner**. Petition of appellant for further review overruled on September 4, 1997.

Nos. A-97-140, A-97-141: **State v. Lee**. Petition of appellant for further review overruled on January 22, 1998.

No. A-97-153: **Mercer v. Abramson**, 97 NCA No. 40. Petition of appellant for further review overruled on January 28, 1998.

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

No. A-97-170: **State v. Poe**. Petition of appellant for further review overruled on November 12, 1997.

No. A-97-181: **State v. Livingston**. Petition of appellant for further review overruled on November 12, 1997.

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

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

No. A-97-230: **Paden v. Catholic Health Corp**. Petition of appellant for further review overruled on January 14, 1998.

No. A-97-232: **State v. Schaefer**. Petition of appellant for further review overruled on January 22, 1998.

No. A-97-237: **State v. Sumlin**. Petition of appellant for further review overruled on September 17, 1997.

No. A-97-242: **Lincoln Trust for the Benefit of Phillip Wright v. Moss**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-243: **C.P. Inv. Trust v. Walker**. Petition of appellant for further review overruled on September 4, 1997.

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

No. A-97-262: **Nunn v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 4, 1997.

No. A-97-269: **In re Conservatorship of Wlaschin**. Petition of appellant for further review overruled on December 31, 1997.

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

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

No. A-97-289: **Umland v. Umland**. Petition of appellant for further review overruled on December 3, 1997.

No. A-97-291: **State v. Weeks**. Petition of appellant for further review overruled on September 4, 1997.

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

No. A-97-330: **Bell v. Lancaster Cty**. Petition of appellant for further review overruled on December 17, 1997.

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

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

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

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

No. A-97-413: **State v. Vanackeren, Jr.** Petition of appellant for further review overruled on November 26, 1997.

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

No. A-97-424: **State v. Davenport**. Petition of appellant for further review overruled on September 24, 1997.

No. A-97-453: **JTL Corp. v. Lancaster Cty. Bd. of Equal.** Petition of petitioner-appellant for further review overruled on October 1, 1997.

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

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

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

No. A-97-507: **State v. Greco**. Petition of appellee for further review overruled on October 22, 1997.

No. A-97-516: **State v. Life**. Petition of appellant for further review overruled on December 24, 1997.

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

No. A-97-539: **State v. Bennett**. Petition of appellant for further review overruled on January 14, 1998.

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

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

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

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

No. A-97-609: **Ryan v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review overruled on October 22, 1997.

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

No. A-97-623: **State v. Felder**, 97 NCA No. 47. Petitions of appellant for further review overruled on January 14 and 16, 1998.

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

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

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

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

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

No. S-97-661: **Anderson v. Omaha Pub. Sch. Dist**. Petition of appellant for further review sustained on January 28, 1998.

No. A-97-668: **State v. Scott**, 97 NCA No. 42. Petition of appellant for further review overruled on January 28, 1998.

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

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

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

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

No. A-97-712: **State v. Malesker**, 97 NCA No. 47. Petition of appellant for further review overruled on January 22, 1998.

No. A-97-734: **Sharp v. Department of Corr. Servs**. Petition of appellant for further review overruled on September 24, 1997.

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

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

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

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

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

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

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

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

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

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

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

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

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

No. A-97-1010: **Ritz v. Ritz**. Petition of appellant for further review overruled on December 24, 1997.

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

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

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

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

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

LIST OF CASES NOT DESIGNATED FOR PERMANENT PUBLICATION

No. A-95-1195: **In re Estate of Reinek**. 97 NCA No. 37. Dismissed in part, affirmed in part, and in part reversed and remanded with directions. Mues, Judge.

No. A-96-085: **State v. Matlock**. 97 NCA No. 38. Reversed and remanded with directions. Hannon, Judge.

No. A-96-154: **State v. Schlondorf**. 97 NCA No. 37. Affirmed. Inbody, Judge.

No. A-96-308: **Stratman v. Stratman**. 98 NCA No. 4. Affirmed as modified. Hannon, Judge.

No. A-96-368: **Urbach v. Industrial Chem. Labs**. 97 NCA No. 34. Affirmed in part, and in part reversed and remanded for a new trial. Hannon, Judge.

No. A-96-393: **Gatlin v. Churchill**. 98 NCA No. 9. Affirmed. Mues, Judge.

No. A-96-444: **Baker v. McGee**. No. 97 NCA 45. Affirmed. Hannon, Judge.

No. A-96-452: **Smith v. Smith**. 97 NCA No. 42. Affirmed in part as modified, and in part reversed. Mues, Judge.

No. A-96-516: **Maloley v. Glinsmann**. 97 NCA No. 49. Reversed and remanded for a new trial. Per Curiam.

No. A-96-529: **Cornhusker Casualty Co. v. County of Cherry**. 97 NCA No. 40. Affirmed. Mues, Judge.

No. A-96-575: **Kuchta v. Larson**. 97 NCA No. 44. Reversed and remanded. Miller-Lerman, Chief Judge.

Nos. A-96-579, A-96-1060: **In re Estate of Dobrovolny**. 97 NCA No. 40. Judgment in No. A-96-579 reversed, and cause remanded with directions. Judgment in No. A-96-1060 affirmed, and cause remanded with directions. Sievers, Judge.

No. A-96-587: **Foote Clinic, Inc. v. City of Hastings**. 97 NCA No. 47. Affirmed. Miller-Lerman, Chief Judge.

No. A-96-588: **Andersen v. American Red Cross**. 97 NCA No. 38. Reversed and remanded. Miller-Lerman, Chief Judge.

No. A-96-807: **Cook v. Cook**. 97 NCA No. 48. Affirmed. Hannon, Judge.

No. A-96-808: **Freeburg v. Artistic Woven Labels**. 97 NCA No. 49. Reversed and remanded with directions to dismiss. Irwin, Judge.

No. A-96-840: **Iwansky v. Iwansky**. 97 NCA No. 44. Affirmed. Sievers, Judge.

No. A-96-853: **Mathies v. Mathies**. 97 NCA No. 38. Affirmed in part, and in part reversed and remanded. Miller-Lerman, Chief Judge.

No. A-96-942: **Roach v. Campbell Soup Co**. 97 NCA No. 49. Affirmed. Hannon, Judge.

No. A-96-986: **State v. Kraupie**. 98 NCA No. 4. Appeal dismissed. Mues, Judge.

No. A-97-005: **State v. Sullivan**. 97 NCA No. 40. Affirmed in part, and in part vacated and remanded for resentencing. Mues, Judge.

No. A-97-015: **In re Interest of Ashley H. et al**. 98 NCA No. 1. Reversed and remanded with directions to dismiss. Miller-Lerman, Chief Judge.

No. A-97-032: **State v. Irwin**. 97 NCA No. 46. Affirmed. Sievers, Judge.

No. A-97-080: **State v. Journey**. 97 NCA No. 46. Affirmed. Inbody, Judge.

No. A-97-188: **Silveira v. William H. Harvey Co**. 97 NCA No. 48. Affirmed. Mues, Judge.

No. A-97-255: **State v. Provencher**. 97 NCA No. 49. Affirmed in part, and in part reversed. Irwin, Judge.

No. A-97-299: **State v. Kadavy**. 97 NCA No. 45. Affirmed. Mues, Judge.

No. A-97-398: **Pratt v. Martin**. 98 NCA No. 2. Reversed. Hannon, Judge.

No. A-97-405: **State v. Coffman**. 98 NCA No. 2. Affirmed. Miller-Lerman, Chief Judge.

No. A-97-410: **Whitney v. Union Pacific RR. Co**. 98 NCA No. 4. Affirmed. Sievers, Judge.

No. A-97-474: **State v. White**. 97 NCA No. 47. Reversed and remanded with directions. Inbody, Judge.

No. A-97-659: **Castoral v. Farmland Indus**. 98 NCA No. 4. Affirmed. Mues, Judge.

No. A-97-992: **State v. Yum**. 98 NCA No. 1. Reversed and remanded for further proceedings. Sievers, Judge.

CASES DETERMINED

IN THE

NEBRASKA COURT OF APPEALS

IN RE ESTATE OF EILEEN C. FOXLEY, DECEASED. JOHN FOXLEY, PERSONAL REPRESENTATIVE OF THE ESTATE OF EILEEN C. FOXLEY, DECEASED, APPELLEE, V. MICHAEL LUKE HOGAN, APPELLANT.

568 N.W.2d 912

Filed September 9, 1997. No. A-96-497.

1. **Wills.** Under Neb. Rev. Stat. § 30-2328 (Reissue 1995), an instrument which purports to be testamentary in nature is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator.
2. ____. A codicil is a supplement to, an addition to, or a qualification of an existing will.
3. ____. The testator's handwritings on a photocopy of the testator's validly executed will, if in compliance with Neb. Rev. Stat. § 30-2328 (Reissue 1995), constitute a valid holographic codicil to that will.

Appeal from the County Court for Douglas County: SAMUEL V. COOPER, Judge. Affirmed.

David L. Welch and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellant.

Charles F. Gotch and Michael K. Huffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellee.

SIEVERS, MUES, and INBODY, Judges.

MUES, Judge.

INTRODUCTION

Michael Luke Hogan appeals from a decision of the Douglas County Court admitting a purported holographic codicil for probate.

BACKGROUND

On February 8, 1985, the testator, Eileen C. Foxley, executed a valid will. The original will and a photocopy thereof, marked "photocopy" on each page, were in Foxley's possession. The relevant terms of the will provided that the bulk of Foxley's estate was to be divided among her six daughters in equal shares. On December 19, 1993, one of Foxley's daughters died, leaving her only child, Michael Luke Hogan, the appellant, surviving her.

Foxley died less than a year later. On the day of Foxley's death, two of her daughters found in the den of her home a folder containing Foxley's original will and the photocopy of the will. The photocopy of the will had been changed in the following manner on the first page:

ARTICLE I

My only children are William C. Foxley, Sarah F. Gress, John C. Foxley, Winifred F. Wells, Elizabeth F. Leach, Shiela F. Radford, Mary Ann Pirotte and ~~Jane F. Jones~~. her share to be divided to between 5 daughters E.F. 1-7-94

ARTICLE II

After consulting with my children, my personal representative

---

The third page had been changed as follows:

ARTICLE III

I hereby give, devise and bequeath all of the rest of my proper to my ~~six~~ 5 (6) daughters in equal shares.

ARTICLE IV

I hereby nominate and appoint my son, John C. Foxley, as the

Foxley's personal representative submitted the original will and the photocopy, alleged to be a codicil, for probate. Hogan objected to the admission of the photocopy of the will, alleging, inter alia, that it was not executed with the formalities required for a valid will or codicil. Trial was then had on the matter.

At trial, evidence was adduced that Foxley did not like Hogan. Foxley believed that Hogan had verbally, if not physi-

cally, abused the daughter. On January 7, 1994, approximately 3 weeks after the daughter died, Foxley approached one of her attorneys, James Schumacher, regarding an irrevocable trust that had been previously established. Foxley had learned that Hogan would take the daughter's share of the irrevocable trust, and she informed Schumacher that "she wanted [Hogan] bought out. She didn't want him as an ongoing beneficiary of that trust. . . . She didn't want to think about [Hogan] participating in that trust."

During this same conversation, Foxley and Schumacher also discussed Hogan's participation in Foxley's estate. Foxley "emphatically" indicated that she did not want Hogan participating in her estate and informed Schumacher that she would " 'take care of it.' " Schumacher explained that he had known Foxley for a number of years, and to him, the statement " 'I'll take care of it' " meant " 'butt out . . . [t]his is my business.' "

Foxley's daughter Winifred Wells testified that the way her mother handled her affairs did not surprise her. Wells explained that her mother had raised eight children on her own and was "used to handling her own affairs" and that "[s]he felt her own opinions were more savvy and meant more to her than most other people — whether they be professional people or her children." Wells explained that her mother regretted that in setting up the trust, she had overlooked the possibility that one of her daughters might predecease her. Wells confirmed that her mother was explicit that she did not want Hogan to participate in her estate.

The trial court, observing that "some mystery remains as to why . . . a woman of wealth would refrain from using the services of an attorney," found that Foxley had substantially, if not fully, complied with the requirements of a holographic codicil. Accordingly, the court admitted the photocopy and Foxley's original will to probate. Hogan timely appealed from this order. For the reasons set forth below, we affirm.

ASSIGNMENTS OF ERROR

Restated, Hogan alleges the trial court erred in finding that the photocopy of the will with the interlineations constituted a valid holographic codicil.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996); *In re Estate of Soule*, 248 Neb. 878, 540 N.W.2d 118 (1995).

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 set aside on appeal unless they are clearly wrong. *Richardson v. Mast*, 252 Neb. 114, 560 N.W.2d 488 (1997); *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996).

In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997); *Cotton v. Ostroski, supra*; *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993).

On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997); *In re Estate of Ackerman*, 250 Neb. 665, 550 N.W.2d 678 (1996).

DISCUSSION

The parties concede that Foxley's original 1985 will was executed with all of the formalities required by Neb. Rev. Stat. § 30-2327 (Reissue 1995) and was properly admitted to probate. It is also undisputed that the changes made on the photocopy of the will were not executed with the formalities required by § 30-2327, and thus, unless the changes made on the photocopy qualify it as a holographic document under Neb. Rev. Stat. § 30-2328 (Reissue 1995), the changes have no legal effect.

[1] Section 30-2328 in pertinent part provides: "An instrument which purports to be testamentary in nature but does not comply with section 30-2327 is valid as a holographic will, whether or not witnessed, if the signature, the material provisions, and an indication of the date of signing are in the handwriting of the testator . . . ."

The comment to § 30-2328 (Reissue 1989) provides, inter alia:

> This section enables a testator to write his own will in his handwriting. There need be no witnesses. By requiring only the "material provisions" to be in the testator's handwriting (rather than requiring, as some existing statutes do, that the will be "entirely" in the testator's handwriting) a holograph may be valid even though immaterial parts such as introductory wording be printed or stamped. A valid holograph might even be executed on some printed will forms if the printed portion could be eliminated and the handwritten portion could evidence the testator's will.

Hogan does not contend that § 30-2328 is applicable only to a holograph which purports to represent a complete and all-encompassing testamentary document. In other words, there is no suggestion in Hogan's appeal that § 30-2328 should not be applied to validate a holographic codicil, which, by definition, only supplements, adds to, or qualifies an existing will. See *Flint v. Panter*, 187 Neb. 615, 193 N.W.2d 279 (1971). Indeed, the term "will" found in § 30-2328 is defined in the Nebraska Probate Code to mean

> any instrument, including any *codicil* or other testamentary instrument complying with sections 30-2326 to 30-2338, which disposes of personal or real property, appoints a personal representative . . . , revokes *or revises* an earlier executed testamentary instrument, or encompasses any one or more of such objects or purposes.

(Emphasis supplied.) Neb. Rev. Stat. § 30-2209 (Reissue 1995).

It is undisputed that the alterations made on the photocopy of the will are in Foxley's handwriting, that the signature is in Foxley's handwriting, and that Foxley dated the instrument when she made the changes. Hogan also does not dispute that by crossing out the name "Jane F. Jones" and writing "her share to be divided to [sic] between 5 daughters," Foxley intended to exclude Hogan from her estate. See Neb. Rev. Stat. § 30-2343 (Reissue 1995) (if devisee who is related to testator predeceases testator, devisee's issue who survive testator take in place of deceased devisee). In fact, Hogan acknowledges that "[a]t trial, evidence was adduced that Eileen Foxley did not like Michael

Luke Hogan, did not want to have anything to do with him, and did not want him to receive anything from her estate." Brief for appellant at 7.

Notwithstanding, Hogan asserts that he is entitled to a portion of Foxley's estate because Foxley failed to comply with § 30-2328. Specifically, Hogan argues that the purported changes are invalid as a holographic codicil because the handwriting does not evidence any testamentary intent and the "material provisions" are not in Foxley's handwriting, both express prerequisites to a valid holograph under § 30-2328.

Testamentary Intent.

In support of his position, Hogan directs us to *Cummings v. Curtiss*, 219 Neb. 106, 361 N.W.2d 508 (1985). In that case, a client, who was one of the two sole beneficiaries named in a will, sued his attorney, claiming that the attorney had made fraudulent misrepresentations. The will had been executed on a printed will form, and relatives of the testator contested the validity of the will. The relatives subsequently approached the client with a settlement offer. The client's attorney expressed reservations about the validity of the will and encouraged the client to accept the settlement offer. After accepting the offer, the client learned of the statute on holographic wills and sued his attorney, claiming that the attorney had falsely represented that the will was invalid. The district court granted the attorney's motion for summary judgment, and the client appealed.

After examining cases from other jurisdictions, the Supreme Court stated that "case law based on similar statutes in other states indicates that only the portion of the will actually in the handwriting of the testator is to be considered. . . . [Citations omitted.] The important determination is whether 'the handwritten portion clearly express[es] a *testamentary* intent.' " *Id.* at 109, 361 N.W.2d at 510. The handwritten portion of the document read:

> "Nebraska
> Pierce
> Ren J Kroupa
> For helping me and taking care of me
> Frank Kroupa Jr. and Bobby Cummings

w.r.o.s.
the court
who the courts decides [sic]
Pierce Pierce
Nebraska 29 Jan 79
Witness is chief of police Gordon Halbmayer [sic]
who i gave this to keep safe for me.
Ren J Kroupa."

Id. at 109, 361 N.W.2d at 510-11.

In affirming the decision of the district court, the Supreme Court stated that "[b]ased on this language alone, it is *doubtful* that the requisite testamentary intent was demonstrated and that all material portions of a will were present." (Emphasis supplied.) *Id.* at 109, 361 N.W.2d at 511.

In reaching its conclusion, our Supreme Court relied in part on *Matter of Estate of Johnson*, 129 Ariz. 307, 630 P.2d 1039 (1981) (finding that holographic will, executed on preprinted form, was invalid because when printed words were eliminated no testamentary intent was evidenced). However, in *Matter of Estate of Muder*, 159 Ariz. 173, 765 P.2d 997 (1988), the Arizona Supreme Court revisited the subject of wills written on preprinted forms. The court, in finding that the document was a valid holographic will, noted:

> We believe that our legislature, in enacting the present statute . . . intended to allow printed portions of the will form to be incorporated into the handwritten portion of the holographic will as long as the testamentary intent of the testator is clear and the protection afforded by requiring the material provisions be in the testator's handwriting is present.
>
> . . . .
>
> . . . We hold that a testator who uses a preprinted form, and in his own handwriting fills in the blanks by designating his beneficiaries and apportioning his estate among them and signs it, has created a valid holographic will. Such handwritten provisions may draw testamentary context from both the printed and the handwritten language on the form. We see no need to ignore the preprinted words when the testator clearly did not, and the statute does not require us to do so.

> . . . "If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt upon purely technical reasoning a construction which would result in invalidating such wills . . . ."

(Emphasis omitted.) *Id.* at 176, 765 P.2d at 1000.

The language used by the Nebraska Supreme Court in *Cummings* is less than a holding that the will involved was invalid. Whether the court would have declared it so if directly faced with the issue, we cannot speculate. Moreover, whether our court would do so today, given the apparent change in Arizona case law upon which our court in part relied, is equally conjectural. However, the facts of our case are clearly distinguishable from *Cummings* in any event. Of course, the major difference is that we have an original, validly executed will to begin with. Moreover, unlike the testator in *Cummings*, by crossing out "Jane F. Jones" and writing "her share to be divided to between 5 daughters" on the photocopy, Foxley clearly demonstrated a testamentary intent. Even Hogan has no doubt about his grandmother's intent.

The court in *Succession of Burke*, 365 So. 2d 858 (La. App. 1978), examined similar language and reached the same conclusion as we have. In that case, the court was faced with the issue of the validity of a will written on a preprinted form. The court observed that in a previous case it had held that a will was invalid because the phrase " 'All to my sister' " did not evidence a testamentary intent. *Id.* at 860. In the case that was before the court in *Succession of Burke*, the testator's will read, " '[T]o my sister Delia . . . my interest in property at 6315 West End Blvd . . . and Insurance . . . . To be shared equally with my other sister . . . .' " *Id.* at 859. The court found that the "writing speaks of decedent's immovable property . . . and insurance and says it is 'to be shared' by two sisters. Thus that writing . . . does contain, in a context referable to the testator's intent, a verb." *Id.* at 860. Foxley's use of the phrase "to be *divided*" similarly contains a verb in a context referable to her intent. (Emphasis supplied.)

The evidence established that Foxley did not want Hogan to inherit from her estate and that Foxley told her attorney that she " 'would take care of it.' " Because Hogan had inherited the daughter's share from the trust, Foxley knew that Hogan would

inherit under her will unless she changed her will. Foxley crossed out the daughter's name and wrote that the daughter's share was to be divided among Foxley's five remaining daughters. While it may be perplexing that Foxley chose to take care of this herself rather than have her attorney make the changes, her testamentary intent was amply demonstrated.

Material Provisions.

Relying on *In re Estate of Sola*, 225 Cal. App. 3d 241, 275 Cal. Rptr. 98 (1990), Hogan argues that the codicil is invalid because the material provisions are not in Foxley's handwriting. In *In re Estate of Sola*, the testator had executed a valid will in 1963. The testator's attorney kept the original will and gave the testator a copy. In 1986, one of the testator's brothers died and left a portion of his estate to his nieces and nephews. After seeing how the nieces and nephews behaved relative to the estate, the testator wanted to ensure that they did not receive anything from his own estate. To effect this result, on the copy of his will the testator scratched out certain names and wrote in the name of another brother. In rejecting the validity of the change, the court held that "[w]here the handwriting in itself lacks testamentary intent and substance and has meaning only in relationship to the typewritten words it relates to, there is no complete testamentary document that can be deemed a holographic will." *Id.* at 247, 275 Cal. Rptr. at 101. In distinguishing an earlier case, the court stated, "The handwritten portions on [the testator's] purported will, however, do not merely identify, as they did in *Nielson*, the portions of the attested will to be revoked or incorporated by reference. Rather . . . the handwritten portions cannot be understood without reference to the typewritten words." *Id.* at 248, 275 Cal. Rptr. at 102.

Hogan argues that "Eileen Foxley's handwritten additional words—'her share to be divided to between 5 daughters'—cannot be understood without reference to the original Will's typewritten words. Standing alone, these handwritten words have no meaning. Thus, the handwritten portion in question fails to qualify as a holographic will or codicil." Brief for appellant at 16.

Unlike the handwriting in *In re Estate of Sola*, as we concluded above, Foxley's handwritten changes do evidence a testamentary intent. The "material provisions," insofar as the pho-

tocopy is concerned, are the changes Foxley made in her handwriting. Hogan is not entirely correct in arguing that we do not know what "her share" means without reference to the original will. The line through the name of Jane F. Jones also appears on the photocopy, and it would be absurd to say that the *line* through the name can legally be considered because it is in Foxley's handwriting, but the name through which the line is drawn must be ignored. Even were we to accept as correct that Foxley's handwritten words take on meaning only by reference to the original will, that is the nature of codicils, holographic or otherwise.

> [2] A "codicil" in reality, is a will or testamentary instrument. However it is not a new will; a "codicil" is a supplement to, an addition to or qualification of, an existing will, made by the testator, to alter, enlarge, or restrain the provisions of the will, to explain or republish it, or to revoke it. . . . A codicil is dependent for its life and force on the life and force of the will to which it is an adjunct. It does not supersede the will, as an after-made will would do; it is a part of the will; and both the codicil or codicils and the will make only one will.

94 C.J.S. *Wills* § 1 b. at 678-79 (1956).

> A codicil republishes the will, and the several clauses of a will and codicil should, if possible, be harmonized so as to give effect to every provision of each instrument, provided that such construction is not inconsistent with the general intent and purpose of the testator as gathered from the entire instrument.

79 Am. Jur. 2d *Wills* § 680 at 765 (1975).

The fact that Foxley chose to make her changes on the photocopy of her will identifies the document as a codicil to her will. Hogan would have us view these changes as if Foxley's handwriting had appeared on a blank piece of paper reading, "———— her share to be divided to between 5 daughters E.F. 1-3-94 —— 5." But we have much more than that before us. We have changes made in Foxley's handwriting, next to the obliteration of the name "Jane F. Jones," appearing in a specific sentence in a specific paragraph of a photocopy of a validly executed will.

Nonetheless, whether the photocopy with the handwriting and with the daughter's name obliterated is read alone or whether it and the will are read together, it is undeniably clear that "her share" is Jane F. Jones' share. Because the daughter had predeceased her, Foxley intended to distribute "her share" among the daughter's surviving sisters.

Incorporation by Reference.

Hogan also claims error in the county court's application of Neb. Rev. Stat. § 30-2335 (Reissue 1995) in this case. In that connection the county court found, "A codicil, by definition, necessarily refers to the original will. By placing the holographic entries on a photocopy of her will, the Testatrix made an incorporation by reference. This is contemplated by Neb. Rev. Stat. Sec. 30-2335 (Reissue 1989)." Hogan argues that the county court thus allowed "an invalidly executed nontestamentary document to incorporate a validly executed Will . . . . This is clearly wrong as a matter of law." Brief for appellant at 17-18.

Our previous discussion addresses and rejects the underlying premise of Hogan's argument, that being that the photocopy is an "invalidly executed nontestamentary document." We believe the writings and obliterations on the photocopy of Foxley's will, under the circumstances of this case, comply with the requirements of § 30-2328 and constitute a valid holographic codicil to Foxley's 1985 validly executed will. Accordingly, the document with those writings and changes was properly admitted to probate along with Foxley's will.

[3] To further explain, the validity of Foxley's codicil does not depend upon whether it successfully incorporated the original will by reference. Rather, its validity is determined by whether it complies with the requirements for holographic testamentary instruments under § 30-2328. It does. Granted, a codicil takes on meaning only by reference to an existing will which it modifies. Thus, the will intended to be altered by the codicil must be identifiable. By placing her handwritings on a photocopy of her will, Foxley chose a simple yet very effective method to unmistakably evidence her intent in this regard. Since our affirmance of the county court's decision does not depend upon whether Foxley accomplished a valid incorpora-

tion of the original will into the codicil by reference, we need not decide the applicability of § 30-2335 in this case.

CONCLUSION

Although we have not discussed every case cited by Hogan, we have carefully considered them along with similar cases in disposing of this appeal. We have found that the law in this area is continuing to develop and change. See, e.g., *In re Estate of Sola*, 225 Cal. App. 3d 241, 275 Cal. Rptr. 98 (1990); *Matter of Estate of Muder*, 159 Ariz. 173, 765 P.2d 997 (1988); *Estate of Nielson*, 105 Cal. App. 3d 796, 165 Cal. Rptr. 319 (1980); *Scott v. Schwartz*, 469 S.W.2d 587 (Tex. Civ. App. 1971); *Estate of Erbach*, 41 Wis. 2d 335, 164 N.W.2d 238 (1969); *Poole v. Starke*, 324 S.W.2d 234 (Tex. Civ. App. 1959). However, in those cases found wherein the purported holographic documents were invalidated, the courts relied in part upon a determination that the handwriting, standing alone, did not evidence a testamentary intent. As discussed earlier in this opinion, we believe the changes made by Foxley, which importantly include the striking out of her deceased daughter's name, did evidence her testamentary intent, and this, in our view, is a significant distinction.

The general comment to the Nebraska Probate Code relating to wills provides in pertinent part: "If the will is to be restored to its role as the major instrument for disposition of wealth at death, its execution must be kept simple. The basic intent of these sections is to validate the will whenever possible." Neb. Rev. Stat. ch. 30, art. 23, part 5 (Reissue 1989).

> [T]he primary legislative purpose of the holographic will statute [is] the prevention of "fraudulent will-making and disposition of property" by virtue of the recognized difficulty of forging an entire handwritten instrument. . . . "[The holographic provision] owes its origin to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that, therefore, the requirement that it should be in the testator's handwriting would afford protection against a forgery of this character."

Estate of Black, 30 Cal. 3d 880, 884, 641 P.2d 754, 756, 181 Cal. Rptr. 222, 224 (1982).

"An overly technical application of the holographic will statute to handwritten testamentary dispositions, which generally are made by persons without legal training, would seriously limit the effectiveness of the legislative decision to authorize holographic wills." *Id.*

In the present case, there is no suggestion of fraud, undue influence, lack of testamentary capacity, or mistaken intent. All the statutory safeguards for preventing fraud have been complied with. The changes were in Foxley's handwriting and were signed and dated by her. Nullification of Foxley's handwritten codicil would result in a portion of Foxley's estate passing to a person whom she did not want to receive it. Her intentions were emphatically, unequivocally, and repeatedly demonstrated by her spoken words, her writings, and her actions. Even Hogan candidly admits that Foxley's desire was to eliminate him as a recipient of her estate. Most importantly for our purposes, her intent was expressed in a valid holograph, which the Legislature, by adopting § 30-2328, has directed be given effect as a testamentary instrument. The judgment of the county court admitting this codicil to probate is correct and is affirmed.

AFFIRMED.

CAROL MARIE HASSENSTAB, APPELLEE, V.
THOMAS KELLY HASSENSTAB, APPELLANT.
570 N.W.2d 368

Filed September 23, 1997. No. A-96-571.

1. **Modification of Decree: Appeal and Error.** The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
2. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action.
3. **Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred.
4. **Child Custody: Visitation.** In determining a child's best interests in custody and visitation matters, Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 1994), provides that the factors to be considered shall include, but not be limited to, the following: (a) the rela-

tionship of the minor child to each parent prior to the commencement of the action or any subsequent hearing; (b) the desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning; (c) the general health, welfare, and social behavior of the minor child; and (d) credible evidence of abuse inflicted on any family or household member.

5. **Child Custody.** A court may consider other factors in determining a child's best interests in custody matters, including the moral fitness of the child's parents and the parents' sexual conduct.
6. ____. The best interests of the minor child remain the court's paramount concern in deciding custody issues.
7. **Child Custody: Evidence.** In determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What courts are interested in are the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child.
8. **Child Custody: Proof.** The Nebraska Supreme Court has repeatedly held, albeit not in the context of a homosexual relationship, that a parent's sexual activity is insufficient to establish a material change in circumstances justifying a change in custody absent a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity.
9. ____: ____. Sexual activity by a parent, whether it is heterosexual or homosexual, is governed by the rule that to establish a material change in circumstances justifying a change in custody there must be a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity and that a change of custody is in the child or children's best interests.

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

Mark J. Milone and John A. Kinney, of Frost, Meyers, Guilfoyle & Govier, for appellant.

Edith T. Peebles and Lisa M. Line, of Brodkey, Cuddigan & Peebles, for appellee.

HANNON, MUES, and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Thomas Kelly Hassenstab appeals from an order entered by the Douglas County District Court denying his application to modify custody from Carol Marie Hassenstab to him. For the reasons set forth herein, we affirm the order of the district court.

STATEMENT OF FACTS

Thomas and Carol were married on September 13, 1986. One child was born of this marriage, Jacqueline A. Hassenstab, on March 28, 1986. On May 24, 1990, the Douglas County District Court entered an order dissolving the parties' marriage and awarding custody of Jacqueline to Carol with reasonable rights of visitation to Thomas.

On June 13, 1995, Thomas filed an "Application to Modify Decree of Dissolution of Marriage" requesting, among other things, that the court modify the prior custody determination by awarding custody of Jacqueline to Thomas. Carol filed an answer which generally denied the allegations contained in Thomas' application to modify and also filed a cross-petition requesting an increase in child support and attorney fees.

A trial on the application to modify and Carol's cross-petition was held on March 22, 1996. The evidence adduced at trial established that following the parties' divorce, Carol had been involved in a homosexual relationship. Additionally, Thomas testified to Carol's alleged suicide attempts which he contends occurred prior to and during the marriage. Carol testified that she attempted suicide on one occasion which was 7 years prior to the modification hearing and prior to the time that the dissolution decree became final. In describing the suicide attempt, Carol stated she "fell" out of a car traveling approximately 40 miles per hour. Additionally, the evidence did establish that Carol has sought counseling for several reasons, including her confusion over her sexual identity, but that she was not in counseling at the time of the modification hearing.

The trial judge met with Jacqueline in the court's chambers prior to submission of the case for determination. During the meeting, Jacqueline expressed a desire to remain in her mother's custody.

The district court subsequently entered an order dismissing Thomas' application to modify, modifying the original dissolution decree to increase Thomas' child support obligation, and awarding Carol $1,250 in attorney fees. Thomas timely appealed to this court regarding the dismissal of his application to modify.

ASSIGNMENTS OF ERROR

On appeal, Thomas contends that the district court erred in finding that no substantial and material change in circumstances had taken place since the entry of the dissolution decree showing that Carol was unfit to retain custody of Jacqueline or that Jacqueline's best interests required a modification of her custody to Thomas. Thomas does not appeal the court's order increasing his child support obligation or the award of attorney fees.

STANDARD OF REVIEW

[1] "The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion." *Adrian v. Adrian*, 249 Neb. 53, 56, 541 N.W.2d 388, 390 (1995).

DISCUSSION

Thomas contends that the district court erred in finding that no substantial and material change in circumstances had taken place since the entry of the dissolution decree that showed that Carol was unfit to retain custody of Jacqueline or that Jacqueline's best interests required a modification of her custody to Thomas.

[2,3] Ordinarily, custody of a minor child will not be modified unless there has been a material change of circumstances showing that the custodial parent is unfit or that the best interests of the minor child require such action. *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996); *Krohn v. Krohn*, 217 Neb. 158, 347 N.W.2d 869 (1984). The party seeking modification of child custody bears the burden of showing that a material change in circumstances has occurred. *Smith-Helstrom, supra*; *Krohn, supra.*

[4] In determining a child's best interests in custody and visitation matters, Neb. Rev. Stat. § 42-364(2) (Cum. Supp. 1994), provides that the factors to be considered shall include, but not be limited to, the following:

> (a) The relationship of the minor child to each parent prior to the commencement of the action or any subsequent hearing;

(b) The desires and wishes of the minor child if of an age of comprehension regardless of chronological age, when such desires and wishes are based on sound reasoning;

(c) The general health, welfare, and social behavior of the minor child; and

(d) Credible evidence of abuse inflicted on any family or household member.

[5,6] Additionally, a court may consider other factors in determining a child's best interests in custody matters, including the moral fitness of the child's parents and the parents' sexual conduct. *Smith-Helstrom, supra*; *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981). However, the best interests of the minor child remain the court's paramount concern in deciding custody issues. *Smith-Helstrom, supra.*

[7] First, we address Thomas' contentions that Carol is an unfit mother by reason of her alleged suicide attempts, alcohol consumption, and other psychological difficulties as well as her failure to provide a stable home environment.

> "[I]n cases of this nature, it appears to us that in determining whether the custody of a minor child should be changed, the evidence of the custodial parent's behavior during the year or so before the hearing on the motion to modify is of more significance than the behavior prior to that time. What we are interested in is the best interests of the child now and in the immediate future, and how the custodial parent is behaving now is therefore of greater significance than past behavior when attempting to determine the best interests of the child."

Kennedy v. Kennedy, 221 Neb. 724, 727-28, 380 N.W.2d 300, 303 (1986) (quoting *Riddle v. Riddle*, 221 Neb. 109, 375 N.W.2d 143 (1985)).

The evidence was that a suicide attempt occurred 7 years prior to the modification hearing and prior to the time that the dissolution decree became final in which Carol "fell" out of a car traveling approximately 40 miles per hour. Additionally, the evidence did establish that Carol has sought counseling for several reasons, including her confusion over her sexual identity, but that she was not in counseling at the time of the modification hearing.

With regard to Carol's alcohol consumption and throwing loud parties, the record contains no evidence that Jacqueline has ever observed Carol in an intoxicated state or that Carol's alcohol consumption has adversely affected Jacqueline or endangered the child in any way. Furthermore, although Carol and Jacqueline have changed residences approximately four times and Carol has had several different roommates since the divorce decree was entered in 1990, there is no evidence that the change of residences has been harmful to Jacqueline. To the contrary, Carol testified that each move resulted in improved living conditions and that Jacqueline has never had to change schools because of the moves. Thus, based upon the evidence, Thomas has not shown that the above factors were a material change in circumstances requiring a change of custody.

[8] Second, we address Thomas' concerns over the effect that Carol's homosexuality has on Jacqueline. The Nebraska Supreme Court has repeatedly held, albeit not in the context of a homosexual relationship, that a parent's sexual activity is insufficient to establish a material change in circumstances justifying a change in custody absent a showing that the minor child or children were exposed to such activity or were adversely affected or damaged by reason of such activity. *Smith-Helstrom, supra*; *Kennedy, supra*; *Krohn, supra* (where there was no showing that children were exposed to sexual activity or otherwise damaged, mother could retain custody of children). See, also, *Anderson v. Anderson*, 5 Neb. App. 22, 554 N.W.2d 177 (1996). Thus, the issue is whether this rule is to be applied in the context of a homosexual parent.

[9] The South Dakota Supreme Court, in *Van Driel v. Van Driel*, 525 N.W.2d 37 (S.D. 1994), held that a custodial parent's homosexual relationship does not render that parent unfit or require an award of custody to the other parent absent a showing that the custodial parent's conduct has had some harmful effect on the children and that a change of custody is in the child's or children's best interests. We agree that sexual activity by a parent, whether it is heterosexual or homosexual, is governed by the rule that to establish a material change in circumstances justifying a change in custody there must be a showing that the minor child or children were exposed to such activity or

were adversely affected or damaged by reason of such activity and that a change of custody is in the child or children's best interests.

In some cases, courts of other jurisdictions have denied custody and liberal visitation to a homosexual parent. However, these cases involved situations where the children have been exposed to the parent's homosexual activity or where, for other reasons, placing the children in the homosexual parent's custody was not in the children's best interests. For example, in *Hall v Hall*, 95 Mich. App. 614, 615, 291 N.W.2d 143, 144 (1980), the appellate court affirmed the trial court's placement of the minor children with the father rather than with the homosexual mother where the evidence established that, given a conflict, the mother would "unquestionably choose the [homosexual] relationship over the children."

In *In re Marriage of Wiarda*, 505 N.W.2d 506, 508 (Iowa App. 1993), the appellate court affirmed the trial court's grant of custody of the minor child to the father where "[i]t appears from the record that [the mother's] relationship with her [female] friend has not had a calming effect upon either the children or upon the difficult problems of the breakup of this marriage" and "[i]t is certain that [the mother's] friend's presence in this matter has caused twelve-year-old Sarah certain anxieties and, from Sarah's viewpoint, has contributed to the continued breakdown of the relationship between [the mother and father]."

In *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992), the appellate court reversed the lower court's grant of liberal visitation to a homosexual mother where the evidence showed that the mother had allowed the minor children to get into bed to sleep with the mother and her lover, sometimes when the mother was not clothed. Further, the evidence established that when one of the children entered the mother's bedroom to find the mother and her lover in an intimate position, the mother did not stop the sexual act to comfort her son. Likewise, in *Wolff v. Wolff*, 349 N.W.2d 656 (S.D. 1984), the appellate court reversed the award of custody of a minor child to the homosexual father where the evidence showed that some homosexual acts had been performed in the presence of the son and that the father

allowed the person involved in those acts to babysit the minor child.

The case at bar is distinguishable from the aforementioned cases because, although there was evidence that Carol and her partner would engage in sexual activity at times when Jacqueline was in Carol's residence and that Jacqueline was generally aware of her mother's homosexual relationship, there was no showing that the daughter was directly exposed to the sexual activity or that she was in any way harmed by the homosexual relationship between Carol and her partner. Because the evidence in the case at bar simply does not establish any harmful effect on Jacqueline because of Carol's homosexual relationship, there has been no showing of a material change of circumstances.

Furthermore, the evidence does not establish that Jacqueline's best interests require a change of custody. At the trial, Jacqueline was described as a happy, self-assured, and confident child. Thomas characterized Jacqueline as "a very loving, fun, special daughter." He further stated that she is "very, very happy, very joyful, very spirited." Other witnesses testified that Jacqueline is dressed in clean clothes which are appropriate for the weather, she is well-kept, and her hair is combed. The record further reflects that Jacqueline is a "B" student and has few discipline problems.

REQUEST FOR ATTORNEY FEES

Carol has filed a motion requesting that attorney fees be awarded to her for the cost of prosecuting this appeal. The award of attorney fees in a dissolution action involves consideration of such factors as the nature of the case, the amount involved in the controversy, the services performed, the results obtained, the length of time required for preparation of the case, the skill devoted to preparation and presentation of the case, the novelty and difficulty of the questions raised, and the customary charges of the bar for similar services. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996); *Venter v. Venter*, 249 Neb. 712, 545 N.W.2d 431 (1996). Considering these factors, an award of attorney fees toward Carol's cost of defending this appeal is warranted. Consequently, Carol's request for attorney fees is granted in the amount of $1,000.

CONCLUSION

In sum, Thomas has failed to meet his burden of proving a material change of circumstances necessitating a change of Jacqueline's custody. Therefore, the order of the district court is affirmed.

AFFIRMED.

MUES, Judge, concurring.

I write simply to clarify that I have no philosophical disagreement with the general tenor of the dissent and in particular with its conviction that a child's exposure to parental conduct which is at odds with the family moral code impairs that child's moral training, including his or her reactions to sexual yearnings. While I pretend no psychological expertise, common sense and experience suggest that is true. And I believe it to be true whether the conduct in question is an indiscreet heterosexual *or* homosexual extramarital relationship.

If this case had involved Carol's live-in relationship with a male, I expect our decision to affirm would have passed with little note. That decision is certainly consistent with current legal precedent in such matters, whether morally correct or not, and I am reluctant to suggest that a different rule be applied in this instance, particularly on the evidence before us.

Our standard of review is limited to judging the trial court's decision for an abuse of discretion. The evidence presented here, to which that standard must be applied, is that knowledge of her mother's sexual relationship has had no harmful effect on Jacqueline. However difficult my sense of the "common" might make my understanding of the "uncommon," I simply cannot ignore that evidence.

HANNON, Judge, dissenting.

I must respectfully dissent from that portion of the opinion which does not award custody to Thomas.

The record shows that both parties have a healthy and good relationship with their daughter, but Thomas' conduct since the divorce has been more mature and settled than Carol's. This difference alone would not justify modifying the previous custody order. However, the record shows that after the decree in 1990, Carol openly lived in a homosexual relationship and that she

and her lover have discussed homosexual relationships with the child. While Carol testified she no longer engages in lesbian relationships, the record is clear that she continued the relationship for 3 months after Thomas filed the application to modify. It seems to me this case clearly focuses on the question of the effect the establishment of a homosexual relationship by a custodial parent should have upon child custody when that activity is recognized by the people involved as a serious moral wrong.

The majority cites the often-stated rule that the court may consider the moral fitness of the child's parents and the parents' sexual conduct. See *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). In our diverse society, we are often confronted with the question of which moral code to apply. I think courts must apply the moral code to which the parties subscribe. In this case, both parties have outwardly subscribed to the Catholic faith since before they were married, and they are sending Jacqueline to a parochial school. The record establishes that both parties regard the practice of homosexuality as morally wrong.

True, Carol did not engage in sexual activity in front of Jacqueline, but both she and her lover discussed homosexual relationships with the child. If Jacqueline does not now understand her mother's conduct, she certainly will within a few short years. At school and at home, Jacqueline will eventually be taught her mother's conduct was morally wrong.

I am convinced that parents can teach their moral code to their children only by quietly living that code in front of them, not by preaching at them or sending them to be formally instructed in it. With regard to this family's moral code, Carol has obviously set a horrible example. When young people raised with a moral code similar to that which the parties to this action apparently subscribe are confronted with natural sexual yearnings, they are usually fortified by moral education and by their observation of the monogamous, heterosexual relationship of their parents. I am convinced that a child's observation of his or her parent's conduct which is at odds with the family moral code seriously affects the child's reaction to his or her sexual yearnings during the formative years. If a parent commits serious and prolonged moral indiscretions in such a way that his or

her child will learn of them, it is foolish to think the moral education of that child will not be seriously damaged. I think the record shows Carol's conduct will necessarily impair Jacqueline's moral training; therefore, it is in Jacqueline's best interests that custody be modified.

JOYCE S., APPELLEE, V. FRANK S., APPELLANT.

571 N.W.2d 801

Filed September 23, 1997. No. A-96-749.

1. **Parental Rights: Courts: Jurisdiction.** Whenever termination of parental rights is placed in issue by the pleadings or evidence, the district court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the district court is a more appropriate forum.
2. **Jurisdiction.** Parties cannot confer subject matter jurisdiction upon the court by consent or acquiescence.
3. **Juvenile Courts: Appeal and Error.** Juvenile court 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.
4. **Child Custody: Appeal and Error.** An appellate court reviews child custody determinations de novo on the record; such determinations are initially entrusted to the discretion of the trial judge.
5. **Rules of Evidence: Parental Rights.** The Nebraska Evidence Rules do not apply in termination actions under the Nebraska Juvenile Code.
6. **Rules of Evidence.** The Nebraska rules of evidence apply to all actions in district court except those in which a judge may act summarily.
7. **Parental Rights: Evidence: Proof.** In cases of termination of parental rights under Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 1996), the standard of proof must be by clear and convincing evidence.
8. **Judgments: Judicial Notice.** Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
9. **Judicial Notice: Records: Rules of Evidence.** An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1995).
10. **Judicial Notice: Records.** A judge cannot consider testimony taken at a previous trial in a subsequent trial unless such testimony is admitted into evidence.
11. **Rules of Evidence: Testimony.** Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995) provides for the admission of the testimony of a witness given at a prior proceeding if the terms of that statute are met.

12. **Judicial Notice: Records.** As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.
13. **Convictions: Evidence: Proof.** Evidence of a final judgment entered after a trial adjudging a person guilty of a crime is admissible to prove any fact essential to sustain the conviction.
14. **Expert Witnesses: Proof.** A testifying expert may not be made a conduit for hearsay.
15. **Expert Witnesses: Records: Hearsay.** The fact that an expert relied on records in forming his or her opinion does not transform the records from inadmissible hearsay to admissible evidence.
16. **Guardians Ad Litem.** A guardian ad litem may be a legal expert, but a person appointed a guardian ad litem is not necessarily an expert on child welfare.
17. **Guardians Ad Litem: Evidence: Appeal and Error.** The primary function of the guardian ad litem is to give the judge the necessary information by way of admissible evidence so the judge may issue an order which is in the best interests of the ward and which will be upheld on appeal. If the court does not issue such an order, the guardian ad litem should appeal.
18. **Guardians Ad Litem: Evidence: Hearsay.** When a guardian ad litem's report does not contain objectionable hearsay, it is an efficient means of communicating the facts that the guardian has learned to the parties and to the judge, if properly admitted into evidence, but a report is not somehow made admissible because it was prepared by a guardian ad litem appointed by a court pursuant to a statute. Hearsay within such reports remains hearsay.
19. **Parental Rights: Appeal and Error.** In reviewing a termination case held in the district court, an appellate court reviews the record de novo to determine whether the district court abused its discretion.
20. **Parental Rights.** Neither criminal conduct nor imprisonment alone necessarily justifies permanently depriving a parent of his or her rights to a child.
21. ____. The parent's inability to perform his or her obligation by reason of imprisonment or the nature of the crime is relevant to the issue of the parent's fitness.
22. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication.
23. **Modification of Decree.** If, in a domestic relations case, circumstances have changed, a former decree may be modified in light of those circumstances.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

James T. Gleason, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellant.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

HANNON, Judge.

In order to protect the parties' privacy, we will avoid using the parties' last name in this opinion. In a proceeding for the modification of a divorce decree in the district court, Frank S. sought supervised visitation of his only child and recalculation of child support. Joyce S., his former spouse, cross-petitioned, praying that Frank's parental rights be terminated on the basis that Frank had been convicted of sexually abusing the child. The trial court terminated his parental rights under Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 1994), thereby rendering the other issues moot. Frank appeals. He argues that the trial court erred in terminating his parental rights because Joyce did not prove the elements necessary for termination of parental rights under § 42-364(7) and that the material circumstances have not changed since the dissolution decree was entered. He contends that the district court erred, depriving him of his constitutional rights, by taking judicial notice of certain court records and by admitting hearsay evidence included in the guardian ad litem's report as well as the guardian's opinion. We conclude that while the trial court erroneously admitted into evidence a great deal of hearsay, upon a de novo trial by this court, not considering the improperly noticed court records, the inadmissible hearsay evidence, or the guardian's opinion, we conclude that a material change of circumstances exists and that the remaining admissible evidence clearly and convincingly justified the termination of Frank's parental rights under § 42-364(7). Accordingly, we affirm.

PRELIMINARY CONSIDERATION

We can find no cases where a district court has terminated parental rights under § 42-364(7). Apparently, before the present version of § 42-364(7) was adopted, the district court did not have the authority to terminate parental rights in a dissolution action. See, *Linn v. Linn*, 205 Neb. 218, 286 N.W.2d 765 (1980); *Sosso v. Sosso*, 196 Neb. 242, 242 N.W.2d 621 (1976); *Perkins v. Perkins*, 194 Neb. 201, 231 N.W.2d 133 (1975). Because this is a case of first impression under § 42-364(7), we find it necessary to dispose of certain preliminary questions that seem to be a necessary background to a proper consideration of the errors assigned. These questions are as follows: (1) Were the

statutory requirements enabling the district court to acquire jurisdiction to terminate parental rights under § 42-364(7) followed? (2) What is the applicable standard of review for this court to follow in this appeal? (3) Do the rules of evidence apply in termination proceedings maintained in district court? (4) What burden of proof must a party seeking to terminate parental rights under § 42-364(7) carry? In addition, before reviewing the case de novo, it also seems advisable to determine whether the considerable hearsay in the bill of exceptions may be considered in reviewing the trial court's decision. Thus, two other preliminary questions arise. They are as follows: (5) May the court take judicial notice of Frank's criminal case? (6) Does the guardian ad litem's report constitute inadmissible hearsay, and is his opinion inadmissible as being based thereon?

Jurisdiction Under § 42-364(7).

[1] This termination proceeding is maintained under § 42-364(7), which provides in significant part:

> Whenever termination of parental rights is placed in issue by the pleadings or evidence, the [district] court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the district court is a more appropriate forum. In making such determination, the court may consider such factors as cost to the parties, undue delay, congestion of dockets, and relative resources available for investigative and supervisory assistance.

[2] Our concern arises because neither the transcript nor the bill of exceptions contains a clear finding by the district court as required by statute in order for the district court to retain jurisdiction of the termination proceedings. The only indication that the trial court might have made the necessary findings is contained in a journal of the court's final decision. The journal states: "The parties have stipulated, and the Court has previously determined, that this action should proceed in District Court rather than in Juvenile Court, an optional forum under the statute." The parties cannot confer subject matter jurisdiction upon the court by consent or acquiescence. *In re Adoption of Kassandra B. & Nicholas B.*, 248 Neb. 912, 540 N.W.2d 554 (1995). However, the evidence would support a finding by the

trial court that the factors prescribed by § 42-364(7) exist and that the district court was the more appropriate forum. Therefore, we conclude that the trial court's determination that "this action should proceed in District Court rather than in Juvenile Court" is tantamount to a finding that the district court is the more appropriate forum and that therefore, the district court had jurisdiction.

Standard of Review.

[3] Juvenile court cases are reviewed de novo on the record, and an appellate court is required to reach a conclusion independent of the trial court's findings; however, where evidence is in conflict, an appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of facts over another. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

[4] This appeal is not from the juvenile court but from a dissolution action in district court. The Supreme Court has frequently stated the standard of review for child custody determinations to be the following:

> An appellate court reviews child custody determinations de novo on the record. Such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of discretion. Where credible evidence is in conflict on a material issue of fact, an appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Smith-Helstrom v. Yonker, 249 Neb. 449, 458, 544 N.W.2d 93, 100 (1996).

There may be a slight academic difference between the two standards of review, but since we agree with the material findings of fact made by the trial court, any difference in the standard of review could have no bearing on the outcome of this appeal.

We shall review the evidence de novo, and as required, we shall reach a conclusion independent of the lower court's ruling on questions of law. *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997). As will be clear later, the evidence does not

pose the question of which version of the facts should be accepted over another, but, rather, whether the facts in evidence clearly and convincingly support the inferences necessary to establish the facts justifying termination of Frank's rights under § 42-364(7).

Rules of Evidence.

[5] This question arises because many of the parties' arguments in their briefs are premised upon the notion that the rules of evidence do not apply to termination proceedings and that, therefore, the admission of hearsay is error only if it violates due process. The Nebraska Evidence Rules do not apply in termination actions under the Nebraska Juvenile Code. *In re Interest of P.D.*, 231 Neb. 608, 437 N.W.2d 156 (1989); *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987). But of course, a proceeding to terminate parental rights must employ fundamentally fair procedures satisfying the requirements of due process as required by such cases. See, *In re Interest of L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991); *In re Interest of J.K.B. and C.R.B.*, 226 Neb. 701, 414 N.W.2d 266 (1987).

The Nebraska Supreme Court has held that the Nebraska rules of evidence do not apply in termination proceedings, on the statutory basis that "the Nebraska Juvenile Code contains explicit standards pertaining to the adduction of evidence at adjudication and dispositional hearings. . . . The Nebraska Juvenile Code also provides: 'Strict rules of evidence shall not be applied at any dispositional hearing.' Neb. Rev. Stat. § 43-283 (Reissue 1984)." *In re Interest of J.S., A.C., and C.S.*, 227 Neb. at 262, 417 N.W.2d at 155. Neb. Rev. Stat. § 43-283 (Reissue 1993) has not been changed, and by its terms it applies only to juvenile courts.

[6] There is no similar statutory basis for holding that the Nebraska rules of evidence do not apply to termination proceedings in district court under § 42-364(7). Neb. Rev. Stat. § 27-1101 (Reissue 1995) provides the Nebraska rules of evidence apply to all actions in district court except those in which a judge may act summarily. Therefore, we consider the evidentiary questions presented under the Nebraska rules of evidence

notwithstanding the fact that many of the parties' arguments are based on the assumption the rules do not apply.

Burden of Proof.

[7] Section 42-364(7) does not specify the burden of proof. The Supreme Court first applied the clear and convincing evidence standard to termination cases in *State v. Souza-Spittler*, 204 Neb. 503, 283 N.W.2d 48 (1979), by reference to the case *State v. Metteer*, 203 Neb. 515, 279 N.W.2d 374 (1979). In these cases, the court made it clear that it was applying the clear and convincing standard to termination cases because the rights of a parent to his or her child are fundamental rights guaranteed under the U.S. Constitution. There are numerous cases holding that an order terminating parental rights must be based on clear and convincing evidence. E.g., *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). It seems clear that in cases of termination of parental rights under § 42-364(7), the standard of proof must be by clear and convincing evidence. Clear and convincing evidence is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997).

Judicial Notice of Prior Criminal Trial.

At Joyce's request, the court took judicial notice of the bill of exceptions and court file of Frank's criminal case, wherein he was convicted of first degree sexual assault of the parties' child, Katie. Frank's counsel asked the court to take judicial notice of the court file insofar as it contains a finding that Frank was found not to be a mentally disordered sex offender.

[8] The law is clear that where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action. *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991). There is some doubt whether the actions are truly interrelated or interwoven, but because Frank's counsel requested that the court take judicial notice of part of Frank's criminal case file and does not argue the two cases are not interrelated, we shall assume they are.

The court took judicial notice of the entire bill of exceptions in Frank's criminal case, and the bill of exceptions contains testimony which would establish Frank molested Katie on many occasions. (The guardian ad litem's report contains a photocopy of the same testimony from that trial.) This is the only evidence supporting the conclusion that Frank sexually molested Katie on more than one occasion.

[9,10] The Supreme Court has said: "An entire trial record cannot be said to fall within the definition of a judicially noted fact as set out in Neb. Rev. Stat. § 27-201(2) (Reissue 1985)." *State v. Ryan*, 233 Neb. 74, 130, 444 N.W.2d 610, 645-46 (1989). Perhaps the best expression of the correct rule in this regard is contained in 31A C.J.S. *Evidence* § 57 at 159-60 (1996) as follows: "A judge cannot consider testimony taken at a previous trial in a subsequent trial unless such testimony is admitted into evidence. Moreover, a court may not judicially notice testimony taken at a prior hearing in the same case with respect to temporary orders."

[11] We call attention to the fact that Neb. Rev. Stat. § 27-804(2)(a) (Reissue 1995) provides for the admission of the testimony of a witness given at a prior proceeding if the terms of that statute are met. Obviously, that statute would be unnecessary if the court could simply judicially notice such evidence.

[12] In *Gottsch v. Bank of Stapleton*, 235 Neb. 816, 835-36, 458 N.W.2d 443, 456 (1990), the Nebraska Supreme Court quoted the following with approval: " '[A]s a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it.' " In *Gottsch*, the Supreme Court held that the trial court could judicially notice the fact of a judgment in another case. However, the *Gottsch* court held that the trial court could not judicially notice the existence of the defendants' allegedly fraudulent behavior in the other case unless the fraud was a previously adjudicated fact binding on one of the parties in the case before it.

[13] Therefore, this court takes judicial notice of the judgment of the court in Frank's criminal case, that is, that Frank was convicted and sentenced for sexually penetrating Katie, on

or about November 1, 1990, through June 30, 1991; that the conviction was affirmed on appeal; and that Frank was found not to be a mentally disordered sex offender. We note, however, that there are certified records in evidence which would prove the same facts and that Neb. Rev. Stat. § 27-803(20) (Reissue 1995) provides: "Evidence of a final judgment entered after a trial . . . adjudging a person guilty of a crime [is admissible] to prove any fact essential to sustain the judgment . . . ." The bill of exceptions was clearly not a proper subject for judicial notice.

Hearsay in Guardian's Report and Opinion.

[14] The Supreme Court has recently warned that a testifying expert may not be made a conduit for hearsay. *Koehler v. Farmers Alliance Mut. Ins. Co.*, 252 Neb. 712, 566 N.W.2d 750 (1997). In the instant case, the guardian ad litem testified, and over objection his report was admitted into evidence. Attached to that report were answers to interrogatories by Joyce and Frank; the testimony of Katie and another witness in Frank's criminal case; a psychiatric evaluation of Katie; a police report; a psychological assessment of Frank; the report, dated December 18, 1991, of a clinical psychiatric interview of Frank; a report, dated February 19, 1992, on Frank's mentally disordered sex offender evaluation; and a letter containing an evaluation of Frank's parents' relationship with Katie, dated December 17, 1992. All of these documents are clearly hearsay under the Nebraska rules of evidence and are inadmissible under the Nebraska rules of evidence unless they come within a recognized exception to Neb. Rev. Stat. § 27-801 (Reissue 1995).

At trial, Frank's attorney objected to the admission of these documents into evidence, and on appeal he clearly assigns and argues that their admission and the admission of the guardian's opinion were error. In her brief, Joyce does not clearly address the admissibility of these documents but seems to assume they are admissible as part of the guardian's report because the guardian testified. She also implies they are admissible because the guardian is an expert.

Joyce's attorney argues that the practice in Nebraska has been to allow a guardian ad litem to conduct an independent investigation, to prepare reports, and to testify when called to do

so. As authority for this procedure, Joyce's attorney cites § 42-364(7) (directing trial court to appoint guardian ad litem); Neb. Rev. Stat. § 42-358(1) (Cum. Supp. 1994) (empowering guardian ad litem to make independent investigation); *Beran v. Beran*, 234 Neb. 296, 450 N.W.2d 688 (1990) (holding that guardian ad litem may testify and that court need not give guardian's testimony more or less credence than that of any other witness); *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983) (holding duties and responsibilities of guardian ad litem are not coextensive with those of attorney); and *Jorgensen v. Jorgensen*, 194 Neb. 271, 231 N.W.2d 360 (1975) (holding that before guardian's report may form basis for judgment, judge must submit it to counsel and hold hearing on it). We do not believe these authorities support the admission of the guardian's report or his opinion.

[15] The trial judge has the discretion to admit the hearsay that an expert relies upon in evidence to support the expert's opinion, but the fact that an expert relied on records in forming his or her opinion does not transform the records from inadmissible hearsay to admissible evidence. *Koehler, supra; Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994). Even under that rule, we would not hesitate to hold that the trial court abused its discretion in allowing such patent hearsay into evidence.

[16] Furthermore, a guardian ad litem may be a legal expert, but a person appointed a guardian ad litem is not necessarily an expert on child welfare. Neb. Rev. Stat. § 27-702 (Reissue 1995), the statute allowing expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Bearing in mind that guardians ad litem and judges are invariably lawyers and that most, if not all, trial judges are at least as experienced in the area of child welfare as practicing lawyers, it is doubtful that an opinion of a guardian ad litem, as an expert, would truly assist the judge in understanding the evidence or in determining any issues of fact in litigation involving the welfare of children.

[17] We suggest that the proper function of a guardian ad litem is to thoroughly investigate the facts to learn where the welfare of his or her ward lies, and then, if the issues necessary for the protection of that ward are not properly framed by appropriate pleadings previously filed by the child's parents, the guardian ad litem should file a report or pleading that will bring to the court's attention those issues. Furthermore, if an investigation by the guardian leads the guardian to conclude that the attorneys for the parties are not going to introduce the relevant and admissible evidence necessary to protect the interests of the ward, the guardian ad litem should do so and then by argument suggest to the court what the law and the evidence dictate would be in the best interests of the ward. We think that under the adversarial system, the duty of the guardian ad litem is to be sure the judge has the full facts and the correct law, accompanied by helpful argument, so that the judge may make a correct decision. In short, the primary function of the guardian ad litem is to give the judge the necessary information by way of admissible evidence so the judge may issue an order which is in the best interests of the ward and which will be upheld on appeal. Of course, if the court does not issue such an order, the guardian ad litem should appeal.

[18] We suggest that the primary function of the guardian ad litem's report is for the guardian to demonstrate to the judge that the guardian has performed his or her duty. Frequently, when a guardian ad litem's report does not contain objectionable hearsay, it is an efficient means of communicating the facts that the guardian has learned to the parties and to the judge, if properly admitted into evidence, but a report is not somehow made admissible because it was prepared by a guardian ad litem appointed by a court pursuant to a statute. Hearsay within such reports remains hearsay. The guardian's report and the documents attached to it will not be considered in our de novo review.

In this case, the guardian ad litem was allowed to opine that it was in Katie's best interests that Frank's parental rights be terminated. The record clearly shows that opinion is based upon hearsay that would not be admissible in court. We see no merit in giving credence to the opinion of a guardian when that opin-

ion is based in large measure on the very hearsay that our legal tradition holds to be improper. Therefore, in our de novo review we shall consider only that portion of the guardian's testimony and evidence that is relevant and admissible.

BACKGROUND, PLEADINGS, AND COURT'S DECISION

Frank and Joyce married on December 13, 1969, and they had one child, Katie, born May 27, 1985. On December 12, 1991, a jury found Frank guilty of first degree sexual assault of Katie, and on March 20, 1992, Frank was found not to be a mentally disordered sex offender and was sentenced to 4 to 6 years in prison. This court affirmed Frank's conviction in *State v. [Frank S.]*, 2 NCA 777 (1993).

On July 2, 1991, Joyce filed a petition for dissolution, seeking custody of Katie. On December 1, 1992, the trial court dissolved the parties' marriage. In the decree, Joyce was awarded custody of Katie, and "[p]ending further Order of the Court," the court did not provide visitation for Frank. At the time, he was incarcerated at the Nebraska Penal and Correctional Complex.

In January 1995, Frank was released from prison. On March 13, 1995, he filed an amended petition requesting reasonable visitation with Katie, recalculation and reestablishment of child support, and other relief concerning the parties' property that is immaterial to this appeal.

Joyce filed a responsive pleading, which contained a cross-petition in which she alleged:

> [Frank] is unfit by his previous lewd and lascivious behavior and the criminal acts perpetrated upon the minor child which were seriously detrimental to the health, morals and well-being of the minor child. It is not in the best interests of the minor child to re-establish any type of relationship between [Frank] and the minor child and [Frank's] parental rights as they pertain to the minor child should be terminated.

Joyce prayed for the termination of Frank's parental rights and other relief concerning property. In answer to this pleading, Frank denied the allegations and alleged it was in Katie's best interests to develop a relationship with him.

The trial was held on February 29, 1996. The pleading posture of this case caused Frank to present his case first. He called Dr. Thomas J. Gilligan, an experienced clinical psychologist, to testify as an expert, and he testified himself. In her case, Joyce called Robert G. Decker, the guardian ad litem, and Dr. Cynthia Topf, a clinical psychologist. Joyce also testified. Frank testified in rebuttal. Pursuant to the parties' request, the trial court took judicial notice as stated above.

The trial court made detailed and specific findings of fact and then made the specific findings that it was in Katie's best interests that Frank's parental rights be terminated and also that Frank "committed repeated acts of a lewd and lascivious type, involving the parties' minor child. This conduct is seriously detrimental to the health or well-being of the minor child." The court ordered Frank's parental rights terminated.

SUMMARY OF EVIDENCE

[19] Upon the basis of the discussion in the standard of review section, we conclude that in reviewing a termination case held in the district court, this court reviews the record de novo to determine whether the district court abused its discretion.

Gilligan, a psychologist, testified at Frank's request. He had been apprised of the background but had not treated or interviewed Katie, Frank, or Joyce. He opined that it was not in Katie's best interests to be forced to see her father if she expresses a desire not to, that a biological child and his or her father will always have a relationship with each other, and that it would be impossible to know Katie's best interests without examining and studying her.

Based on experience, he opined that the relationship between sexually abused children and their abusers can be reestablished with treatment. He opined that it was in Katie's best interests to start the process with a lot of background work. He also estimated that therapy would be long and expensive, and that success would not be ensured. He also testified that 58 percent of sex offenders are rearrested for the same offense and that one well-established school of thought holds that sex offenders are not treatable unless they are able to admit what they have done.

Frank testified that at the time of trial, he lived in Omaha with his brother and parents. He holds a bachelor of science

degree in business administration, but the only employment he can find is working in a sandwich shop earning a gross monthly wage of $1,408.33. He again denied sexually abusing his daughter. He testified that he does not believe that his daughter lied, but, rather, that she was manipulated by Joyce. He admits he has not sought any type of treatment for any sexual disorder.

Decker, the licensed lawyer appointed guardian ad litem, testified. Much of his testimony has been rejected in other sections of this opinion. He testified to the extent of his investigation to determine where Katie's best interests lie. He had talked to Katie and found her to be "an effervescent young lady," who was "full of vim and vigor." He learned that she was doing excellently in school. When he saw her on the day of trial, she appeared to have been crying.

Topf, a clinical psychologist practicing in Omaha, testified for Joyce. Topf specializes in the area of sexual abuse and works with children in that field. She had not examined Frank, Joyce, or Katie. She testified hypothetically that Katie would not benefit from contact with Frank unless Katie expressed a desire to see him and that before any meeting it would be necessary for a therapist to determine whether Katie was ready for such a meeting. She testified that an abused child often fears being remolested if the abusing parent has been out of his or her life for a while and suddenly reappears and that Katie could not reestablish a relationship with a father who maintains his denial. She too testified to the considerable therapy necessary before a relationship between Frank and Katie could be reestablished.

Topf opined there is no reason to reestablish the relationship between Katie and Frank, because Katie had expressed that she does not want to see her father and because Frank has not gone through treatment and remains in denial. Topf testified that based upon these same facts, it "might" be in Katie's best interests to terminate Frank's parental rights.

Joyce was 51 at the time of trial, single, in good health, and a certified public accountant. Her 1994 income was $75,450. She testified that after the assault, Katie had trouble sleeping, had problems playing and interacting with her friends, and had nightmares until 6 months after the criminal case was over. Joyce testified that Katie received counseling from approxi-

mately June 1991 until January 1993 and that Joyce intends to start Katie in counseling again when she reaches adolescence.

Joyce testified that she never initiates any conversation with Katie about Frank and that Katie never initiates any such conversation with her. She also testified that Katie has not expressed any desire to see Frank or his extended family and that Katie has told her that she does not want to see Frank. Joyce testified that she had observed that Katie was very apprehensive when Katie had to talk to the guardian ad litem.

Joyce testified that her mother had recently died and that her only living relatives, aside from Katie, are an aged aunt and uncle and that she wants Frank's parental rights terminated so he will have no claim on Katie if Joyce should die.

ASSIGNMENTS OF ERROR

Frank alleges the court erred (1) by terminating his parental rights, (2) by not establishing visitation rights for him, (3) by admitting the testimony of the guardian ad litem and exhibits produced by him, and (4) by taking judicial notice of records and testimony not properly subject to judicial notice.

ANALYSIS

Frank's Conduct as Grounds for Termination Under § 42-364(7).

The gist of Frank's argument in this area is that the trial court found that Frank committed "repeated acts of a lewd and lascivious type, involving the parties' minor child," but absent the hearsay evidence in the guardian's report and the evidence in the judicially noticed bill of exceptions, there is no proof that he committed repeated acts of a lewd and lascivious type, but only that he sexually penetrated Katie on one occasion. We agree that the admissible evidence from Frank's criminal case establishes only that Frank committed one lewd and lascivious act because it shows only that he sexually penetrated Katie on one occasion, and § 42-364(7) provides in part that parental rights may be terminated if one or both parents are unfit by reason of "repeated lewd and lascivious behavior." Frank argues that without evidence of repeated acts, the requirement of the statute is not met.

This argument is not controlling, in part because in the original dissolution decree the trial court found Frank was incarcerated " 'based upon a guilt finding involving sexual crimes com-

mitted against the minor child.' " In view of the fact that Joyce's burden is to prove each of the elements justifying termination by clear and convincing evidence, there is insufficient evidence to prove that Frank committed repeated lewd and lascivious acts.

However, Joyce also pled that Frank perpetrated criminal acts upon Katie, and one of these criminal acts clearly supports a finding of a statutory basis to terminate his parental rights under alternate grounds. Section 42-364(7) also allows termination of parental rights if a parent is unfit by reason of debauchery, and there is no requirement that there be repeated acts of debauchery. Debauchery has been defined as "**1.** excessive indulgence in sensual pleasures; intemperance. **2.** *Archaic.* seduction from duty, allegiance, or virtue." Webster's Encyclopedic Unabridged Dictionary 372 (1989). Debauchery is " '[v]icious indulgence in sensual pleasures' " or " '[e]xcessive indulgence in sensual pleasures of any kind; gluttony; intemperance; sexual immorality; unlawful indulgence of lust.' " *Cleveland v. United States*, 329 U.S. 14, 17 n.4, 67 S. Ct. 13, 91 L. Ed. 12 (1946). The criminal act which Frank was found guilty of having committed on Katie certainly comes within the definition of debauchery, although most members of our society regard the incestuous rape of a 5-year-old child as a particularly repulsive sort of debauchery. There is clear and convincing evidence on this record providing that Frank is unfit by reason of debauchery.

Whether Frank's conduct is found to constitute repeated acts of lewd and lascivious conduct or debauchery, before Frank's parental rights may be terminated on either ground, the evidence must show that the ground relied upon was "seriously detrimental to the health, morals, or well-being of the minor child." § 42-364(7). It is probably self-evident that Frank's conduct satisfies that particular statutory provision.

Furthermore, Joyce testified that Katie had last seen her father in district court on December 9, 1991; that Katie had nightmares until 6 months after the criminal trial; and that Katie underwent psychological counseling from approximately June 1991 to January 1993 and will resume such counseling when she reaches adolescence.

Cases considering the detrimental effects of sexual abuse of a child by a parent arise under the Nebraska Juvenile Code, either when the State seeks to have a child declared to be a child as defined under Neb. Rev. Stat. § 43-247(3) (Reissue 1993) or when the State seeks termination under Neb. Rev. Stat. § 43-292 (Reissue 1993). The specific statutory requirements of these statutes vary from the provision under consideration, but all attempt to set a standard by which a court may determine whether the parent's conduct is such that further or unsupervised association of the parent with the child is likely to be detrimental to the child. In cases involving sexual abuse of a child by a parent, such abuse has been universally condemned and held to be sufficiently detrimental, justifying either intervention by the State under § 43-247 or termination under § 43-292. See, *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997) (upholding termination of mother's parental rights because she continued to associate with man who was convicted of first degree sexual assault of one of her children); *In re Interest of M.B. and A.B.*, 239 Neb. 1028, 480 N.W.2d 160 (1992) (upholding adjudication of M.B. and A.B. because father had not received treatment for sexual disorder and had twice been convicted of committing sex crimes against his children); *In re Interest of B.B. et al.*, 239 Neb. 952, 479 N.W.2d 787 (1992) (upholding termination of mother's parental rights because she continued to associate with two men whom she had previously accused of sexually abusing her children); *In re Interest of W.C.O.*, 220 Neb. 417, 370 N.W.2d 151 (1985) (upholding finding that W.C.O. was child within meaning of § 43-247(3), since W.C.O.'s father had committed sexually abusive act upon another child; court stated danger of permitting father to be alone with his minor child should be obvious); *In re Interest of Goodon*, 208 Neb. 256, 303 N.W.2d 278 (1981) (upholding termination of parents' rights to their children where father had sexually molested some of his female children).

We conclude that clear and convincing evidence shows that Frank's debauchery was seriously detrimental to Katie's health, morals, and well-being.

Is Termination in Katie's Best Interests?

[20,21] Neither criminal conduct nor imprisonment alone necessarily justifies permanently depriving a parent of his or her rights to a child. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). However, the parent's inability to perform his or her obligation by reason of imprisonment or the nature of the crime is relevant to the issue of the parent's fitness. See, also, *In re Interest of Reed*, 212 Neb. 208, 322 N.W.2d 411 (1982). We review the evidence on the issue of Katie's best interests with these rules in mind.

Topf testified that Katie's relationship with Frank cannot be established as long as he denies the abuse and that in such a situation, the child remains unsafe. She testified that there was no reason to reestablish a relationship between Katie and Frank, since Katie had stated that she does not want to see him and since Frank continues to deny the abuse. Topf testified that it "might" be in Katie's best interests to terminate Frank's rights for Katie's safety and well-being and because victims of child abuse often fear that the abuse will recur if the abuser reappears.

Gilligan testified that it was not in Katie's best interests to see her father if she did not want to, although he testified that he needed more information before he could decide whether termination of Frank's rights was in Katie's best interests. He testified that he had previously recommended terminating a parent's rights where the parent had not undergone treatment for sexual abuse. He stated that it is well established that sex offenders are not generally treatable unless they admit what they have done and that it generally is recognized that sexually abusive parents must take full responsibility for their actions in front of their children. He testified that Frank's denial put Katie at risk of being sexually molested again.

At the time of trial, Katie was doing very well, making good grades in school, and engaging in various social activities. She never initiates any conversations about Frank and has expressed that she does not want to see him. Frank had had no contact with Katie for 5 years because of his arrest and conviction for sexually assaulting Katie. Frank continues to deny the abuse, and both Topf and Gilligan testified that Frank poses a risk of harm to Katie because of this denial.

Most 30-year-old parents are not very concerned that they will not live to see their children into adulthood, but provident 50-year-old single parents have legitimate concerns about not being around to help their children into adulthood. Most family situations are such that life insurance and a will providing for a responsible guardian are about all that is necessary or advisable. However, in Joyce's case, if she dies, Frank, as Katie's only surviving parent, would be entitled to her custody and control. See, Neb. Rev. Stat. § 30-2608 (Reissue 1995); *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992). Even Frank's expert opined that Frank and Katie should have contact only if prolonged counseling proved effective, yet as things now stand, upon Joyce's death, Frank would have the sole right to her custody. Of course public officials and concerned friends could bring an action under the Nebraska Juvenile Code to protect Katie, but Joyce does not have close relatives with the vigor to push such litigation, and a hesitancy to rely upon some unknown public official is understandable.

On the other hand, how can Katie benefit from the continued existence of Frank's parental rights? Because his crime causes almost everyone to agree he cannot be trusted to have unsupervised visitation, she can hardly benefit from the usual father-daughter association. It is certainly unrealistic to think that after his crime he can give her the comfort and support a father usually gives a daughter in our society, and he certainly cannot be considered a role model for her to use in judging the men she will encounter later in life. Katie's mother has the income to support her, and Frank could supply only limited support at best. Topf opined there is no reason to reestablish a relationship between Katie and Frank. We agree. Therefore, we conclude that clear and convincing evidence shows that it is in Katie's best interests that Frank's parental rights be terminated.

Material Change of Circumstances.

The record shows that Frank was convicted of the first degree sexual assault of Katie during the period from November 1990 to June 1991. The decree of dissolution was entered on December 1, 1992. Frank was not awarded visitation rights, nor were his parental rights terminated. Therefore, Frank argues that Joyce's "right to seek a termination of his parental rights based

on activity which had to have occurred prior to the Decree of Dissolution is precluded under the doctrine of res judicata." Brief for appellant at 13. Joyce argues that the termination of Frank's parental rights is not barred by res judicata because circumstances have changed since the entry of the decree.

[22] The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication. *Moulton v. Board of Zoning Appeals*, 251 Neb. 95, 555 N.W.2d 39 (1996).

[23] In *Moulton*, the Supreme Court noted that an exception to this rule exists when there has been an intervening change in facts or circumstances. A party seeking to modify a child support order must show that a material change in circumstances has occurred since the entry of the original decree which was not contemplated when the decree was entered. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). The principles of these cases apply to all domestic relations litigation. If, in a domestic relations case, circumstances have changed, a former decree may be modified in light of those circumstances.

At the time of the decree, Frank was incarcerated and was not seeking any visitation with Katie; Joyce's mother was still living. Neither criminal conduct nor imprisonment alone necessarily justifies permanently depriving a parent of his or her child. *In re Interest of L.V.*, 240 Neb. 404, 482 N.W.2d 250 (1992). Furthermore, the expert testimony in evidence would lead to the conclusion that if Frank had admitted to the crime and sought counseling, or perhaps if he had merely sought counseling, his relationship with Katie might have been reestablished. Undoubtedly, had Joyce sought termination at the time of the decree, she would have been met with the claim that Frank intended to do whatever was necessary to reestablish a relationship with Katie, and a court would quite likely have concluded he would have to be given the chance. Katie's present attitude in regard to her father could not have been predicted. Therefore, while many of the material circumstances have not changed, others have changed sufficiently to allow the court to modify the decree. The decision of the trial court is affirmed.

AFFIRMED.

MIKE HUFFMAN, APPELLEE AND CROSS-APPELLANT, V. C. WAYNE POORE, APPELLANT AND CROSS-APPELLEE, EDNA POORE, APPELLEE AND CROSS-APPELLEE, AND DANIEL L. OTTO, APPELLEE.

569 N.W.2d 549

Filed October 7, 1997. No. A-96-287.

1. **Judgments: Appeal and Error.** 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 set aside on appeal unless they are clearly wrong.
2. ____: ____. In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. ____: ____. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
4. **Corporations: Liability: Debtors and Creditors.** Generally, a corporation's officers and directors are not liable to the corporation's creditors or third persons for corporate acts or debts, simply by reason of an official relation with the corporation.
5. **Corporations: Contracts: Liability.** A corporation's officers and directors are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate officers and directors purport to bind themselves, or have bound themselves, to performance of the contract.
6. **Corporations: Fraud: Liability.** Where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible for the fraud liable in their individual capacities.
7. ____: ____: ____. A court will disregard a corporation's identity and hold the shareholder liable for the corporation's debt only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another.
8. **Torts: Corporations: Liability.** Where a tort action is brought against an officer or director, there is no need to pierce the corporate veil and liability will be imposed if the elements of the tort are satisfied.
9. **Corporations: Fraud: Liability.** Ordinarily, corporate directors are personally liable, independently of statute, for fraud or for false and fraudulent representations which they or their agents made within the scope of their employment, or for those which were approved or ratified.
10. **Actions: Fraud.** In order to sustain a cause of action for fraudulent misrepresentation, a plaintiff must show (1) that a representation was made, (2) that the representation was false, (3) that when made the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion, (4) that it was made with the intention that the plaintiff should rely upon it, (5) that the plaintiff reasonably did so rely, and (6) that he or she suffered damage as a result.
11. **Actions: Fraud: Intent.** A plaintiff does not have to prove intent to deceive to sustain a cause of action for fraudulent misrepresentation.

12. **Fraud: Evidence: Proof.** Courts of law require proof of fraud by a preponderance of the evidence, while courts of equity require clear and convincing evidence.
13. **Fraud.** To constitute fraud, a misrepresentation must be an assertion of fact, not merely an expression of opinion.
14. **Fraud: Intent.** The fraud involved in the misrepresentation must relate to a present or preexisting fact and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive.
15. **Torts: Corporations: Liability.** Officers and directors of a corporation may be held individually liable for personal participation in tortious acts even though they derived no personal benefit, but acted on behalf of, and in the name of, the corporation and the corporation alone was enriched by the acts.
16. **Corporations: Fraud: Liability.** A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation.
17. **Torts: Corporations: Liability.** An officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers, or employees of the corporation.
18. **Fraud: Proximate Cause: Damages.** False representations must be the proximate cause of the damage before a party may recover.
19. **Contracts: Fraud: Election of Remedies.** One who has been induced to enter into an agreement by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract; this is so because one remedy, damages, depends upon the existence of a contract, and the other, rescission, depends upon the concept that because of the fraud no contract came into existence.
20. **Breach of Contract: Property: Damages.** The measure of damages for breach of contract, where the contract is to tender specific property, is the value of the property at the time of the breach.
21. **Appeal and Error.** Errors assigned but not argued will not be addressed.
22. **Fraud: Words and Phrases.** A fiduciary duty arises out of a confidential relation, which exists when one party gains the confidence of another and purports to act or advise with the other's interest in mind.
23. **Corporations: Fraud: Liability.** A stockholder can be individually liable for a constructive fraud committed by the corporation only where he had knowledge of and instigated the fraud.

Appeal from the District Court for Red Willow County: DONALD E. ROWLANDS II, Judge. Affirmed as modified, and cause remanded with directions.

James J. Paloucek and Royce E. Norman, of Norman & Paloucek Law Offices, for appellant.

Waldine H. Olson and Christopher D. Curzon, of Schmid, Mooney & Frederick, P.C., and Ronald D. Mousel, of Mousel, Garner & Rasmussen, for appellee Huffman.

SIEVERS, MUES, and INBODY, Judges.

SIEVERS, Judge.

Mike Huffman brought an action against Mid States Dairy Leasing, Inc. (Mid States), and three of its officers, directors, and shareholders, C. Wayne Poore, Edna Poore, and Daniel L. Otto, for (1) fraudulent misrepresentation, (2) fraudulent concealment, (3) negligent misrepresentation, and (4) breach of fiduciary duty in connection with Mid States' management of Huffman's dairy cows. Prior to trial, the case against Mid States was dismissed without prejudice. The Red Willow County District Court found in favor of the remaining defendants on all theories of recovery except fraudulent misrepresentation. On that theory, the court found in favor of Huffman against only Wayne and awarded Huffman $25,400. Wayne now appeals, contending that the court erred in holding him liable without evidence to pierce the corporate veil, in finding that he had made fraudulent misrepresentations to Huffman, and in awarding damages not caused by the alleged fraudulent misrepresentation. Huffman cross-appeals on the ground that the court erred in not holding both Wayne and Edna liable for breach of fiduciary duty.

I. FACTUAL BACKGROUND

Mid States, which began as a partnership between Otto and Joe Frazier in late 1985 or early 1986, is a business which acts as an agent for owners of dairy cows. Mid States sells dairy cows to buyers, called "investors," and then, on behalf of the investors, leases the cows to dairies in Kansas, Colorado, Nebraska, and North Dakota. As part of the service that it provides to its investors, Mid States also manages the cows, which generally includes making inspections of the dairies and cows and reporting back to the investors.

In early 1989, Wayne and Edna bought Frazier's interest in the partnership, and on December 27, 1989, Mid States filed its articles of incorporation. Mid States has three shareholders:

Otto (a 50-percent interest), Wayne (a 25-percent interest), and Edna (a 25-percent interest). These three, along with Melinda Otto, are officers of the corporation and compose the board of directors.

On October 1, 1991, Huffman purchased 10 Holstein dairy cows from Mid States for $12,000 and agreed to have Mid States manage those cows. The record contains four documents dated October 1, 1991: (1) the bill of sale for the 10 cows, (2) a "Management Agreement" entered into between Huffman and Mid States, (3) a "Dairy Cow Lease," and (4) a "Security Agreement." All four documents were signed by Wayne, acting in his capacity as vice president of Mid States. Under the Management Agreement, Mid States agreed to "arrange for the leasing of the cows owned by Owner with [sic] a suitable dairyman who maintains a suitable dairy operation." The Management Agreement specifically stated that the cows had been leased to B. J. Smarsh & Sons (the Smarsh dairy), a dairy in Goddard, Kansas. In the Management Agreement, Mid States agreed, among other things, to make monthly inspections of the cows, provide a consulting and recordkeeping service, confer with the owner on a regular basis to review the status of the leasing operation and to give advice and make recommendations concerning such operations, and provide detailed quarterly reports. As compensation, Mid States was to receive $15 per cow per month.

The Management Agreement referred to the Dairy Cow Lease between Mid States, acting on behalf of Huffman, and the Smarsh dairy. The lease began on October 1, 1991, and was to continue for 5 years. Under the provisions of the lease, Smarsh agreed to pay $21,000 in equal monthly installments of $350 (60 months). Pursuant to paragraph 5.6, "[a]t the termination of the Lease (60 months)," Mid States was to provide Huffman with 10 "bred springing heifers," which met certain criteria, presumably to replace the 10 cows. A springing heifer is a bred heifer ready to give birth to its first calf, and when it gives birth, it becomes a cow. Edna testified that Mid States sold only cows, as opposed to springing heifers, to its investors.

The Smarsh dairy made 22 monthly payments to Huffman under the lease, satisfying its obligation through July 1993. On

August 28, 1993, Mid States discovered that the Smarsh dairy had only 10 head of what should have been a herd of 291 dairy cows. The Smarsh dairy then ceased making its rental payments and soon thereafter filed for bankruptcy. Huffman never received any additional compensation for his 10 cows placed with the Smarsh dairy.

The Smarsh dairy was a family business owned and operated by Bernard J. Smarsh and his two sons, Bernard B. Smarsh and Thomas G. Smarsh. Wayne first inspected the dairy in May or June 1989 and discovered that the facilities and cows were "good" and that the dairy's production records indicated that its cows individually averaged 50 pounds of milk per day. Wayne, however, did not do a cash-flow analysis of the dairy and did not request any financial statements. Mid States first leased its investors' cows to the Smarsh dairy on August 1, 1989.

As of March 1991, Mid States had placed 184 dairy cows with the Smarsh dairy, including 140 leased cows and 44 owned by Mid States. However, when Wayne Poore and Wayne Ball, an investor, traveled to the Smarsh dairy during that same month, some 6 months before the transaction with Huffman, they discovered that the dairy was 80 head short. Bernard B. Smarsh explained that the deficit was due to having to sell cows to pay the dairy's bills, "close culling," sickness and death resulting from bad feed, and the lack of replacement heifers. Wayne Poore testified that Mid States never identified the investors to whom the 80 cows belonged and therefore did not know what leases were in default.

In order to remedy the shortage of cows, Wayne and Otto, on behalf of Mid States, and the Smarsh dairy entered into an agreement whereby on April 1, 1991, the Smarsh dairy transferred ownership of its entire heifer crop of 99 calves to Mid States. However, none of the 99 were old enough to replace the 80 missing cows. According to Wayne, the Smarsh dairy also agreed to sell some of its own crops to buy replacement cows. At some point, Mid States exchanged 41 of these 99 heifers for 30 Holstein springing heifers. In his subsequent visits to the Smarsh dairy, Wayne discovered that although the head count was still short, the size of the herd was increasing. Ball, who made several additional trips to the dairy with Wayne, testified

that on various occasions they discovered shortages of 10, 20, 32, and 40 cows. Wayne testified that by July 1991 he knew that the Smarsh dairy had not used crop money to buy replacements. Wayne and Edna, through Mid States as their agent, personally leased 30 of their own cows to the Smarsh dairy on June 1, 1991. Although Mid States had purchased 291 cows for the Smarsh dairy, 275 of which its investors had purchased and leased back to the dairy, by the end of August 1993 only 10 cows remained at the Smarsh dairy.

The testimony from Bernard B. Smarsh reveals that the Smarsh dairy had financial problems dating back to at least 1986. After beginning its arrangement with Mid States, the Smarsh dairy had a culling rate of approximately 35 percent of the herd and was unable to replace the cows with springing heifers. The dairy continually had problems paying its bills and had to make rental payments on cows that did not exist. Smarsh also testified that the price of milk hit an all-time low in the spring of 1991.

Willis Armbrust, a judge of dairy cattle, testified that in his opinion, as of April 1, 1991, the Smarsh dairy was not a suitable dairy. Armbrust explained that the dairy had an excessive culling rate (normal rates run between 15 and 20 percent) and an insufficient inventory of heifer calves. Armbrust further testified that the dairy was unsuitable because of its shortages of cattle, its sale of replacement heifers, and its financial problems. Armbrust's testimony was based on his review of the testimony of Wayne, Otto, and one of the Smarshes.

The record further reveals that Huffman had previously used Mid States, working with Otto, to lease cows to another dairy without any problems. At trial, Otto maintained that Mid States did not solicit Huffman to invest. The only other testimony on such subject was from Huffman himself, a friend and former employee of Wayne's. According to Huffman,

> I would visit with Wayne Poore on occasion and at some point he mentioned that he had some dairy cattle that were close to being ready to be placed, and I had saved up some money over a period of time and when I had approximately the $12,000 for ten head, then I went out and talked to him about it.

Huffman testified that he made his investment based on Wayne's experience, the fact that Wayne himself was investing, and their friendship. However, Huffman admitted that Wayne never discussed the Smarsh dairy operation with him. Huffman also admitted that when he made the decision to buy the cows, he did not really know for sure that they were going to end up at the Smarsh dairy. According to Huffman, he learned either at the time he delivered the check (a time which is not in evidence) or shortly thereafter that the cows were going to the Smarsh dairy. Huffman also testified that he could not remember whether Edna said anything to him.

The trial court found for the defendants on all causes of action except fraudulent misrepresentation. On that cause of action, the court found in favor of Huffman against only Wayne. In its findings of fact, the court stated: "By March 1 of 1991, Mid-States as well as each of the Defendants individually had knowledge that the Smarsh Dairy was a financially troubled operation and was not a suitable dairy." With regard to Huffman's fraudulent misrepresentation claim, the court found:

> In this case, the Plaintiff has proven by the greater weight of the evidence, each and all of the elements set forth above, only as to the Defendant, C. Wayne Poore. The Plaintiff was induced by Mr. Poore to purchase ten cows upon a representation that the cows would be placed with a "suitable dairyman." In March of 1991, and certainly before October 1, 1991, Mr. Poore clearly knew that this representation was false. The expression was not merely an opinion. It was a statement of fact that the Plaintiff reasonably relied upon prior to entering into the agreement with the Smarsh Dairy.
>
> I therefore find in favor of the Plaintiff and against the Defendant, C. Wayne Poore, on this cause of action. Since the Plaintiff's own testimony establishes that he did not have any contact with the remaining Defendants concerning his investment with the Smarsh Dairy, I find in favor of Mrs. Poore and Dr. Otto, and against the Plaintiff on this cause of action.

The court then, noting that Huffman had elected to affirm the agreement and sue for damages, awarded Huffman the following: (1) the loss of 39 monthly lease payments at a net rate of

$20 per head per month for a total of $7,600; (2) the value of 10 bred replacement heifers as of August 1993, which was $11,000 ($1,100 per heifer); (3) the agreed salvage value of the dairy cows at $350 per head for a total of $3,500; and (4) reimbursement for management fees paid to Mid States for a period of 22 months at the rate of $15 per head per month for a total of $3,300. Wayne filed a motion for a new trial, which the trial court overruled. Wayne now appeals.

II. ASSIGNMENTS OF ERROR

Wayne contends that the trial court erred in (1) holding him personally liable for the damages claimed by Huffman without piercing the corporate veil, (2) finding in favor of Huffman on the fraudulent misrepresentation claim, (3) awarding damages not caused by the alleged fraudulent misrepresentation, (4) awarding elements of damage which have no factual basis in the record, and (5) overruling Wayne's motion for a new trial.

Huffman cross-appeals, arguing that the trial court erred in finding that Edna and Wayne were not liable for breach of fiduciary duty.

III. STANDARD OF REVIEW

[1,2] 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 set aside on appeal unless they are clearly wrong. *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996). In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Id.*

[3] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997).

IV. ANALYSIS

1. Personal Liability of Officers and Directors for Fraudulent Misrepresentation

[4,5] Generally, a corporation's officers and directors are not liable to the corporation's creditors or third persons for corpo-

rate acts or debts, simply by reason of an official relation with the corporation. *Walker v. Walker Enter.*, 248 Neb. 120, 532 N.W.2d 324 (1995); *Hecker v. Ravenna Bank*, 237 Neb. 810, 468 N.W.2d 88 (1991). Similarly, a corporation's officers and directors are in the same position as agents of private individuals and are not personally liable on a corporation's contract unless the corporate officers and directors purport to bind themselves, or have bound themselves, to performance of the contract. *Walker v. Walker Enter., supra*; *Hecker v. Ravenna Bank, supra.*

[6] However, it has long been held in Nebraska that where fraud is committed by a corporation, it is time to disregard the corporate fiction and hold the persons responsible therefor liable in their individual capacities. *ServiceMaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986) (action against principal stockholder and officer for fraudulent misrepresentation); *Hahn & Hupf Constr. v. Highland Heights Nsg. Home*, 222 Neb. 189, 382 N.W.2d 607 (1986) (actions against directors for false and fraudulent representations), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986); *Fowler v. Elm Creek State Bank*, 198 Neb. 631, 254 N.W.2d 415 (1977) (action against directors and stockholders for fraud and negligent mismanagement and dissipation of corporate assets); *Allied Building Credits, Inc. v. Damicus*, 167 Neb. 390, 93 N.W.2d 210 (1958) (action for fraudulent misrepresentation against officer); *Ashby v. Peters*, 128 Neb. 338, 258 N.W. 639 (1935) (action against directors and shareholders for conspiracy to defraud); *Paul v. Cameron*, 127 Neb. 510, 256 N.W. 11 (1934) (directors liable for fraudulent misrepresentation); *Ashby v. Peters*, 124 Neb. 131, 245 N.W. 408 (1932) ("[t]he officers of a corporation are responsible for the acts of the corporation, and in a suit for fraud, if fraud is proved, the law will look through the corporation to the officers who acted in the matter, and the officers who acted in the premises are proper parties defendant" (syllabus of the court)). A director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation. *Hahn & Hupf Constr. v. Highland Heights Nsg. Home, supra.*

Wayne contends that the corporate veil must be pierced before he can be held personally liable for fraud. Wayne bases his argument on the following language from *Wolf v. Walt*, 247 Neb. 858, 866, 530 N.W.2d 890, 896 (1995):

> Some of the relevant factors in determining whether to disregard the corporate entity on the basis of fraud are: " '(1) Grossly inadequate capitalization; (2) Insolvency of the debtor corporation at the time the debt is incurred; (3) Diversion by the shareholder or shareholders of corporate funds or assets to their own or other improper uses; and (4) The fact that the corporation is a mere facade for the personal dealings of the shareholder and that the operations of the corporation are carried on by the shareholder in disregard of the corporate entity.' "

See, also, *Carpenter Paper Co. v. Lakin Meat Processors*, 231 Neb. 93, 435 N.W.2d 179 (1989); *Southern Lumber & Coal v. M. P. Olson Real Est.*, 229 Neb. 249, 426 N.W.2d 504 (1988); *J. L. Brock Bldrs., Inc. v. Dahlbeck*, 223 Neb. 493, 391 N.W.2d 110 (1986). Wayne argues that because there was no evidence introduced to prove any of these four factors, the court could not pierce the corporate veil and hold him individually liable for fraudulent misrepresentation.

[7] Wayne overlooks a crucial distinction between actions against shareholders who control the corporation to such an extent that it becomes their alter ego and actions against officers or directors for their individual torts. Piercing the corporate veil is a tool that courts use to prevent shareholders, who are not normally liable for corporate debts or liabilities, from hiding behind the corporate shield when the corporation is under their direct control. In such cases, a court will disregard a corporation's identity and hold the shareholder liable for the corporation's debt only where the corporation has been used to commit fraud, violate a legal duty, or perpetrate a dishonest or unjust act in contravention of the rights of another. *Wolf v. Walt, supra* (action against only shareholder); *Carpenter Paper Co. v. Lakin Meat Processors, supra* (action against sometimes sole and sometimes majority shareholder); *Southern Lumber & Coal v. M. P. Olson Real Est., supra* (action against sole shareholder and employee); *J. L. Brock Bldrs., Inc. v. Dahlbeck, supra*. See,

also, *Slusarski v. American Confinement Sys.*, 218 Neb. 576, 357 N.W.2d 450 (1984) (action against three shareholders); *United States Nat. Bank of Omaha v. Rupe*, 207 Neb. 131, 296 N.W.2d 474 (1980) (action against sole shareholder). If the corporate veil is pierced, individual liability will be imposed for the corporate debt. See, e.g., *Wolf v. Walt, supra*; *J. L. Brock Bldrs., Inc. v. Dahlbeck, supra.*

[8] However, where a tort action is brought against an officer or director, there is no need to pierce the corporate veil and liability will be imposed if the elements of the tort are satisfied. See, *ServiceMaster Indus. v. J.R.L. Enterprises, supra*; *Hahn & Hupf Constr. v. Highland Heights Nsg. Home, supra.* Even in *Wolf v. Walt, supra*, after the court refused to pierce the corporate veil, it still addressed whether there was evidence to overcome the defendant's motion for directed verdict on the plaintiff's causes of action for bailment, conversion, and constructive fraud. *Wolf v. Walt* thus provides further support for the proposition that it is not necessary to pierce the corporate veil in tort actions for fraud against officers and directors of a corporation.

[9] Nebraska's position on the personal liability of officers and directors and when it is necessary to pierce the corporate veil for their torts comports with that of a leading commentator on corporations: "Ordinarily, corporate directors are personally liable, independently of statute, for fraud or for false and fraudulent representations which they or their agents made within the scope of their employment, or for those which were approved or ratified." 3A William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 1192 at 449 (rev. perm. ed. 1994).

Fletcher continues:

> An officer of a corporation who takes part in the commission of a tort by the corporation is personally liable for resulting injuries; but an officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers or employees of the corporation. Officers and directors may be held individually liable for personal participation in tortious acts even though they derived no personal benefit, but acted on behalf, and in the name of, the corporation, and the corporation alone was enriched by the acts.

> It is not necessary that the "corporate veil" be pierced in order to impose personal liability as long as it is shown that the corporate officer knowingly participated in the wrongdoing. However, it is necessary to pierce the corporate veil in order to impose personal liability upon a nonparticipating corporate officer.

Id., § 1137 at 300-01.

Similarly, the text writers observe:

> The cases are agreed that a director or officer of a corporation is not liable, merely because of his official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in it. On the other hand, it is clearly established that a director or officer of a corporation is individually liable for fraudulent acts or false representations of his own or in which he participates, even though his action in such respect may be in furtherance of the corporate business. . . . The rationale for holding an officer or director individually responsible is that fraud and deceit is a tort which causes a direct and unique injury to a third party, for example, a creditor, thereby permitting the injured third party to proceed directly and solely on his own behalf against the offending officer or director.
>
> . . . .
>
> Acts of corporate officers may constitute a fraud upon the creditors of the corporation by which their rights are prejudiced and may render them liable to the creditors for the damages suffered thereby. Directors are personally liable for fraudulent representations whereby a person is induced, to his injury, to contract with the corporation, the liability being based upon the tort, not upon the contract.

18B Am Jur. 2d *Corporations* § 1882 at 730-32 (1985).

Given that the basis of the trial court's finding against Wayne was fraudulent misrepresentation, the corporate veil did not have to be pierced in order to hold Wayne, as an officer and director of Mid States, liable for fraudulent misrepresentation.

2. FRAUDULENT MISREPRESENTATION

[10,11] In order to sustain a cause of action for fraudulent misrepresentation, a plaintiff must show (1) that a representation was made, (2) that the representation was false, (3) that when made the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion, (4) that it was made with the intention that the plaintiff should rely upon it, (5) that the plaintiff reasonably did so rely, and (6) that he or she suffered damage as a result. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986); *Servicemaster Indus. v. J.R.L. Enterprises*, 223 Neb. 39, 388 N.W.2d 83 (1986); *Hahn & Hupf Constr. v. Highland Heights Nsg. Home*, 222 Neb. 189, 382 N.W.2d 607 (1986). A plaintiff does not, however, have to prove intent to deceive to sustain a cause of action for fraudulent misrepresentation. *Alliance Nat. Bank v. State Surety Co., supra*; *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986). Poore contends that Huffman failed to produce sufficient evidence on the first and third elements.

[12] Courts of law require proof of fraud by a preponderance of the evidence, while courts of equity require clear and convincing evidence. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989); *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). Since this is an action at law, Huffman must prove the fraudulent misrepresentation by a preponderance of the evidence. See *Alliance Nat. Bank v. State Surety Co., supra*.

In a fraud case, direct evidence is not essential, but proof of fraud drawn from circumstantial evidence must not be guesswork or conjecture; such proof must be rational and logical deductions from the facts and circumstances from which they are inferred. *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996).

Wayne first contends that the court erred in finding that he had made a representation to Huffman. It is undisputed that Wayne made no oral representations to Huffman. The trial court predicated liability upon the representation made in the Management Agreement that Mid States would place Huffman's cows "with a suitable dairyman who maintains a suitable dairy operation."

[13,14] To constitute fraud, a misrepresentation must be an assertion of fact, not merely an expression of opinion. *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 502 N.W.2d 444 (1993). The fraud involved in the misrepresentation must relate to a present or preexisting fact and generally may not be predicated on an inference concerning any event in the future or acts to be done in the future unless such representations as to future acts are falsely and fraudulently made with an intent to deceive. *Havelock Bank v. Woods*, 219 Neb. 57, 361 N.W.2d 197 (1985), *overruled on other grounds, Nielsen v. Adams, supra.*

The Management Agreement stated that (1) Huffman's cows would be placed with a "suitable dairyman" who ran a suitable dairy operation and (2) the cows had been leased to the Smarsh dairy. When these statements are read together, the agreement therefore represented that Huffman's cows had been placed with a suitable dairy, the Smarsh dairy. This was a statement of present fact and not a mere expression of opinion or inference concerning any event in the future. We thus conclude that these statements constituted a representation.

[15-17] Wayne argues that the statements in the Management Agreement were a representation made by Mid States rather than by him, and therefore he cannot be held liable. It is true that Wayne signed the agreement in his official capacity as vice president of Mid States. However, the evidence reveals that Wayne was the only representative of Mid States with whom Huffman had contact concerning the investment in dairy cattle to be placed at the Smarsh dairy. As stated above, officers and directors of a corporation may be held individually liable for personal participation in tortious acts even though they derived no personal benefit, but acted on behalf of, and in the name of, the corporation and the corporation alone was enriched by the acts. 3A William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 1137 (rev. perm. ed. 1994). See, also, 18B Am. Jur. 2d *Corporations* § 1882 (1985). Moreover, as also stated above, a director who misrepresents a material fact to another to induce the latter to enter into a financial relation with a corporation, to that person's detriment, may be liable to such other person for fraud and misrepresentation. *Hahn & Hupf Constr. v. Highland Heights Nsg. Home, supra.* Thus, Wayne

can be held individually liable for fraudulent misrepresentation if Huffman satisfies his burden. However, the other officers and directors, specifically Edna and Otto, cannot be held personally liable for Wayne's actions in the absence of evidence that they also participated in some manner. An officer who takes no part in the commission of the tort is not personally liable to third persons for the torts of other agents, officers, or employees of the corporation. 3A Fletcher, *supra*.

Wayne does not argue that the Smarsh dairy was a suitable dairy. There is ample evidence in the record to support the finding that the Smarsh dairy was not a suitable dairy. The record reveals that prior to October 1, 1991, the Smarsh dairy was 80 short in a herd of 184, had a culling rate of 35 percent of the herd or better, did not have sufficient funds with which to pay its bills and debts, did not have a replacement heifer herd, and had lost a significant portion of the herd to bad feed. Armbrust, a judge of dairy cattle, testified to what seems fairly obvious: that as of April 1, 1991, the Smarsh dairy was not a suitable dairy.

Wayne claims that there was insufficient evidence to conclude that he knew that the dairy was unsuitable. We disagree. Wayne knew in March 1991 that 80 of the 184 cows, or 43 percent of the dairy herd, were missing. That fact by itself ought to have told Wayne, whose business was the placement of his "investors' " cattle, that the Smarsh dairy was unsuitable. What investors would want their dairy cattle going to a dairy which "loses" nearly half its herd? Thereafter, Wayne entered into an agreement with the dairy in which it transferred to Mid States its entire herd of 99 heifers, none of which were ready to produce milk. Moreover, Wayne should have known that by transferring its entire herd of replacement heifers to Mid States, the dairy would be unable to replace any culled cows. Wayne also knew by July 1991 that the Smarsh dairy had not fulfilled its promise to sell its crops to add replacement cows. While Wayne may have been trying to give the Smarsh dairy the benefit of the doubt and therefore may not have "known" that his representation was false, there is abundant evidence to show that the representation was, at the very least, made recklessly and as a positive assertion.

[18] Reliance is clearly proven, and Wayne does not dispute that the representation was made with the intention that Huffman should rely upon it and that Huffman did rely on it. However, Wayne does contend that his statement was not the proximate cause of Huffman's damages. False representations must be the proximate cause of the damage before a party may recover. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). But for the representation made by Wayne in the Management Agreement that the Smarsh dairy was a suitable dairy operation, Huffman would not have agreed to lease his cattle to the Smarsh dairy. See, e.g., *id.* Having reviewed the evidence in the light most favorable to Huffman, the successful party, we cannot say that the trial court's finding that Wayne made a fraudulent misrepresentation to Huffman, which proximately caused Huffman's damages, was clearly wrong.

3. Damages

[19] We now turn to whether the trial court used the proper measure of damages. One who has been induced to enter into an agreement by virtue of a material misrepresentation, that is to say, by virtue of fraud, may either affirm the agreement and sue for damages or disaffirm the agreement and sue to be reinstated to his or her position as it existed before entry into the contract. *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985). This is so because one remedy, damages, depends upon the existence of a contract, and the other, rescission, depends upon the concept that because of the fraud no contract came into existence. *Id.* Huffman elected to affirm the agreement, and thus he is entitled to recover such damages as will compensate him for the loss or injury actually caused by the fraud and place him in the same position as would have existed had there been no fraud. See *Alliance Nat. Bank v. State Surety Co., supra.*

(a) Loss of Rent

The trial court first awarded Huffman "[t]he loss of 39 monthly lease payments at a net rate of $20 per head per month for a total of $7,600." (However, $200 per month for Huffman's 10 head multiplied by 39 months equals $7,800. But as demon-

strated below, the court meant 38 monthly payments.) Under the terms of the Dairy Cow Lease and the Management Agreement, the Smarsh dairy was to make 60 monthly payments of $350 (10 cows at $35 per cow per month) to Huffman, $150 (10 cows at $15 per month per cow) of which was to be paid to Mid States as its management fee. Thus, Huffman was to net $200 a month. The Smarsh dairy failed to make 38 payments. At a net of $200 per month, Huffman should have received a total of $7,600. Thus, the trial court properly awarded $7,600 in damages for loss of rent.

(b) Value of 10 Replacement Heifers

The trial court additionally awarded Huffman "[t]he value of ten bred replacement heifers as of August 1993, the fair market value of which would be $1,100 per heifer for a total amount of $11,000." As stated above, Huffman elected to affirm the lease, and therefore he is entitled to be put in the same position he would have been had there been no fraud. See *Alliance Nat. Bank v. State Surety Co., supra.* Under paragraph 5.6 of the Dairy Cow Lease, at the end of the 60-month lease, Mid States was to provide Huffman with "a number of bred springing heifers equal to the number of Cows" subject to the lease, which heifers were to meet certain quality standards. Armbrust testified that the value of bred springing heifers in August 1993 was in the $1,100 range. Armbrust further testified that he had personally sold some heifers in 1995 in the $1,000 to $1,250 range.

[20] Wayne contends that since Huffman would not be entitled to receive 10 bred replacement heifers until the termination of the 60-month lease, the correct measure of damages is the value of the 10 heifers on October 1, 1996. Wayne further contends that because Huffman did not present any evidence as to the value of such heifers on October 1, 1996, the trial court's award for replacement costs was pure speculation. The measure of damages for breach of contract, where the contract is to tender specific property, is the value of the property at the time of the breach. *Consumers Cooperative Assn. v. Sherman*, 147 Neb. 901, 25 N.W.2d 548 (1947). At the time of the breach in August 1993, the value of the 10 replacement heifers was approximately $1,100 each. The trial court did not err in this award of damages.

(c) Salvage Value of Huffman's 10 Dairy Cows

The trial court also awarded Huffman "[t]he agreed salvage value of the dairy cows at $350 per head for a total amount of $3,500." While the Management Agreement is silent on the issue of salvage value, paragraph 5.4 of the Dairy Cow Lease provides, in relevant part: "Upon the replacement of the culled Cow with a satisfactory replacement Cow by Lessee [Smarsh dairy], Lessor [Huffman] shall endorse any bank draft or check to the order of Lessee [Smarsh dairy] and shall deliver any other proceeds to Lessee [Smarsh dairy]." Thus, it appears that, by contrast, Smarsh was to get the salvage value. However, Wayne admitted at trial that up to a point in time Mid States told its investors that they would all receive $350 salvage value for culled cows and that after that point they would receive the "average salvage value." Wayne also testified that he presumed that Huffman was told that he would receive a salvage value of $350. While the testimony appears to be in conflict with the terms of the lease, Wayne does not complain about this portion of the damage award on appeal. Thus, we will not disturb it.

(d) Reimbursement of Mid States' Management Fees

On this issue, the trial court found as follows:

> 4) Reimbursement for management fees paid to Mid-States for a period of 22 months at the rate of $15 per head per month for a total of $3,300. I find that these management fees were essentially worthless, as no relevant financial reports or information [was] furnished to the Plaintiff during the term of the lease. The Defendants failed to inspect the books and records of the Smarsh Dairy, and their inspections showed a continuing pattern of shortages of cows at the Smarsh Dairy in that 22 month period of time.

Had there been no fraud, at the end of the lease Huffman would have paid 60 months' worth of management fees to Mid States. While Huffman might be able to recover the management fees he paid in a breach of contract action, a matter which we do not decide, he cannot recover the 22 months' worth of management fees that he did pay to Mid States, because he would not have been entitled to those at the termination of the

Dairy Cow Lease and he did in fact receive 22 months of lease payments. Thus, we conclude that the trial court erred in assessing $3,300 in management fees against Wayne.

4. Motion for New Trial

[21] Wayne also assigns, but fails to discuss, the court's denial of his motion for new trial. Errors assigned but not argued will not be addressed. *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997).

5. Constructive Fraud/Breach of Fiduciary Duty

[22,23] On cross-appeal, Huffman contends that the trial court erred in finding that Wayne and Edna were not liable for constructive fraud by the breach of a fiduciary duty. A fiduciary duty arises out of a confidential relation, which exists when one party gains the confidence of another and purports to act or advise with the other's interest in mind. *Wolf v. Walt*, 247 Neb. 858, 530 N.W.2d 890 (1995). A stockholder can be individually liable for a constructive fraud committed by the corporation only where he had knowledge of and instigated the fraud. *Id.* In the instant case, Huffman failed to prove that Wayne or Edna had any fiduciary duty toward him, and such duty does not automatically arise merely because the parties entered into a contract. There is no evidence in the record that Wayne or Edna gained the confidence of Huffman. Thus, the trial court did not err in its finding that only Wayne was liable.

V. CONCLUSION

Finding that the trial court erred only in its award of reimbursement of the $3,300 in management fees, we remand with directions to reduce the judgment by that amount. In all other respects, the trial court's judgment is affirmed.

AFFIRMED AS MODIFIED, AND CAUSE REMANDED WITH DIRECTIONS.

ONE PACIFIC PLACE, LTD., A TENNESSEE LIMITED PARTNERSHIP, APPELLEE, V. H.T.I. CORPORATION, DOING BUSINESS AS LEGGOONS, A CORPORATION, APPELLANT.

569 N.W.2d 251

Filed October 7, 1997. No. A-96-601.

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. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.
3. **Pleadings: Verdicts: Judgments.** There is no more inflexible rule of law than that, to sustain a verdict or judgment, the pleadings and the proof, *allegata et probata*, must agree.
4. **Pleadings: Judgments.** The pleadings before the trial court at the time of decision form the issues for that decision.
5. **Pleadings: Judgments: Appeal and Error.** A judgment rendered on a petition which does not state a cause of action cannot be sustained and should be set aside.
6. **Pleadings: Judgments.** Under Nebraska's system of pleading and practice, issues to be tried must be formed by the pleadings, and a judgment rendered thereon must respond to the issues raised by the pleadings.
7. **Pleadings: Summary Judgment: Damages.** A summary judgment cannot be awarded for an amount in excess of the damages pled and prayed for in the operative petition.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Reversed and remanded for further proceedings.

Larry R. Demerath, of Demerath Law Offices, for appellant.

Anthony J. Hruban, of Bradford, Coenen & Welsh, for appellee.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

In this action, One Pacific Place, Ltd., sued H.T.I. Corporation (HTI) to recover possession of real estate rented to HTI and to recover rent and damages. HTI gave up possession of the real estate, leaving only the issue of damages. One Pacific Place filed a "Motion for Partial Summary Judgment," but the parties and the court have treated it as a motion for summary

judgment. The trial court granted a summary judgment in favor of One Pacific Place and awarded damages of $82,718.07. HTI appeals, alleging that the court erred in awarding penalty damages of $36,090.66 and in failing to give HTI credit for rent that One Pacific Place obtained when it leased the property after HTI left the premises. We conclude that the petition will not support the judgment award; therefore, we must reverse the summary judgment awarded and remand the cause for further proceedings in the district court.

In its petition, One Pacific Place alleges (1) that on or about April 23, 1990, it entered into a written lease of certain premises to HTI for a period of 10 years; (2) that the lease provided HTI was to pay minimum annual rent, payable monthly, plus certain real estate taxes, common area costs, insurance costs, and promotional expenses; and (3) that HTI failed to make payment for certain items payable in 1993, and for rent and other items payable in 1994. One Pacific Place also alleges that it was entitled to possession of the premises by reason of such default, but this is now a moot issue. In addition, One Pacific Place alleged specific amounts totaling $29,471.91 that HTI owed under the terms of the lease for rent, taxes, and other items. One Pacific Place further alleged that under the lease, it was entitled to 10 percent interest from the due date of all items until paid. One Pacific Place claimed that it was entitled to $1,642.43 in interest on rent and other charges unpaid through June 1, 1995, and $3,914.25 for additional rent through June 1, 1995. One Pacific Place prayed for a judgment of money damages of $37,975.12 plus "additional rent that will accrue from and after the date of the filing of this Petition." In addition, One Pacific Place alleges that "One Pacific Place will suffer damages in the form of lost rentals in the event [HTI] vacates the Premises and terminates The Shopping Center Lease prior to the expiration of its term."

STANDARD 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. *Anderzhon/Architects v. 57 Oxbow II Partnership*, 250 Neb. 768, 553 N.W.2d 157 (1996).

[2] On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

DISCUSSION

For purposes of this opinion, we assume the evidence would establish that there is no genuine issue as to the material facts necessary to enable One Pacific Place to recover judgment for the $82,718.07 awarded. One Pacific Place, in its petition, prayed for a judgment of $37,975.12. HTI generally denied the allegations of the petition. For proof in its motion for partial summary judgment, One Pacific Place established damages of approximately $45,128.91 in an affidavit. (This figure would vary depending upon the date from which interest was computed.) In its brief, HTI argues that of the $82,718.07 awarded as a judgment, $36,090.66 should not have been awarded because it amounted to penalty damages.

By way of explanation, the $36,090.66 was apparently awarded under § 4.3 of the lease. That section recites the importance to One Pacific Place that someone be conducting business at the space at all times, and then goes on to provide:

> In the event TENANT [HTI] fails to operate as provided herein, LANDLORD [One Pacific Place] shall have, in addition to any other remedies available under this lease or otherwise, the right to collect in addition to the Minimum Annual Rent and other sums payable under this lease a further item of additional rent at a rate equal to three (3) times the Minimum Annual Rent per day for each and every day TENANT fails to operate, which further additional rent shall be deemed to be in lieu of any Percentage Rent that may have been earned during such period.

In its brief, HTI claims that the above section of the lease provides for a penalty and that $36,090.66 of the judgment awarded constitutes a penalty. One Pacific Place argues that the section provides for additional rent, rather than a penalty. On the basis of *Seevers v. Potter*, 248 Neb. 621, 537 N.W.2d 505

(1995), One Pacific Place argues that an appellate court should not consider on appeal an issue which was not presented to or passed on by the trial court. In addition, upon the basis of *Gordon v. Pfab*, 246 N.W.2d 283 (Iowa 1976), One Pacific Place argues that a party who contends that liquidated damages are a penalty has the burden to plead and prove this issue. In view of the fact that One Pacific Place's petition did not specifically allege or pray for the liquidated damages in question, it is difficult to understand how HTI could have pled this issue.

One Pacific Place's argument points out the weakness of the proceeding in the court below. One Pacific Place did not allege facts which would justify an award of money under § 4.3 of the lease and did not pray for the damages which could have included an award of liquidated damages under that paragraph of the petition.

A summary judgment may be granted if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Neb. Rev. Stat. § 25-1332 (Reissue 1995). This statutory provision is consistent with Nebraska's system of code pleading. Neb. Rev. Stat. § 25-804 (Reissue 1995) provides that a petition shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language . . . ." This same statute provides that if recovery of money be demanded, the amount of special damages shall be stated, but the amount of general damages shall not be stated. Neb. Rev. Stat. § 25-1102 (Reissue 1995) provides, insofar as is applicable to this case, that "[a]n issue of fact arises . . . upon material allegation in the petition denied by the answer . . . ."

[3,4] These statutes are supported by a long history of holdings by the Nebraska Supreme Court. "[T]here is no more inflexible rule of law than that, to sustain a verdict or judgment, the pleadings and the proof, *allegata et probata*, must agree." *Traver v. Shaefle*, 33 Neb. 531, 548, 50 N.W. 683, 688 (1891). In *Clemons v. Heelan*, 52 Neb. 287, 72 N.W. 270 (1897), the Supreme Court stated that the relief should have been confined to that prayed for and that which was justified by the averments of the pleadings. In *Domann v. Domann*, 114 Neb. 563, 208

N.W. 669 (1926), the Supreme Court modified a decree to the extent that it was not supported by the pleadings. In the more recent case *State ex rel. Douglas v. Schroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982), the Supreme Court stated that the pleadings before the trial court at the time of decision form the issues for that decision.

[5] The Supreme Court has also held that a judgment rendered on a petition which does not state a cause of action cannot be sustained and should be set aside. *Hague v. Sterns*, 175 Neb. 1, 120 N.W.2d 287 (1963).

[6] We realize that there are additional items of damages not claimed to be covered by § 4.3 of the lease which may or may not be allowable, but the total of these items would be far short of the $82,718.07 awarded. We could perhaps study the evidence to ascertain what these items might be. However, they still would not be covered by the pleadings. In *Bowman v. Cobb*, 128 Neb. 289, 258 N.W. 535 (1935), the Supreme Court observed that the only safe rule is to require litigants to try their cases upon the issues presented by the pleadings. The *Bowman* court stated:

> We have repeatedly held that, under our system of pleading and practice under the Code, issues to be tried must be formed by pleadings and a judgment rendered thereon must respond to the issues raised by the pleadings. *Clarke v. Kelsey*, 41 Neb. 766; *Hobbie v. Zaepffel*, 17 Neb. 536; *School District v. Randall*, 5 Neb. 408; *Traver v. Shaefle*, 33 Neb. 531.

128 Neb. at 293, 258 N.W. at 537.

[7] When applied to summary judgment, this rule means that a summary judgment cannot be awarded for an amount in excess of the damages pled and prayed for in the operative petition.

HTI argues in favor of some sort of "offset," brief for appellant at 14, based upon the fact that One Pacific Place re-leased the property for more than HTI had paid in its lease. This claim, and we are not at all sure what it consists of, amounts to either a setoff, counterclaim, or cross-petition. Neb. Rev. Stat. § 25-812 (Reissue 1995) provides that a defendant may set forth in his answer as many grounds of defense, counterclaim, and setoff as the defendant may have. Neb. Rev. Stat. § 25-811 (Reissue

1995) provides that such matters shall be stated in ordinary, concise language, without repetition. We are unable to consider HTI's argument concerning a possible setoff, because it is not pled in the answer as is required.

We realize that HTI does not dispute a large part of the judgment awarded and apparently agrees, or does not dispute, that it owes a considerable portion of the amount included in the judgment. However, for us to merely decrease the amount of the judgment would either (1) deprive the parties of the opportunity to plead and prove the rights which they argue in their briefs they are entitled to or (2) result in a partial summary judgment by this court, which would grant the litigants only part of the relief they seek, and, of necessity, would be an interlocutory judgment, which is not appealable. See, § 25-1332 and Neb. Rev. Stat. § 25-1333 (Reissue 1995); *Burroughs Corp. v. James E. Simon Constr. Co.*, 192 Neb. 272, 220 N.W.2d 225 (1974). Neither result is defensible; therefore, we reverse the summary judgment awarded by the trial court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
TIMOTHY C. RODRIGUEZ, APPELLANT.
569 N.W.2d 686

Filed October 7, 1997. No. A-96-1304.

1. **Criminal Law: Directed Verdict.** A directed verdict in a criminal case is proper only when there is a complete failure of evidence to establish an essential element of the crime charged or when the evidence is so doubtful in character, lacking probative value, that a finding of guilt on such evidence cannot be sustained.
2. **Convictions: Evidence: Appeal and Error.** Regardless of whether evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as failure to direct a verdict, insufficiency of evidence, or failure to prove a prima facie case, the standard of review is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh evidence. Such matters are for the finder of fact, and a conviction will be affirmed, absent prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

3. **Juries: Discrimination: Appeal and Error.** A trial court's determination of whether a defendant has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility.
4. **Juries: Discrimination: Prosecuting Attorneys: Appeal and Error.** A trial court's determination of the adequacy of the State's neutral explanation of its peremptory challenges will not be reversed on appeal unless clearly erroneous.
5. **Equal Protection: Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to show that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause, a defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; if such showing is made, the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried the burden of proving purposeful discrimination.
6. **Juries: Discrimination.** Shared identity of race between a defendant and an excluded juror is not required to present a successful challenge under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).
7. ____: ____. Race of a defendant is irrelevant to the defendant's standing to object to the discriminatory use of peremptory challenges.
8. **Trial: Juries: Discrimination: Waiver.** An objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be made prior to the swearing in of the jury; if such an objection is not timely, it has been waived by the defendant.
9. **Juries: Discrimination: Prosecuting Attorneys: Proof.** If the trial court does not state on the record that a defendant has met the burden of proving a prima facie case of purposeful discrimination in jury selection based on the prosecutor's use of peremptory challenges, it does so implicitly by asking the State to articulate its reasons for the questioned strikes.
10. **Constitutional Law: Equal Protection: Juries: Discrimination: Prosecuting Attorneys.** A prosecutor's basis for his or her peremptory strikes need not rise to the level of rationality to satisfy the Equal Protection Clause. The trial court need not determine if the explanation given by the prosecutor for a peremptory strike is reasonable, but only that it is nondiscriminatory and is constitutionally permissible.
11. **Directed Verdict: Waiver: Convictions: Appeal and Error.** A defendant who moves for a directed verdict at the close of the State's case and proceeds with the presentation of evidence waives any error in ruling on that motion, but may challenge the sufficiency of the evidence for the defendant's conviction.
12. **Trial: Waiver.** A party who fails to insist upon a ruling to a proffered objection waives that objection.
13. **Directed Verdict: Waiver.** Where a defendant makes a motion for a directed verdict at the end of the State's case, whether ruled upon or not, and the defendant thereafter presents evidence, the defendant has waived any error in connection with the motion for directed verdict made at the end of the State's case.
14. **Criminal Law: Intent.** The crime of making terroristic threats does not require an intent to execute the threats made or that the recipient of the threat be terrorized; rather, Neb. Rev. Stat. § 28-311.01 (Reissue 1995) and Nebraska cases require that the perpetrator have the intent to terrorize the victim as a result of the threat or a reckless disregard of the risk of causing such terror.

15. **Criminal Law: Evidence: Intent.** When the sufficiency of the evidence as to criminal intent is questioned, a direct expression of intention by the actor is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
16. **Witnesses: Testimony: Juries.** The credibility of a witness and the weight to be given to the testimony of that witness are issues for the jury to resolve.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

James Martin Davis for appellant.

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

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

PER CURIAM.

I. INTRODUCTION

Timothy C. Rodriguez appeals his conviction in the district court for Sarpy County of making terroristic threats in violation of Neb. Rev. Stat. § 28-311.01 (Reissue 1995). For the reasons cited below, we affirm.

II. BACKGROUND

On February 15, 1996, the State filed a criminal complaint charging Rodriguez with making terroristic threats against Lelon Sapp on February 13. On April 19, Rodriguez entered a plea of not guilty.

A jury trial began in the district court for Sarpy County on July 10. After the jury had been sworn in, but prior to the opening statements, counsel for Rodriguez challenged the use of peremptory challenges by the State, alleging that the State had been racially discriminatory in violation of the rule first laid down in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

In connection with his *Batson* challenge, Rodriguez' counsel noted that the sole African-American member of the venire had been stricken by the State. The trial court noted that Rodriguez was not of the same race as the dismissed venireperson. In response, Rodriguez' counsel stated that the *Batson* rule could be applied if a defendant was of a minority group and stated that Rodriguez was Hispanic.

The trial court then observed that while the African-American member of the venire had been dismissed, a Hispanic member of the venire had not been stricken and concluded that *Batson* was not applicable. The trial judge, nevertheless, offered the State the chance to recite for the record why the African-American venireperson had been stricken.

The State first replied that Rodriguez' counsel's challenge was untimely because the jurors had already been sworn in before the *Batson* challenge was urged. Second, the State argued that Rodriguez was not of the "same class" as the dismissed venireperson. Finally, the State said that the reason for the use of the peremptory challenge was that the dismissed venireperson had been "on a prior jury and didn't indicate whether [the verdict] was guilty or not guilty, and I assumed it was not guilty."

The trial court overruled Rodriguez' *Batson* challenge "probably on all three grounds."

With respect to the substance of the case, the first witness for the State was Patricia Balvans, the office manager for and a longtime employee of Sapp, the victim. Balvans testified that she had first seen Rodriguez in February 1996, when he came into Sapp's insurance office in the afternoon. Rodriguez apparently had attempted to assert a claim on an insurance policy that had been sold to him by an agent working for Sapp, but which policy was issued by another company. Balvans testified that Rodriguez seemed agitated and demanded that Sapp's office issue him a check. Balvans stated that she attempted to reason with him, but finally asked him to leave. When he refused, she summoned Sapp.

Balvans testified that after she left Sapp and Rodriguez in Sapp's office, she could hear loud voices, but could not make out what was being said. Rodriguez left soon after. Balvans said that after Rodriguez left the office, she and the other employees had locked the doors and moved several of the vehicles on the premises to someplace where they would be safer.

Balvans testified that about an hour after he left, Rodriguez called Sapp at his office on the telephone. Balvans was able to hear Sapp and Rodriguez speaking on Sapp's speaker telephone, and while she did not hear all of the conversation, she

did hear an exchange in which Sapp asked, "[A]re you threatening me?" and Rodriguez said, "I want my money or something bad is going to happen to you." Balvans testified that she believed Rodriguez' threat and that she was intimidated by him.

Sapp then testified for the State. Sapp stated that when he first encountered Rodriguez, Rodriguez was swearing and was very angry. Sapp said that while they were in his office, Rodriguez had threatened to "blow [him] away." When Sapp asked what that meant, Rodriguez said to Sapp, "You will be dead by tonight." Sapp stated that he had been scared by Rodriguez' threats.

Sapp further testified that later that afternoon, he was again threatened by Rodriguez on the telephone. Sapp then called the police. He also reported that later that afternoon, he received a telephone call from Elaine Rodriguez, evidently Rodriguez' mother. Sapp stated that she was very conciliatory toward him, but did state that Rodriguez was sometimes violent.

The next witness for the State was Deputy Sheriff Melissa Adkins. Adkins testified that she was called to Sapp's place of business, where she took a report from Sapp regarding the incident. On cross-examination, Adkins said that Sapp described Rodriguez as saying to him that "great harm will come to you or your property." After taking Sapp's report, she stated that she and another officer went to see Rodriguez that evening at his residence.

According to Adkins, Rodriguez was generally uncooperative and kept closing the door on the officers such that they had to shout back and forth through closed windows. Finally, said Adkins, her supervisor was able to contact Rodriguez on the telephone, and they were able to talk to him. Adkins said that Rodriguez denied making threats against Sapp's life, but admitted to telling Sapp that he would get some of his friends and "camp out" on Sapp's property and block access to Sapp's office until they were satisfied.

Adkins testified that Rodriguez was agitated and aggressive, so that the officers were nervous and wondered if he might have weapons in his house. Adkins said that they finally issued a citation for third degree assault, which they had to slip under the door of Rodriguez' residence.

On cross-examination, Adkins admitted to an error on her original report regarding the incident. Her report indicated that Rodriguez had come into Sapp's office at approximately 3:15 p.m. Adkins indicated that was an error and that that time should have been indicated as the approximate time of the telephone call from Rodriguez to Sapp, not of Rodriguez' visit to Sapp's office.

The final witness for the State was Monty Daganaar, an investigator for the Sarpy County sheriff's office and the arresting officer of Rodriguez. Daganaar indicated that when he arrested Rodriguez, Rodriguez was angry, particularly at Sapp, and demanded to know why Sapp had not been placed under arrest for being "a crook." Daganaar also indicated that the charges against Rodriguez had been upgraded from third degree assault to making terroristic threats after Daganaar's interview with Sapp, based on what Sapp told him at that time. He also stated that Sapp was genuinely frightened by Rodriguez' threats.

At the close of the State's case, Rodriguez moved for a directed verdict. The motion was taken under advisement. Thereafter, Rodriguez presented evidence.

The sole witness testifying for the defense was Elaine Rodriguez, Rodriguez' mother. Elaine Rodriguez indicated that her son was not violent, but did lose his temper sometimes. She denied telling Sapp on the telephone that Rodriguez was violent, although she admitted to calling Sapp at her son's request. She also testified that during her telephone conversation with Sapp, he indicated to her that her son had made threats against him.

At the close of all the evidence, Rodriguez' counsel said that he would "like to renew my motion to dismiss." The court indicated that the motion would be kept under advisement.

On July 11, 1996, the jury returned a verdict of guilty. Rodriguez filed a motion for new trial on August 5 based on insufficient evidence to sustain his conviction. Sentencing was set for September 6, but Rodriguez failed to appear on that date.

On December 6, Rodriguez appeared for sentencing. Prior to sentencing, Rodriguez presented argument on his motion for new trial. Rodriguez argued that the jury may have been preju-

diced by his misbehavior during the closing arguments at trial. The substance of Rodriguez' alleged misbehavior is not apparent from the record. Rodriguez' counsel then reminded the trial court that he had moved for a directed verdict on two occasions and had not obtained a ruling. The trial court indicated that the first motion for directed verdict, made after the State's case, had been waived because Rodriguez had presented evidence on his own behalf. The trial court then denied the renewed motion for directed verdict, which had been made after all the evidence. Thereafter, the trial court denied Rodriguez' motion for new trial.

Rodriguez was sentenced to 6 months' imprisonment in the Sarpy County Jail. Rodriguez appeals.

III. ASSIGNMENTS OF ERROR

Rodriguez assigns three errors, which he states as follows: (1) The district court erred by denying Rodriguez' *Batson* challenge, (2) the district court erred by failing to rule on Rodriguez' two motions for a directed verdict, (3) the court erred by not dismissing the case because the evidence was insufficient as a matter of law to convict Rodriguez.

IV. STANDARD OF REVIEW

[1] A directed verdict in a criminal case is proper only when there is a complete failure of evidence to establish an essential element of the crime charged or when the evidence is so doubtful in character, lacking probative value, that a finding of guilt on such evidence cannot be sustained. *State v. Morley,* 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

[2] Regardless of whether evidence is direct, circumstantial, or a combination thereof, and regardless of whether the issue is labeled as failure to direct a verdict, insufficiency of evidence, or failure to prove a prima facie case, the standard of review is the same: In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of the witnesses, or reweigh evidence. Such matters are for the finder of fact, and a conviction will be affirmed, absent prejudicial error, if properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the

conviction. *State v. Glantz,* 251 Neb. 947, 560 N.W.2d 783 (1997); *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995); *State v. McCaslin*, 240 Neb. 482, 482 N.W.2d 558 (1992).

[3] A trial court's determination of whether a defendant has established purposeful discrimination in jury selection is a finding of fact and is entitled to appropriate deference from an appellate court because such a finding will largely turn on evaluation of credibility. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993).

[4] A trial court's determination of the adequacy of the State's "neutral explanation" of its peremptory challenges will not be reversed on appeal unless clearly erroneous. *State v. Lopez, supra; State v. Edwards, supra.*

V. ANALYSIS

1. *Batson* Challenge

Rodriguez argues that the trial court erred in denying his challenge to the State's use of peremptory strikes under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), because the trial court mistakenly believed that a defendant and a stricken venireperson must be members of the same racial class and denied Rodriguez' *Batson* challenge on this basis. Rodriguez does not claim the denial of his *Batson* challenge was in error for any other reason. As explained more fully below, we conclude that although the trial court was mistaken in its view of the law to the extent that the trial court understood that a defendant and a stricken venireperson must be of the same race, this misperception is of no consequence in the present case.

[5] It is well settled that in order to show that a prosecutor has used peremptory challenges in a manner violating the Equal Protection Clause, a defendant must first make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; if such showing is made, the burden then shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried the burden of

proving purposeful discrimination. *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *State v. Starks*, 3 Neb. App. 854, 533 N.W.2d 134 (1995).

[6] In the instant case, the State argued, inter alia, that Rodriguez' *Batson* challenge was ill founded because Rodriguez, who is Hispanic, and the dismissed African-American venireperson were not of the "same class." The trial court evidently agreed. Contrary to the State's argument and the trial court's apparent agreement, shared identity of race between a defendant and an excluded juror is not required to present a successful *Batson* challenge. In *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991), the U.S. Supreme Court specifically held that common racial identity between a defendant and an excluded venireperson was not a prerequisite for a challenge under *Batson* and that such a requirement would contravene the Equal Protection Clause.

[7] In *Powers,* a Caucasian defendant raised a challenge to the exclusion, allegedly based on race, of African-Americans from the jury in his case. The Court stated that "to bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service." 499 U.S. at 415. The Court held that "race [of the defendant] is irrelevant to a defendant's standing to object to the discriminatory use of peremptory challenges." 499 U.S. at 416. See, also, *Hernandez v. New York, supra*; *State v. Starks, supra.* But see, *State v. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997); *State v. Lopez*, 249 Neb. 634, 544 N.W.2d 845 (1996); *State v. Covarrubias,* 244 Neb. 366, 507 N.W.2d 248 (1993); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Martin*, 239 Neb. 339, 476 N.W.2d 536 (1991); *State v. Edwards*, 2 Neb. App. 149, 507 N.W.2d 506 (1993) (cases in Nebraska decided after *Powers v. Ohio, supra*, that continue to refer to defendant's race as prerequisite to challenge under *Batson v. Kentucky, supra.*)

We acknowledge that Rodriguez raises a valid point regarding the State's and the trial court's misplaced understanding that Rodriguez' *Batson* challenge should be denied because he and the dismissed venireperson were not of the "same class." This misperception, however, does not require reversal, because

Rodriguez' *Batson* challenge was untimely and the State's explanation for excluding the juror in question was nondiscriminatory. In this regard, we note that Rodriguez' brief on appeal does not address either of the other two reasons offered by the State for the rejection of Rodriguez' challenge, i.e., that Rodriguez' *Batson* challenge, which was made after the jury was sworn in, was untimely and that prior jury service of the excluded venireperson was a nondiscriminatory explanation for exclusion. As explained more fully below, we conclude that the denial of Rodriguez' *Batson* challenge based on untimeliness and/or neutral explanation was not clearly erroneous.

[8] According to the record, Rodriguez' *Batson* challenge was not made until after the jury had been sworn in. This makes his challenge untimely. An objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be made prior to the swearing in of the jury; if such an objection is not timely, it has been waived by the defendant. *State v. Covarrubias, supra*. This rule is consistent with that announced by the U.S. Court of Appeals for the Eighth Circuit in *U.S. v. Parham*, 16 F.3d 844 (8th Cir. 1994) (holding that *Batson* objection must be made, at latest, before venire is dismissed and before trial commences). The U.S. Supreme Court has also specifically approved a similar rule in a case appealed from the Georgia courts. See *Ford v. Georgia*, 498 U.S. 411, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991) (holding that state court may adopt general rule that *Batson* claim is untimely if raised after jury is sworn in).

Since Rodriguez did not assert his *Batson* challenge until after the jury had been sworn in, it was untimely, and his objection was therefore waived.

[9] For the sake of completeness, we note that even had a timely objection been made, Rodriguez' *Batson* challenge would have been properly denied. We assume for the sake of this discussion that Rodriguez established a prima facie case of discrimination. We so assume because, under the cases, if the trial court does not state on the record that a defendant has met the burden of proving a prima facie case of purposeful discrimination in jury selection based on the prosecutor's use of peremptory challenges, it does so implicitly by asking the State

to articulate its reasons for the questioned strikes. *State v. Lopez, supra.* The trial court did so here.

As its reason for excluding the African-American venireperson, the State in this case said that the dismissed venireperson had indicated that she had served on a jury before, but that she had failed to indicate the outcome of the trial, and the State said that it had assumed the verdict was not guilty. It was for the trial court to credit this explanation.

[10] It is well settled that a prosecutor's basis for his or her peremptory strikes need not rise to the level of rationality to satisfy the Equal Protection Clause. *State v. Starks*, 3 Neb. App. 854, 533 N.W.2d 134 (1995). The trial court need not determine if the explanation given by the prosecutor for a peremptory strike is reasonable, but only that it is nondiscriminatory and is constitutionally permissible. *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Starks, supra.* Accord, *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991); *Gee v. Groose*, 110 F.3d 1346 (8th Cir. 1997). The U.S. Court of Appeals for the Eighth Circuit has specifically indicated that the "prosecutor's explanation 'may be "implausible or fantastic," even "silly or superstitious," and yet still be "legitimate" '. . . ." *Gee v. Groose*, 110 F.3d at 1351. Under this standard, it is clear that the trial court's acceptance of the State's articulated explanation for its peremptory strike was not clearly erroneous.

Rodriguez' *Batson* challenge to the jury selection was untimely, and the State gave a legitimate nondiscriminatory explanation. Rodriguez' assignment of error pertaining to the denial of his *Batson* challenge is without merit.

2. Rulings on Motions for Directed Verdict

Rodriguez' second assignment of error claims: "The District Court Erred by Failing to Rule on Defendant's Two Motions for a Directed Verdict." This assignment of error misstates the record.

With respect to the subject of ruling on Rodriguez' motions for directed verdict at the end of the State's case and at the end of the whole case, the bill of exceptions contains the following exchange, which took place on December 6, 1996, in connection with Rodriguez' motion for a new trial and before sentencing:

> [Rodriguez' counsel]: . . . If the Court could see that I would submit that he would be entitled to a new trial, and in addition to that we did make motions for directed verdict at the end of the State's case and at the end of our case, which you did take under advisement. My recollection [is] that never was ruled on.
>
> THE COURT: Did you present a case then?
>
> [Rodriguez' counsel]: Yes.
>
> THE COURT: Then you waive my ruling if you make a motion for directed verdict at the close of the State's case, which I take under advisement, and you proceed and produce evidence you waive any —
>
> [Rodriguez' counsel]: Then at the end of our case we renewed the motion.
>
> THE COURT: The motion for directed verdict?
>
> [Rodriguez' counsel]: We renewed it. That would be the sum and substance of the argument, Your Honor.
>
> [Prosecutor]: I would ask you to overrule it. There was sufficient evidence to sustain the verdict.
>
> THE COURT: I am going to deny it.

This exchange shows that, contrary to Rodriguez' assignment of error, the trial court effectively ruled on Rodriguez' motions for directed verdict. Specifically, and as explained more fully below, the record shows first, that by presenting evidence, Rodriguez waived a ruling on his motion for directed verdict at the close of the State's case, and second, that Rodriguez' motion for directed verdict at the close of the evidence was denied.

(a) Motion at Close of State's Case

As noted above, Rodriguez claims that the trial court failed to rule on his motion for directed verdict. In his appellate brief, Rodriguez varies his appellate claims by arguing that error was committed when the trial court, rather than ignoring his motions for directed verdict, instead took his motions for directed verdict "under advisement." We do not find these arguments persuasive.

[11] It is well settled that a defendant who moves for a directed verdict at the close of the State's case and proceeds with the presentation of evidence waives any error in ruling on that motion, but may challenge the sufficiency of the evidence for the defendant's conviction. *State v. Severin*, 250 Neb. 841,

553 N.W.2d 452 (1996); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992), *overruled on other grounds, State v. Williams*, 243 Neb. 959, 503 N.W.2d 561 (1993); *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992).

Nebraska jurisprudence is replete with cases in which no error was found where motions for directed verdict at the close of the plaintiff's case were taken "under advisement," regardless of whether or not the defendant thereafter presented evidence. See, e.g., *Hill v. City of Lincoln*, 249 Neb. 88, 541 N.W.2d 655 (1996); *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987); *Prudential Ins. Co. v. Greco*, 211 Neb. 342, 318 N.W.2d 724 (1982).

[12] The apparent rationale for concluding that no error occurs where the motion is simply taken under advisement after the close of the State's case is that a party who fails to insist upon a ruling thereafter waives his or her complaint that the trial court failed to rule on the motion. This court has specifically so held in an unpublished opinion. See *State v. McCauley*, 95 NCA No. 50, case No. A-95-252 (not designated for permanent publication). We note that this situation is analogous to that in which a party fails to insist upon a ruling to an objection during trial and, accordingly, waives that objection. See, e.g., *State v. Nowicki*, 239 Neb. 130, 134, 474 N.W.2d 478, 482-83 (1991) (stating that "although the defendant was entitled to a ruling, he should have made a request for such. By failing to do so the defendant elected instead to allow the preference of the trial court not to rule to stand unchallenged"). See, also, *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991).

Rodriguez also argues in his brief that he did not waive his motion for directed verdict at the end of the State's case because the trial court did not specifically overrule his motion, as distinguished from merely taking the motion under advisement. In this regard, Rodriguez relies on cases holding that the presentation of evidence by a defendant waives a motion for directed verdict at the close of the State's case where the trial court first specifically overrules the motion and the defendant thereafter presents evidence. The inference made by Rodriguez is that where there is no ruling, there can be no waiver. In this regard,

Rodriguez refers this court to Maryland cases which he interprets to mean that a waiver by a defendant is effective only "upon denial" of a motion for directed verdict. See, e.g., *Warfield v. State*, 315 Md. 474, 554 A.2d 1238 (1989); *Spencer v. State*, 76 Md. App. 71, 543 A.2d 851 (1988). We do not read these cases or Nebraska cases with similar language as Rodriguez suggests.

A review of Nebraska jurisprudence shows Nebraska cases containing language almost identical to that in the Maryland cases, stating that "upon overruling," a defendant waives a motion for directed verdict after the State's case by the presentation of evidence. See, e.g., *State v. Dawson*, 240 Neb. 89, 480 N.W.2d 700 (1992); *State v. Gray*, 239 Neb. 1024, 479 N.W.2d 796 (1992); *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

[13] Although these cases commonly describe the waiver due to the presentation of evidence after the motion for directed verdict at the end of the State's case has been overruled, a ruling on the motion for directed verdict is not a necessary precondition for the waiver to occur. See, e.g., *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Massa*, 242 Neb. 70, 493 N.W.2d 175 (1992); *State v. Back*, 241 Neb. 301, 488 N.W.2d 26 (1992). Thus, where a defendant makes a motion for a directed verdict at the end of the State's case, whether ruled upon or not, and the defendant thereafter presents evidence, the defendant has waived any error in connection with the motion for directed verdict made at the end of the State's case. *State v. McCauley, supra.*

In sum, Rodriguez has waived any error in the court's treatment of his motion for directed verdict made at the close of the State's case by his failure to insist upon a prompt ruling and by his presentation of evidence.

(b) Motion at Close of All Evidence

With respect to Rodriguez' second motion for directed verdict made at the close of all the evidence, as noted above, the motion was brought to the trial court's attention before the trial court ruled on the motion for a new trial and before sentencing, and a denial of the motion for directed verdict was issued by the

court. In his brief, Rodriguez' appellate argument is limited to the claim that the trial court failed to rule on this motion. In the instant case, the trial court did not fail to rule on this motion, although the ruling was belated. In this regard, we note that Nebraska jurisprudence includes cases in which no error was detected where a defendant's motion for directed verdict was taken under advisement at the close of all the evidence and the case was submitted to the trier of fact. See, e.g., *Scholl v. County of Boone*, 250 Neb. 283, 549 N.W.2d 144 (1996); *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979). This is so even where the motion was ruled upon after the jury returned a verdict. See, e.g., *Jones v. Foutch, supra*.

It is clear from the record that the trial court found the evidence sufficient to submit the case to the jury. There was neither a failure of proof of an element of the crime charged nor evidence so doubtful in character, lacking in probative value, that a finding of guilt could not be sustained. See, *State v. Morley, supra*; *State v. Thomas, supra*. This assignment of error is without merit.

3. Sufficiency of Evidence

Rodriguez claims that the evidence presented at trial was insufficient to convict him as a matter of law. We do not agree.

Rodriguez was convicted of making terroristic threats as defined by § 28-311.01, which reads:

> (1) A person commits terroristic threats if he or she threatens to commit any crime of violence:
>
> (a) With the intent to terrorize another;
>
> (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or
>
> (c) In reckless disregard of the risk of causing such terror or evacuation.
>
> (2) Terroristic threats is a Class IV felony.

[14] The crime of making terroristic threats does not require an intent to execute the threats made or that the recipient of the threat be terrorized; rather, the statute and cases require that the perpetrator have the intent to terrorize the victim as a result of the threat or a reckless disregard of the risk of causing such terror. *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990).

In *Saltzman*, the defendant was convicted of making terroristic threats during telephone calls in which he made remarks such as "'[Y]ou're gonna die, you bitch!'" and "'[Y]ou're going to die. I'm going to blow up your house.'" 235 Neb. at 966, 458 N.W.2d at 241-42. The Nebraska Supreme Court held that evidence of these remarks was sufficient to sustain conviction for the commission of making terroristic threats.

[15] The similarity is apparent between the remarks made in *State v. Saltzman, supra*, and the remarks made in the present case. Rodriguez argues that the requisite element of intent was not proven, since his "intent was hidden." Brief for appellant at 10. As noted, however, in *Saltzman*,

> When the sufficiency of the evidence as to criminal intent is questioned, a direct expression of intention by the actor is not required; the intent with which an act is committed involves a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.

235 Neb. at 969, 458 N.W.2d at 243.

In the present case, the evidence, taken in the light most favorable to the State, supports the inference that Rodriguez intended to terrorize Sapp, either out of anger or in the hope that intimidating Sapp would afford Rodriguez the relief he sought. Moreover, even if evidence of intent was lacking, the evidence in the case supports a finding by the jury that Rodriguez acted with reckless disregard for the effect his threats would have on Sapp.

Rodriguez also questions the sufficiency of the evidence on the ground that Sapp's testimony was necessary for conviction and was uncorroborated by the State's other witnesses. We note, however, that Sapp's testimony was consistent with the testimony of the State's other witnesses and was generally uncontradicted by Rodriguez' mother, who was the sole witness offered by the defense.

[16] Rodriguez' argument about the details of Sapp's testimony in effect challenges the credibility of Sapp as a witness. The credibility of a witness and the weight to be given to the testimony of that witness are issues for the jury to resolve. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). The jury was

permitted to credit the testimony of Sapp, and the testimony of Sapp was sufficient and essentially uncontradicted.

We, therefore, find that the evidence, viewed in the light most favorable to the State, is sufficient to support the conviction, because a rational trier of fact could have found the essential elements of the crime of making terroristic threats had been proved beyond a reasonable doubt. This assignment of error is without merit.

VI. CONCLUSION

For the reasons cited above, we affirm Rodriguez' conviction in the district court for Sarpy County of making terroristic threats.

AFFIRMED.

DIANA J. SUITER, PERSONAL REPRESENTATIVE OF THE ESTATE OF HARRY E. WOLSTENCROFT, DECEASED, APPELLANT, V. DONALD J. EPPERSON, SR., DOING BUSINESS AS CREDIT CAR CENTER, AND ANTHONY D. ROUTT, APPELLEES.

571 N.W.2d 92

Filed October 14, 1997. No. A-96-379.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's refusal to give the tendered instruction.
2. **Jury Instructions: Appeal and Error.** A jury instruction is not reversible error if, taken as a whole, it correctly states the law, is not misleading, and adequately covers the issues.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.
4. **Motor Vehicles: Right-of-Way.** One does not forfeit his right-of-way by driving at an unlawful speed.
5. **Motor Vehicles: Highways: Right-of-Way.** Drivers required to stop must yield the right-of-way to cross traffic that is so close to the intersection and traveling at such a speed that it is not safe for them to proceed into the intersection.
6. **Directed Verdict.** The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence

which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.

7. **Motor Vehicles: Highways: Right-of-Way.** A motorist is required to yield the right-of-way to a vehicle traveling on a highway protected by stop signs if the vehicle is close enough to the intersection to pose an immediate hazard.
8. **Motor Vehicles: Highways: Negligence.** A driver who fails to see another motorist who is favored over him is guilty of negligence as a matter of law when the motorist's vehicle is indisputably located in a favored position.
9. **Motor Vehicles: Highways: Words and Phrases.** A vehicle is located in a favored position when it is within that radius which denotes the limit of danger, a definition which focuses on the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road.
10. **Jury Instructions: Words and Phrases: Appeal and Error.** The terms "lookout" and "control" are ordinary terms well within the understanding, common sense, and usage of the average juror. It is not error to refuse to give an instruction defining such terms.
11. **Negligence: Statutes: Ordinances: Proximate Cause.** A violation of a statute or ordinance enacted in the interest of public safety is evidence of negligence, but the rule cannot be made applicable unless there is some causal relation between the violation and an accident.
12. **Motor Vehicles: Negligence: Liability.** The law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise is incapable of properly operating an automobile without endangering others.
13. **Motor Vehicles: Negligence: Liability: Proof.** In order to establish liability on the part of an owner, it must be shown that he had knowledge of the driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted.
14. **Motor Vehicles: Negligence: Sales.** Absent knowledge that a prospective test driver is unlicensed, it is not negligence for a car dealer to entrust a vehicle to such a driver, unless the dealer knows or should have known that the prospective driver is incompetent to drive.
15. ____: ____: ____. Current Nebraska law does not impose a duty upon a car dealer to inquire, absent knowledge or forewarning, whether a prospective test driver possesses a valid driver's license.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John Thomas for appellant.

Stephen G. Olson II and Suzanne M. Shehan, of Hansen, Engles & Locher, P.C., for appellees.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

INTRODUCTION

This opinion addresses the appropriateness of certain jury instructions—specifically, whether it was proper to instruct, in a motor vehicle accident case, that speeding does not forfeit right-of-way and whether it was error for the trial court to decide that one party was negligent, when the issue of comparative negligence was to be submitted to the jury. We also address the issue of negligent entrustment in the context of a used car dealer's allowing an unlicensed prospective purchaser to take a vehicle for a test drive, when that driver and vehicle are later involved in an accident.

FACTUAL BACKGROUND

On June 9, 1993, Anthony D. Routt went to Credit Car Center to buy a white Oldsmobile 98. Upon arriving, Routt asked to test drive the car and was given the keys by Jerry Epperson, an employee of Credit Car Center. The Oldsmobile chosen by Routt had the words "ICE COLD AIR" and several snowflakes painted on the windshield with white shoe polish. Epperson never asked Routt to present a valid driver's license and did not go on the test drive. At trial, Epperson testified that "we just tell them to be careful and cross your [sic] fingers[.]" Routt's license, at the time of the test drive, was under suspension.

Routt was proceeding north on 60th street, traveling approximately 50 m.p.h. in a 35-m.p.h. zone, when he saw a vehicle, driven by Harry E. Wolstencroft, stopped at a stop sign. The Wolstencroft vehicle was positioned to Routt's right, at the intersection of 60th and Pratt. Sixtieth Street is a primary traffic roadway with two lanes for northbound travel and two lanes for southbound travel. Pratt Street is a two-lane roadway running in an east-to-west direction. The intersection was controlled by stop signs for eastbound and westbound traffic on Pratt Street. Routt testified that he was almost to the Pratt and 60th Streets intersection when the Wolstencroft vehicle sped out in front of him. Routt slammed on his brakes but hit the car, killing Wolstencroft's wife, who was a passenger in the vehicle,

instantly. Wolstencroft died a few hours later. After viewing the accident scene, Routt fled.

PROCEDURAL BACKGROUND

Diana J. Suiter, personal representative of Wolstencroft's estate, and his only child, sued Routt in the district court for Douglas County for negligence and alleged that Routt failed to keep a proper lookout, failed to exercise reasonable control, and operated his vehicle at a speed greater than was reasonable and prudent under the conditions. Suiter also sued Donald J. Epperson, Sr., owner of Credit Car Center, by and through his agent and employee, Jerry Epperson, for negligent entrustment. The jury rendered a verdict in favor of both defendants, specifically finding that Suiter had failed to sustain her burden of proof. Suiter moved for a new trial, which was overruled. Suiter then appealed to this court.

ASSIGNMENTS OF ERROR

Suiter alleges that the trial court erred (1) in instructing the jury that one does not forfeit his right-of-way by driving at an unlawful speed; (2) in refusing to give a definition of "reasonable lookout" and "reasonable control" in its jury instructions; (3) in instructing the jury that Wolstencroft was negligent; (4) in sustaining a motion in limine to exclude any mention of Wolstencroft's wife; (5) in instructing the jury that Wolstencroft was negligent, but not instructing the jury on the effects of the allocation of Wolstencroft's negligence; and (6) in refusing to instruct the jury on Epperson's negligence in entrusting a vehicle to Routt, whose license was suspended.

STANDARD OF REVIEW

[1] 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. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997).

[2] A jury instruction is not reversible error if, taken as a whole, it correctly states the law, is not misleading, and ade-

quately covers the issues. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995).

[3] On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Mahoney v. Nebraska Methodist Hosp.*, 251 Neb. 841, 560 N.W.2d 451 (1997); *Koster v. P & P Enters.*, 248 Neb. 759, 539 N.W.2d 274 (1995).

ANALYSIS

Jury Instruction No. 10: Forfeiture of Right-of-Way by Speed

Suiter first assigns error to the giving of jury instruction No. 10, which reads, "Nebraska statutes provide: No person shall drive at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. However, one does not forfeit his right-of-way by driving at an unlawful speed."

Suiter cites to NJI2d Civ. 7.13, "Duty of Driver Having Right of Way—Stop Sign, Yield Sign, Traffic Light," arguing that because the drafters recommended no separate instruction on this subject, it was error for the court to include the forfeiture language in instruction No. 10. Suiter also argues that this language is inconsistent with instruction No. 9, which states in part, "On the other hand, drivers who do not have stop signs are not relieved of their duty to exercise reasonable care." Suiter further argues that the forfeiture concept is included in another instruction, No. 12, which states, "A person may assume that every other person will use reasonable care and will obey the law until the contrary reasonably appears." Finally, Suiter contends that the nonforfeiture language is just "too harsh." Brief for appellant at 11.

In *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995), this court addressed what is essentially the reverse of

Suiter's argument. There, Smith argued that the trial court erred by failing to instruct the jury that he did not forfeit his right-of-way by driving at an unlawful speed. The key facts in *Smith* are that Smith was northbound on 19th Street, while Kellerman was eastbound on Dorsey Street. There was a stop sign for eastbound traffic at the intersection of 19th and Dorsey Streets. Kellerman stopped at the stop sign and looked to his right, but his view was obscured by a bush. Kellerman pulled forward and looked again to the right and saw the headlights on Smith's vehicle approximately 2 blocks away. Kellerman looked to the left and then accelerated in a " 'normal' fashion," *id.* at 179, 541 N.W.2d at 62, across the intersection while looking straight ahead and without looking back to the right for the Smith vehicle. Smith applied his brakes, but the two cars collided. There was evidence that Smith was traveling 66 to 77 m.p.h. in a 35-m.p.h. zone immediately before applying his brakes.

[4,5] In *Smith*, this court restated a well-established tenet of Nebraska motor vehicle law that " '[o]ne does not forfeit his right-of-way by driving at an unlawful speed.' " *Id.* at 189, 541 N.W.2d at 67 (quoting *Burrows v. Jacobsen*, 209 Neb. 778, 311 N.W.2d 880 (1981)). In addressing the issue of the trial court's failure to instruct that Smith had not forfeited his right-of-way by speeding, we turned to the actual instructions given. Instruction No. 9 in *Smith*, modeled on NJI2d Civ. 7.04, stated: " 'Drivers required to stop must yield the right-of-way to cross traffic that is so close to the intersection and traveling at such a speed that it is not safe for them to proceed into the intersection[.]' " (Emphasis omitted.) 4 Neb. App. at 190-91, 541 N.W.2d at 68. We relied upon a doctrine promulgated by the Nebraska Supreme Court in *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979), that the Nebraska Jury Instructions should be used when applicable and practical, but when it is necessary to draft special definitional instructions, the trial court should, whenever possible, place such instructions in an affirmative rather than a negative posture. Consequently, we concluded that the trial court "need not and should not instruct on conduct which does not forfeit right-of-way." *Smith*, 4 Neb. App. at 191, 541 N.W.2d at 68. At the conclusion of *Smith*, we held that "[t]he nonforfeiture of right-of-way doctrine is contained within

NJI2d Civ. 7.04 which was given to the jury. A separate negative instruction telling the jury that certain conduct does not constitute a forfeiture *is not required*." (Emphasis supplied.) 4 Neb. App. at 191, 541 N.W.2d at 69.

Smith, which at first blush appears to be on point with this case, is different in one important aspect. In *Smith*, the assigned error was the failure to give an instruction, whereas in the case at hand, the error assigned involves an instruction which was given, but allegedly given erroneously. To establish reversible error from a court's refusal to give a requested instruction, an appellant has the burden to show three things: (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. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997). On the other hand, where an instruction is given, it is not reversible error if, taken as a whole, the instruction correctly states the law, is not misleading, and adequately covers the issues. *Scharmann v. Dayton Hudson Corp.*, 247 Neb. 304, 526 N.W.2d 436 (1995). In short, a slightly different question is presented when the claim is that an instruction should have been given than when the claim is that an instruction should not have been given.

In *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995), the separate instruction was not warranted by the evidence, since the rule that speeding does not forfeit one's right-of-way was embodied in instruction No. 9. Thus, Smith was not prejudiced by the failure to give such an instruction. We observed in *Smith* that we knew of no case holding affirmatively that such an instruction must be given—which is a different proposition from whether a trial court commits reversible error by giving such an instruction. In resolving the latter question, we remain mindful that, as we have held in *Smith*, the law in Nebraska is that speeding does not forfeit right-of-way. Here, we are governed by a different rule of law, because the instruction was given.

Focusing on the standard applicable when an instruction is actually given, it is clear from our discussion and holding in

Smith that the language of instruction No. 10 in the instant case that "one does not forfeit his right-of-way by driving at an unlawful speed" is a correct statement of Nebraska law. We believe the question as to whether this instruction was misleading is answered by examining it in the context of another instruction which was given. Instruction No. 2 states in part, "The court has determined, and you are to accept as proven, that Harry Wolstencroft was negligent in failing to yield the right-of-way to Anthony D. Routt by entering 60th Street." Suiter also assigns error to the trial court for giving this instruction. If it was proper for the trial court to find Wolstencroft negligent as a matter of law, then the forfeiture instruction was not error, since it merely explained to the jury how Wolstencroft could be negligent even though Routt was speeding. Thus, at worst, the forfeiture instruction was unnecessary, but informative. However, inherent in this conclusion is the conclusion that the trial court properly found Wolstencroft negligent as a matter of law. Therefore, we turn to that question.

Instruction No. 2: Finding That Wolstencroft Was Negligent as Matter of Law

Suiter argues that the court erred in instructing the jury: "The Court has determined, and you are to accept as proven, that Harry Wolstencroft was negligent in failing to yield the right-of-way to Anthony D. Routt by entering 60th Street." A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997).

[6] The party against whom a verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Sedlak Aerial Spray v. Miller*, 251 Neb. 45, 555 N.W.2d 32 (1996).

The trial court cited four cases as a basis for finding Wolstencroft negligent for failure to yield, two of which we find

helpful in our disposition of this issue. *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986), involved a car accident similar to the one at hand. Steven Doornbos was proceeding west on U.S. Highway 26, and as he crested an incline, he saw Kelly Schmall's car stopped behind a stop sign on a county road on the north side of the intersection. When Doornbos was 400 feet from the intersection and moving at about 50 m.p.h, Schmall's car proceeded into the intersection in front of him. Doornbos applied his brakes, but as the car continued to move across the westbound lane, he released his brakes and swerved to his left to avoid a collision, but this was unsuccessful. Schmall testified that a glare off a road sign had made it difficult to see anything. There was no significant conflict in the two drivers' versions of the accident. The Supreme Court, in reiterating the rules applicable to cases involving violation of the right-of-way of a driver on a favored highway, said:

> "A driver of a motor vehicle about to enter a street or highway protected by stop signs is required to come to a full stop as near the right-of-way line as possible before driving onto such street or highway. After having stopped, such driver shall yield the right-of-way to any vehicle which is approaching so closely on the favored highway as to constitute an immediate hazard if the driver at the stop sign moves his vehicle into or across such intersection. . . .
>
> "A person traveling on a favored street protected by stop signs of which he has knowledge may properly assume, until he has notice to the contrary, that motorists about to enter from a nonfavored street will observe the foregoing rules."

Id. at 84, 396 N.W.2d at 107-08 (quoting *Hartman v. Brady*, 201 Neb. 558, 270 N.W.2d 909 (1978)).

The court in *Chlopek* concluded that the trial court had been correct in concluding that Doornbos' truck was at such a distance as to constitute a hazard when Schmall pulled out and that her negligence in doing so was the sole proximate cause of the accident. Thus, the directed verdict was proper.

In *Kasper v. Carlson*, 232 Neb. 170, 440 N.W.2d 195 (1989), the Supreme Court once again directed a verdict of negligence based on a set of facts similar to those in *Chlopek* and those in

the instant case. Kasper and a friend were traveling south on West River Road, a two-lane highway that runs north and south. Carlson was proceeding east on a gravel county road which intersected West River Road. Carlson testified that he knew a stop sign existed, and he stopped, looking both to his left (north) and right (south). After stopping at the stop sign, Carlson proceeded to the pavement of West River Road and looked left when his truck was halfway through the intersection. He did not see Kasper's truck until seconds before the collision. Kasper was killed in the accident.

[7] Kasper's father, suing for the wrongful death of his son, assigned error to the district court for failing to direct a verdict of negligence against Carlson. Carlson argued that because the issue of the excessive speed of the decedent's vehicle was controverted, the determination as to whether or not he (Carlson) was negligent was properly submitted to the jury. The Supreme Court found that a directed verdict would have been proper under the facts. The court, citing *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986), once again set forth the fundamental precept: "It is well established in this jurisdiction that a motorist is required to yield the right-of-way to a vehicle traveling on a highway protected by stop signs if the vehicle is close enough to the intersection to pose an *immediate hazard*." (Emphasis supplied.) *Kasper*, 232 Neb. at 173, 440 N.W.2d at 197.

After detailing the above applicable law, the Supreme Court returned to the facts. In his own testimony, Carlson stated that he stopped and looked both directions approximately 55 feet from the pavement of West River Road. After stopping at the stop sign, he then drove to the pavement and never looked to the north again before driving onto the highway. There was also testimony from more than one witness that Carlson admitted immediately following the accident that he could not stop and that his foot slipped off the brake and he went out into the intersection. The court concluded that based on the above evidence, Kasper was entitled to an instruction that Carlson was negligent as a matter of law.

[8,9] Returning to the instant case, whether one fails to look, or looks and sees an approaching vehicle but misjudges its

speed and distance, the question of negligence is usually for the jury, except in those cases where the evidence that the approaching vehicle was within the limit of danger is so conclusive that reasonable minds could not differ thereupon. *Smith v. Kellerman*, 4 Neb. App. 178, 541 N.W.2d 59 (1995). See, also, *Getzschman v. Yard Co.*, 229 Neb. 231, 426 N.W.2d 499 (1988). Moreover, a driver who fails to see another motorist who is favored over him is guilty of negligence as a matter of law when the motorist's vehicle is indisputably located in a favored position. Before a verdict can properly be directed in such a case, the oncoming vehicle must be definitively located in the favored position, that is, within the radius which denotes the limit of danger. *Smith, supra.* A vehicle is located in a favored position when it is within that radius which denotes the limit of danger, a definition which focuses on the vehicle's geographical proximity to the collision point and the vehicle's favored status under the applicable rules of the road. *Floyd v. Worobec*, 248 Neb. 605, 537 N.W.2d 512 (1995). Thus, in the instant case, the question becomes whether Routt's vehicle was so undisputedly located in a favored position that Wolstencroft was negligent as a matter of law. This question turns on Routt's geographical proximity to the intersection because, as the driver of the vehicle on the protected roadway, Routt is favored under the rules of the road. In addressing the issue of geographical proximity, we view the evidence most favorably to Suiter, as we must when determining whether a verdict should be directed.

In *Smith, supra,* the evidence was that Smith was proceeding at 77 m.p.h. when he applied the brakes, meaning that he was covering 115 feet per second, and he left 142 feet of preimpact skid marks. There was also evidence of perception and reaction time totaling 1½ seconds, meaning that at 77 m.p.h., Smith would have been 173 feet south of where his skid marks began at the instant he was first motivated to apply the brakes. This put Smith at least 315 feet south of the intersection when he perceived Kellerman entering the intersection. However, we also determined that Smith could have been as much as 430 feet south of the intersection when first observed by Kellerman because of the evidence that Kellerman had seen Smith and then shifted his gaze away before starting across the intersection.

This fact would add additional time, and thereby additional distance, to the calculation. Consequently, we held that it could not be said as a matter of law that Smith was undisputedly located in the favored position.

In comparison, the evidence in the instant case is undisputed that Routt was traveling a minimum of 50.3 and no faster than 57 m.p.h. when he first perceived and reacted to Wolstencroft's vehicle. The accident reconstructionist, called by Suiter, testified that Routt was approximately 190 feet from the point of impact when he perceived the danger posed by Wolstencroft's pulling out into the intersection. The fact that Routt had only slowed to 32.09 m.p.h., according to Suiter's accident reconstructionist, upon impact, after full application of his brakes, as well as the fact that the Wolstencroft vehicle pulled out into the intersection with a car just 190 feet away, leads us to conclude that reasonable minds could not differ about whether Routt's vehicle was in a favored position. Routt was so close when Wolstencroft entered the intersection that the only reasonable conclusion is that Routt was in a favored position. Having determined this, we find that the trial court properly found Wolstencroft negligent as a matter of law. Furthermore, because this finding was proper, we find the instruction that "one does not forfeit his right-of-way by driving at an unlawful speed" was not error because all it did was explain to the jury why Wolstencroft could be negligent even though Routt was undisputedly speeding. This is not to hold that it was necessary to so instruct, but, rather, that there was no reversible error in the jury's being told this facet of Nebraska's automobile negligence law.

Failure to Instruct on "Reasonable Lookout" and "Reasonable Control"

Suiter assigns error to the district court for refusing to give a definition of "reasonable lookout" and "reasonable control." Suiter argues that both she and the defendants requested such an instruction, but that the court failed to comply, instructing only that "Suiter . . . claims that the Defendant . . . was negligent in one or more of the following ways: 1. In failing to keep a proper lookout; 2. In failing to exercise reasonable control[.]" Instruction No. 2.

We find that there was no error in failing to instruct on the meaning of these terms because an expression of common usage requires no definition in instructions to a jury. See *Clark Bilt, Inc. v. Wells Dairy Co.*, 200 Neb. 20, 261 N.W.2d 772 (1978).

[10] The terms "lookout" and "control" are ordinary terms well within the understanding, common sense, and usage of the average juror. It is not error to refuse to give an instruction defining such terms. Compare *Danielsen v. Eickhoff*, 159 Neb. 374, 66 N.W.2d 913 (1954) (holding that "proximate cause" is legal concept with particular meaning in law and is not in category of words or phrases commonly known and understood by lay public; thus, it was error not to give instruction defining it). Moreover, at the core of automobile negligence litigation is the notion that typically the common sense and collective wisdom of the jury determine what is reasonable lookout or reasonable control in a particular factual setting. Having the trial court try to define such terms runs counter to that basic principle. This assignment of error is without merit.

Motion in Limine as to Presence of Wolstencroft's Wife

On the morning of trial, counsel for both Routt and Epperson orally moved to exclude any evidence that Wolstencroft's wife, Lillian, was his passenger at the time of the accident, that she was also killed in the accident, and that Routt fled the scene after seeing her. The motion was based on the fact that Lillian's estate had filed a separate action for damages, which was settled prior to the trial, and that any evidence concerning Lillian was irrelevant to the issue of Wolstencroft's negligence, as well as highly prejudicial. The trial court sustained this motion and prohibited any reference to Lillian at all during the trial. Suiter assigns error to the court for sustaining the motion, arguing that it forced witnesses to testify about Wolstencroft's life and the accident as if Lillian did not exist, making their testimony awkward and conveying to the jury that they were not credible witnesses.

The admissibility of evidence is reviewed for an abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *State v.*

Allen, 252 Neb. 187, 560 N.W.2d 829 (1997). The question here obviously is one of probative value versus prejudicial effect, under Neb. Rev. Stat. § 27-403 (Reissue 1995), which involves the exercise of discretion. See *State v. McBride*, 250 Neb. 636, 550 N.W.2d 659 (1996). The record reveals that in the instant case the trial court judge, in sustaining the motion in limine, stated, "It is — there is only one reason to bring this up and that is to aggravate the claim for Harry. And I think that it would just be unduly prejudicial to the defendant to do that." Suiter could easily have introduced Routt's flight from the accident as evidence of guilty knowledge, without mention of Lillian or Routt's observation of Lillian. Lillian's presence as a passenger in the car and Routt's fleeing were not inextricably linked. Rather, it is more likely that Routt fled because he was driving without a license. We conclude that the trial court judge did not abuse his discretion in disallowing testimony of Lillian's death, since it was prejudicial and not in the least probative as to the issues of the negligence of Wolstencroft and the two defendants.

Propriety of Finding One Party Negligent as Matter of Law in Comparative Negligence Case

Suiter argues that "[t]he court erred in instructing the jury that Wolstencroft was negligent, but not instructing the jury on the effects of the allocation of Wolstencroft's negligence, because the jury could not properly compare Wolstencroft's breach of his duty with the breaches of duty of Routt and Epperson." Suiter contends that because the jury was not allowed to determine Wolstencroft's negligence for itself, it could not meaningfully compare his negligence to Epperson's and Routt's. Suiter cites no authority for this proposition.

This argument is without merit. The trial court found only that Wolstencroft was negligent as a matter of law. The jury was left to make its own determination as to whether Epperson or Routt was also negligent; whether Wolstencroft's negligence was the sole proximate cause of the accident; and if not, to then compare the negligence of Wolstencroft and one or both defendants. In *Traphagan v. Mid-America Traffic Marking*, 251 Neb. 143, 555 N.W.2d 778 (1996), a case arising under the new comparative negligence statute, Neb. Rev. Stat. § 25-21,185.09

(Reissue 1995), Mid-America had contracted to apply and maintain temporary pavement markings during a construction project. Traphagan was traveling east on U.S. Highway 20 when her car collided with the right rear of a 1-ton truck owned and operated by Mid-America. There was evidence that both parties had been negligent. The trial court found that Traphagan was negligent as a matter of law in running into the stopped truck, which was within her range of vision, but the trial court left the determination of Mid-America's negligence to the jury. The Supreme Court found that the trial court had correctly determined that Traphagan was negligent as a matter of law. The Supreme Court went on to note: "However, from our review of the record we cannot say as a matter of law that Traphagan's negligence equaled or exceeded Mid-America's negligence. The trial court properly submitted the negligence issue to the jury in order to have it compare Traphagan's negligence to the negligence of Mid-America." *Traphagan*, 251 Neb. at 153, 555 N.W.2d at 785.

The jury in the case at hand was instructed as follows:

> The Court has determined, and you are to accept as proven, that Harry Wolstencroft was negligent in failing to yield the right-of-way to Anthony D. Routt by entering 60th Street.
>
> In connection with their claim that Harry Wolstencroft was negligent, the burden is on the Defendants to prove by the greater weight of the evidence . . . [t]hat the negligence on the part of Harry Wolstencroft in failing to yield the right-of-way was a proximate cause of his own injury and damage.

Instruction No. 2. The jury was further instructed:

> If the plaintiff has met her burden of proof as to Defendant Routt or as to Defendants Routt and Epperson, and either or both Defendants have also met their burdens of proof, then you must compare the negligence of Plaintiff with that of the Defendant or Defendants' negligence, and you do that by completing Verdict Form 4 or 5 (depending upon whether you find that Plaintiff met her burden as to either or both Defendants, and that the applicable Defendant also met his burden of proof).

Id. Verdict forms 4 and 5 were not included in the appellate record, but no claim is made that the verdict forms did not correctly embody the applicable law on comparing the negligence of Wolstencroft and the defendants.

Provided first that the jury found negligence on the part of either defendant, and second that the jury did not find Wolstencroft's negligence to be the sole proximate cause of the accident, it is clear that the jury was instructed to make its own determination as to the extent of negligence attributable to Wolstencroft for purposes of comparing it with the negligence of either defendant.

NEGLIGENT ENTRUSTMENT

Finally, Suiter argues that the trial court erred in refusing to instruct the jury "on Epperson's negligence in entrusting a vehicle to Routt, whose license and privilege to operate a motor vehicle was suspended." The jury was, instead, instructed as follows: "The Plaintiff claims that the Defendant Donald J. Epperson, Sr., d/b/a Credit Car Center, was negligent in entrusting a vehicle to Anthony D. Routt when . . . [t]he car was unsafe for use on public roads with advertising lettering that it had on the vehicle's windshield." Instruction No. 2.

Suiter's proposed instruction would have premised Epperson's negligent entrustment of the vehicle to Routt on the ground that Routt's license and privilege to drive a motor vehicle were suspended, a fact which Epperson did not know or discern. However, the court only instructed on the basis that the negligent entrustment arose by virtue of the advertising on the vehicle's windshield. Thus, the question is presented as to whether one's allowing a driver whose license has been suspended to drive a vehicle under one's control can be negligence which proximately causes or contributes to an accident.

[11] We turn first to *Crandall v. Ladd*, 142 Neb. 736, 743-44, 7 N.W.2d 642, 647 (1943), wherein the court said:

> Defendants urge that the court erred in the failure to properly instruct with regard to the failure of the deceased to have a driver's license. In this contention we think there is no merit.
>
> The evidence indicated that the deceased had no driver's license. The court instructed that this evidence

was "admitted by the court for your consideration merely for whatever you may consider it worth in determining whether or not Crandall was negligent at the time."

If this was error no reason is observable why it was prejudicial to the defendants. There is no word in any of the testimony from which even an inference of casual [sic] connection between the accident and the failure to have a driver's license could be drawn.

We are not unmindful of the rule that a violation of a statute or ordinance enacted in the interest of public safety is evidence of negligence (*Walker v. Klopp*, 99 Neb. 794, 157 N. W. 962; *Stevens v. Luther*, 105 Neb. 184, 180 N. W. 87), but the rule cannot be made applicable unless there is some causal relation between the violation and an accident.

[12,13] Probably the most complete discussion of the issues involved in Suiter's negligent entrustment claim is found in *Deck v. Sherlock*, 162 Neb. 86, 90-91, 75 N.W.2d 99, 102 (1956):

It is the contention of the appellant that the evidence shows that Sherlock was negligent in entrusting his automobile to Duffy and Hull under the circumstances shown, and that the trial court erred in directing a verdict in favor of Sherlock. Neither the law of master and servant, nor the law of principal and agent, is applicable to the instant case. Walker v. Klopp, 99 Neb. 794, 157 N. W. 962, L. R. A. 1916E, 1292. The controlling rule is as follows: The law requires that an owner use care in allowing others to assume control over and operate his automobile, and holds him liable if he entrusts it to, and permits it to be operated by, a person whom he knows or should know to be an inexperienced, incompetent, or reckless driver, to be intoxicated or addicted to intoxication, or otherwise incapable of properly operating an automobile without endangering others. Williamson v. Eclipse Motor Lines, Inc., 145 Ohio St. 467, 62 N. E. 2d 339, 168 A. L. R. 1356. A motor vehicle is not an inherently dangerous instrumentality and the owner is not generally liable for its negligent use by another to whom it is entrusted to be used. Liability may arise, however, if the owner permits operation of his

> motor vehicle by one whom he knows or should have known to be so incompetent, inexperienced, or reckless as to render the vehicle a dangerous instrumentality when operated by such person. In order to establish such a liability on the part of an owner it must be shown that he had knowledge of the driver's incompetency, inexperience, or recklessness as an operator of a motor vehicle, or that in the exercise of ordinary care he should have known thereof from facts and circumstances with which he was acquainted. Williamson v. Eclipse Motor Lines, Inc., *supra*. See, also, Annotation, 168 A. L. R. 1364.

Generally, an automobile dealer who places one of his cars in the hands of a prospective purchaser, or one acting for the latter, whom he knows, or in the exercise of reasonable care should know, to be incompetent to operate the car safely, is liable for injuries caused by the driver's incompetence, and this is true whether or not the dealer or his representative is present in the car at the time the injury or damage was caused. Annot., 31 A.L.R.2d 1457 (1953). Courts in other states have limited a dealer's liability for negligent entrustment to circumstances where the driver was intoxicated, lacked driving experience, or was unfamiliar with a particular type of car. See *id.* at 1457-61.

There are, then, basically two requirements necessary to impose liability on a dealer for negligent entrustment. First, the dealer must know, or in the exercise of reasonable care should know, the driver to be incompetent. See *Deck, supra*. Here, there is no evidence to show that Epperson knew or should have known that Routt was incompetent to drive—unless we impose a duty on the car dealer to ask for a license and also hold that the absence of a license equates with incompetency. Second, the injuries complained of must be a result of such incompetence. Annot., 31 A.L.R.2d, *supra*. In this case, the jury found the sole proximate cause of the accident to be Wolstencroft's negligence. Here, the "incompetence" complained of is apparently the fact that Routt was an unlicensed driver. Lacking a driver's license does not equal incompetency to drive; it just means that the person cannot lawfully drive.

[14,15] There is a statute, Neb. Rev. Stat. § 60-491 (Reissue 1993), which provides in relevant part:

> It shall be unlawful for any person:
>
> . . . .
>
> . . . To authorize or knowingly permit a motor vehicle owned by him or her or under his or her control to be driven upon any highway by any person who is not authorized under the act or is in violation of any of the provisions of the act[.]

The act referred to in the statute is the Motor Vehicle Operator's License Act, which, as a general proposition, requires that people have driver's licenses before they drive, and Routt did not. However, the plain language of the statute prohibits only "knowingly" permitting or authorizing one to drive a vehicle who is unlicensed to do so. As is apparent from the testimony of Jerry Epperson, the evidence reveals what might be called a "don't ask" policy, and the suspended driver is pretty unlikely "to tell." Epperson testified that he made no attempt to determine if Routt was licensed to drive before authorizing a test drive of the vehicle. However, we find no Nebraska statutes or case law holding that a car dealer has a duty to ask a prospective test driver for a license. We acknowledge that without the duty to ask, it would be very difficult for a car dealer to ever knowingly violate this statute. Consequently, the submission as a particular of negligence to a jury of the claim that a car dealer allowed a person with a suspended license to drive is rather unlikely. Thus, we hold that absent knowledge that a prospective test driver is unlicensed, it is not negligence for a car dealer to entrust a vehicle to such a driver, unless the dealer knows or should have known that the prospective driver is incompetent to drive. The notion that car dealers should be responsible to ensure that they are entrusting a vehicle to a licensed driver for a test drive seems a rather elementary statement of desirable public policy, but we do not make public policy. In any case, current Nebraska law does not impose a duty upon a car dealer to inquire, absent knowledge or forewarning, whether a prospective test driver possesses a valid driver's license. Thus, because the record is devoid of any knowledge that Epperson knew, or should have known, that Routt was unlicensed, and absent any duty to ask about Routt's status as a driver, it follows that the trial court was correct in not submitting the question of

negligent entrustment due to the lack of a valid driver's license by Routt to the jury.

CONCLUSION

To conclude, the trial court did not err by instructing the jury that speeding does not forfeit a driver's right-of-way. It was appropriate for the trial court to find Wolstencroft negligent as a matter of law, because Routt was clearly in a favored position when Wolstencroft entered the intersection. Definitions of "reasonable lookout" and "reasonable control" were not needed in the jury instructions, because they are words of common usage. The trial court's exclusion of references to the death of Wolstencroft's wife was not an abuse of discretion. Finally, the court did not err by refusing to instruct on negligent entrustment because of Routt's suspended license. Therefore, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
V. JERRY E. KINNEY, APPELLANT.
572 N.W.2d 383

Filed October 14, 1997. No. A-96-1080.

1. **Motions to Suppress: Probable Cause: Appeal and Error.** In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court.
2. **Constitutional Law: Search and Seizure.** Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable searches and seizures by the government.
3. ____: ____. Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions.
4. **Police Officers and Sheriffs: Search and Seizure: Probable Cause: Motor Vehicles: Weapons.** Inasmuch as roadside encounters between police and suspects present especially dangerous situations, on the reasonable belief that a suspect is dangerous and may gain access to a weapon, the police may search those parts of the passenger compartment of a vehicle they have properly stopped where a weapon may be hidden.

5. **Police Officers and Sheriffs: Search and Seizure: Probable Cause: Motor Vehicles.** When an officer has probable cause to stop a vehicle and has a reasonable, articulable belief that his safety may be in danger, the fact that the officer searches the vehicle subsequent to issuing the ticket rather than prior to issuing the ticket does not necessarily render the search invalid.
6. **Constitutional Law: Search and Seizure.** The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable searches and seizures.
7. **Police Officers and Sheriffs: Search and Seizure: Probable Cause: Motor Vehicles: Controlled Substances.** The finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle.
8. **Police Officers and Sheriffs: Search and Seizure: Probable Cause: Motor Vehicles.** When the police have probable cause prior to instituting any search, they may search the entire vehicle (interior compartments and trunk), including any package, luggage, or container that might reasonably hold the item for which they had probable cause to search.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

David L. Kimble, Seward County Public Defender, for appellant.

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

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MUES, Judge.

INTRODUCTION

Jerry E. Kinney was convicted in a bench trial of possession of methamphetamine, possession of alprazolam, possession of marijuana, possession of drug paraphernalia, possession of illegal fireworks, and failure to signal. Kinney now appeals those convictions. The only issue presented by this appeal is whether the trial court erred in denying Kinney's motion to suppress evidence the police obtained from his automobile.

FACTS

Kinney was charged with one count of possession of methamphetamine and one count of possession of alprazolam, Class IV felonies under Neb. Rev. Stat. § 28-416(3) (Cum.

Supp. 1994); possession of marijuana, an infraction under § 28-416(11)(a); possession of drug paraphernalia, an infraction under Neb. Rev. Stat. § 28-441 (Reissue 1995); possession of illegal fireworks, a Class III misdemeanor under Neb. Rev. Stat. §§ 28-1244 and 28-1250 (Reissue 1995); and failure to signal, a traffic infraction under Neb. Rev. Stat. § 60-6,161 (Reissue 1993). Prior to trial, Kinney filed a motion to suppress all evidence seized from his person and his motor vehicle. At the hearing on the motion to suppress, the following facts were introduced:

On August 5, 1994, Nebraska State Patrol Trooper Russell Stanczyk had just completed a traffic stop and was merging onto Interstate 80 when he noticed Kinney's vehicle change lanes without signaling. Stanczyk activated his patrol car's overhead lights, and Kinney pulled off to the side of the road. Stanczyk then proceeded to the driver's side of the car and asked Kinney for his driver's license and vehicle registration. While requesting these documents, Stanczyk observed a gold-colored badge on the console of Kinney's car, a police scanner which was plugged into the cigarette lighter, a pair of binoculars, and a beer can inside of a "coozy."

As Kinney turned his body to reach for the requested documents, Stanczyk observed what he believed to be a semiautomatic pistol in a shoulder holster underneath Kinney's left arm. Prior to the time Kinney turned his body, the pistol was concealed from Stanczyk's view, and Kinney did not inform Stanczyk that he had a weapon. Kinney then pulled out his wallet, which contained another gold-colored badge and Kinney's driver's license. Stanczyk informed Kinney why he was being stopped and asked Kinney to remove the shoulder holster and step back into the patrol car. Stanczyk's patrol car did not have a protective screen to separate him from Kinney, so he conducted a pat-down search before Kinney was seated in the passenger's seat of the patrol car. No additional weapons were found on Kinney's person.

Stanczyk testified that the gold-colored badges had the word "Ombudsman" on them. When he recognized this fact, Stanczyk remembered an earlier incident he had heard about involving Kinney. In September 1993, Kinney was working for

the state ombudsman's office and had gone to the Nebraska State Fair and used his badge and identification card to gain access to a Garth Brooks concert. Kinney was accompanied by a female, and in gaining access, he stated that "he and this female needed to check out the — the way that the security was handled by the State Patrol and UNL police . . . . [B]ecause he was working in his official capacity, [he] [n]eeded to check out these items."

Kinney was allowed into the concert; however, the State Patrol was subsequently informed that Kinney was not performing any official duties and had actually brought his wife to the concert. An intelligence report was then issued so that other troopers would be aware of this for the remainder of the State Fair. Stanczyk was also informed that the ombudsman's office does not issue badges and that Kinney had had the "Ombudsman" badges made up.

Kinney disputes these reports. He testified that he had received an anonymous tip from a state employee "complaining about the nature and the coordination of the security and the safety of the crowds in Devaney Sports Center between the State Patrol and the University of Nebraska Police Department." There were two concerts coming up, the Garth Brooks concert and one that "was more geared for the teenager population," so Kinney decided to attend the Garth Brooks concert as opposed to the other. Kinney testified that his wife did attend the concert, but she paid $50 for tickets and attended the concert with two friends. Kinney also testified that the badges that he carries were issued by the deputy director of the ombudsman's office.

While seated in the patrol car, Stanczyk informed Kinney that he was going to write him a warning ticket. Stanczyk testified that Kinney informed him that he was headed out to do an investigation and "was just driving with his head up his ass." While talking with Kinney, Stanczyk noticed a slight odor of alcohol on Kinney's breath but did not believe Kinney was impaired.

Stanczyk called in Kinney's license for a routine check for suspensions or warrants and was informed by dispatch that Kinney was entered into the State Patrol's "10-38" file. Stanczyk explained that the State Patrol has several codes to

warn officers of potentially dangerous situations. A "10-50" file means use caution when encountering this person. A 10-38 file is the next step above 10-50 and means that the person is potentially dangerous.

Trooper Glen Elwell was working near the area where Stanczyk had stopped Kinney and was monitoring the radio traffic. When dispatch informed Stanczyk that Kinney was entered into the State Patrol's 10-38 file, Elwell recognized the name and radioed Stanczyk 10-78 (for your information), 10-50 (use caution). Stanczyk testified that this communication implied to him that Elwell had personal knowledge of this individual and that he should use caution. Stanczyk testified that he was "suspicious enough of the situation that [he] want[ed] to run a check on the gun that was located on Mr. Kinney's person, run a check on it and make sure it's not stolen," so he requested that Elwell assist him.

While waiting for Elwell to arrive, Stanczyk finished writing out the warning for the traffic infraction and returned Kinney's documents to him. Stanczyk testified that he informed Kinney that he was going to call another officer to come and assist him because he wanted to check Kinney's gun to make sure it was not loaded or stolen. Stanczyk also informed Kinney that he felt he had the authority to search within the reach, grasp, or lunge area of Kinney's driver's seat for any additional weapons that might be concealed. Stanczyk testified that Kinney understood this. When asked whether Kinney offered any resistance, Stanczyk replied, "No, he just responded in an affirmative response." Stanczyk further testified that while waiting for Elwell, Kinney informed him that Kinney was a federally licensed firearms dealer.

Within about 2 minutes, Elwell arrived to assist Stanczyk. While Elwell was watching Kinney, Stanczyk proceeded to Kinney's vehicle. Through his hand-held radio, Stanczyk ran the serial number on the gun and found it was not stolen. Stanczyk removed the magazine and found it was loaded. Stanczyk next opened the console between the driver's seat and passenger's seat and observed what appeared to be an "alligator" clip with a partial marijuana cigarette in it. Next to the marijuana cigarette there was a small metal container which

Stanczyk perceived as a place where additional drugs could be located. Upon further inspection, Stanczyk found three marijuana cigarettes.

Stanczyk also noticed a nylon briefcase behind the driver's seat. When Stanczyk opened up the briefcase, he observed a brown pouch that was large enough to conceal a weapon or a controlled substance. Inside the pouch, there were a small knife, a razor blade, a "snorting tube" with white residue, and a brown-colored bottle with an off-white powdery substance which Stanczyk believed was methamphetamine.

At this point, Stanczyk walked back to Kinney and showed him the brown bottle and asked Kinney if he knew what it was. Kinney responded that he did not know. Stanczyk showed the substance to Elwell, who agreed that it was probably methamphetamine. Kinney was then placed under arrest.

Kinney testified that after Stanczyk gave Kinney the warning ticket, Stanczyk informed him that he was going to run a check on Kinney's gun. Kinney informed Stanczyk that he thought this was pointless because Kinney was a federally licensed firearms dealer, and he showed Stanczyk his federal license. Stanczyk informed Kinney that he had to run the check on the gun anyway, and Kinney replied, "[W]ell, as far as I'm concerned our business is concluded but if you must go ahead and run it and let's get — get on with it." According to Kinney, Stanczyk went to the car and ran the check on the gun. When the check revealed that the gun was not stolen, Stanczyk returned to where Kinney and Elwell were standing and informed Kinney that he was going to search for additional weapons. Kinney again informed Stanczyk that their business was concluded and said "no" when Stanczyk informed him that he was going to search for additional weapons.

Shortly after being placed under arrest, Kinney began complaining of chest pains and was transported to Seward Memorial Hospital by Elwell. While he was at the hospital, one of the nurses approached Elwell and handed him a plastic baggie with an off-white-colored powder inside. The nurse informed Elwell that it had been brought to her attention that Kinney had hidden something under his left buttock and that the nurse had retrieved the item.

Evidence at trial revealed that in a subsequent search of Kinney's car, officers discovered several pistols, a "mini-14," a shotgun, a stun gun, ammunition, fireworks, and a baggie containing 15 yellow tablets which were later determined to be alprazolam.

Following the hearing on Kinney's motion to suppress, the trial court denied Kinney's motion. At the bench trial, held July 31, 1995, the bill of exceptions from the hearing on the motion to suppress was entered into evidence subject to a continuing objection by Kinney. Foundation was laid for the exhibits, and the parties rested. The trial court found Kinney guilty on all counts and sentenced him to intensive supervision probation. Kinney now appeals the admission of the evidence seized from his vehicle.

ASSIGNMENTS OF ERROR

In the errors which were both assigned and discussed, Kinney alleges the trial court erred in overruling his motion to suppress because the search of his vehicle violated the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution.

STANDARD OF REVIEW

[1] In reviewing a trial court's ruling on a motion to suppress, an appellate court reviews the ultimate determination of probable cause de novo and reviews the findings of fact made by the trial court for clear error, giving due weight to the inferences drawn from those facts by the trial court. *State v. Nissen*, 252 Neb. 51, 560 N.W.2d 157 (1997).

A trial court's ruling on a motion to suppress, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Merrill*, 252 Neb. 510, 563 N.W.2d 340 (1997).

To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *McArthur v. Papio-Missouri River NRD*, 250 Neb. 96, 547 N.W.2d 716 (1996); *Ford Motor Credit Co. v. All Ways, Inc.*, 249 Neb. 923, 546 N.W.2d 807 (1996); *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995).

DISCUSSION

Before we begin our discussion, we remind counsel for the State that Neb. Ct. R. of Prac. 9D(1)f and g (rev. 1996) requires that factual recitations be annotated to the record, whether they appear in the statement of facts or argument section of a brief; the failure to do so may result in an appellate court's overlooking a fact or otherwise treating the matter under review as if the represented fact does not exist. *First Westside Bank v. For-Med, Inc.*, 247 Neb. 641, 529 N.W.2d 66 (1995).

Warrantless Search.

Although not stated succinctly, we interpret Kinney's first argument as alleging the trial court erred in overruling his motion to suppress because the search of his vehicle violated the Fourth Amendment guarantee to be free from unreasonable searches and seizures. We note that Kinney does not argue that Stanczyk did not have probable cause to make the initial stop of the vehicle.

[2,3] Both the Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution protect against unreasonable searches and seizures by the government. *State v. Konfrst*, 251 Neb. 214, 556 N.W.2d 250 (1996). Searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. *Konfrst, supra.* Less rigorous requirements govern searches of automobiles, not only because of the element of mobility, but because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office. *Id.*

[4] Inasmuch as roadside encounters between police and suspects present especially dangerous situations, on the reasonable belief that a suspect is dangerous and may gain access to a weapon, the police may search those parts of the passenger compartment of a vehicle they have properly stopped where a weapon may be hidden. *State v. DeGroat*, 244 Neb. 764, 508 N.W.2d 861 (1993). See, also, *State v. Gross*, 225 Neb. 798, 408 N.W.2d 297 (1987) (holding officer may search vehicle for

weapons if officer has reasonable belief based on articulable facts that officer or another may be in danger).

In *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983), two officers were on patrol late one evening when they observed a vehicle swerve off into a ditch. The officers stopped to investigate. The officers had to repeat requests for documents several times before Long responded. One of the officers thought Long " 'appeared to be under the influence of something.' " 463 U.S. at 1036. When Long was requested to produce his vehicle registration, he headed toward the open door of his vehicle. The officers followed Long, and both observed a hunting knife on the floorboard of the driver's side of the vehicle. The officers then did a *Terry* protective pat-down search, which revealed no weapons.

One of the officers then stood with Long at the rear of the vehicle while the other officer shined his flashlight into the interior of the vehicle to search for other weapons. The officer noticed something protruding from underneath the armrest. He lifted up the armrest and saw a pouch containing what appeared to be marijuana. The officers impounded the vehicle and discovered 75 pounds of marijuana.

Long filed a motion to suppress, which was denied. The Michigan Supreme Court reversed, and the State appealed. On appeal, the U.S. Supreme Court observed:

> Our past cases indicate then that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect. These principles compel our conclusion that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. [Citation omitted.] "[T]he

> issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger."

463 U.S. at 1049-50.

Did Officer Have Reasonable Belief That Kinney Was Dangerous?

Stanczyk stopped Kinney's car at approximately 8:20 in the evening for failing to signal when he changed lanes. When stopped, Kinney volunteered that he was "heading out to do an investigation." Stanczyk testified that he was suspicious of the situation because of "all the — the police type paraphernalia that was in the car, the — the badges, the scanner, wearing a weapon on his person, consuming alcohol, the binoculars. All these things that would portray himself as a — as a police officer." Stanczyk also testified that he had knowledge that Kinney had impersonated a peace officer in the past. Stanczyk was already using caution because Kinney had a gun on his person. Stanczyk then received two radio communications informing him that Kinney was "potentially dangerous" and that Stanczyk should "use caution." Stanczyk testified that when he received the communication from Elwell to use caution, that indicated to him that Elwell either had had previous contact with Kinney or had knowledge of Kinney. Stanczyk felt threatened enough by this situation to contact Elwell for backup. Prior to Elwell's arrival, Kinney informed Stanczyk that he was a licensed firearms dealer. Under these facts, "a reasonably prudent man . . . would be warranted in the belief that his safety or that of others was in danger." However, this does not end our inquiry because, given that Stanczyk's reasonable belief was based in part upon the knowledge of others, we must also determine whether the State Patrol or Elwell had a reasonable belief that Kinney was a danger to Stanczyk or others.

Elwell testified that the federal Bureau of Alcohol, Tobacco, and Firearms (ATF) contacted him because the ATF was going to do an inspection of Kinney's firearms business and the ATF had received information that Kinney was a dangerous person. The ATF requested that Elwell investigate Kinney in order to determine whether the ATF "needed to be more prepared officer safety-wise when going and conducting the inspection."

Elwell investigated Kinney's criminal history and contacted other law enforcement agencies regarding any contacts the agencies may have had with Kinney. Elwell learned that Kinney had been involved in some acts of intimidation against a former spouse; had been charged with terroristic threat activity; and had been "contacted" in connection with impersonating a peace officer. Elwell also knew that Kinney was a firearms dealer and had been known to be in possession of firearms in the past. The State Patrol had issued an "intelligence information" to take precaution when contacting Kinney because of Kinney's desire to be involved in and around law enforcement agencies.

We find that this information, combined with Stanczyk's personal recollections and observations, certainly gave rise to an articulable and objectively reasonable belief that Kinney might be a danger to Stanczyk or others.

Having so determined, we need not comment on whether Kinney's name being on the State Patrol's 10-38 (potentially dangerous) list was sufficient, standing alone, to create a reasonable belief that Kinney was dangerous.

Significance of Initial Reason for Stop Being Over.

We interpret Kinney's next argument as alleging that even if the officers did have a reasonable belief that Kinney was dangerous, they had no right to search his vehicle for weapons because Stanczyk had already issued Kinney a warning ticket and given him all of his paperwork back. In other words, if Stanczyk had searched the vehicle while Kinney was legally detained, prior to issuance of the warning ticket, the search would have been legal. However, after Stanczyk issued the warning ticket, Kinney's further detention was illegal, and therefore, the search made during that detention was also illegal. We cannot agree.

[5] When an officer has probable cause to stop a vehicle and has a reasonable, articulable belief that his safety may be in danger, the fact that the officer searches the vehicle subsequent to issuing the ticket rather than prior to issuing the ticket does not necessarily render the search invalid. Indeed, the U.S. Supreme Court anticipated such situations in *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983). The Court stated:

> Just as a *Terry* suspect on the street may, despite being under the brief control of a police officer, reach into his clothing and retrieve a weapon, so might a *Terry* suspect in Long's position break away from police control and retrieve a weapon from his automobile. [Citation omitted.] In addition, if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside. [Citation omitted.] Or, as here, the suspect may be permitted to reenter the vehicle before the *Terry* investigation is over, and again, may have access to weapons. In any event, we stress that a *Terry* investigation, such as the one that occurred here, involves a police investigation "at close range," [citation omitted] when the officer remains particularly vulnerable in part *because* a full custodial arrest has not been effected, and the officer must make a "quick decision as to how to protect himself and others from possible danger . . . ."

463 U.S. at 1051-52.

In the present case, Stanczyk had already seen one weapon. Given the knowledge that Kinney was a licensed firearms dealer, plus the other circumstances then known to Stanczyk, including the information that Kinney was potentially dangerous to Stanczyk or to others, it was not unreasonable to assume that there might be additional weapons in the vehicle.

[6] The Fourth Amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution prohibit only unreasonable searches and seizures. *State v. Brooks*, 5 Neb. App. 463, 560 N.W.2d 180 (1997). The brief detention necessary to dispel Stanczyk's reasonable belief that his life was in danger was not an unreasonable seizure.

Scope of Search.

We interpret Kinney's final argument as alleging that, even if the search for weapons was permissible, Stanczyk improperly extended the scope of his search.

> [T]he U.S. Supreme Court held long ago in *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925), that a warrantless search of an automobile by police officers with probable cause to believe the vehicle

contains contraband is permissible under the Fourth Amendment. See, also, *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992); *State v. Gerjevic*, 236 Neb. 793, 463 N.W.2d 914 (1990). Probable cause means "'a fair probability that contraband or evidence of a crime will be found.'" *United States v. Sokolow*, 490 U.S. 1, 7, 109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989) (quoting *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)).

State v. Konfrst, 251 Neb. 214, 229, 556 N.W.2d 250, 262 (1996).

[7] In *State v. Watts*, 209 Neb. 371, 307 N.W.2d 816 (1981), this court held that the finding of a quantity of suspected illicit drugs by an officer making a legitimate search of an automobile may serve to substantiate that officer's suspicions and furnish additional probable cause for him to make a complete search of the vehicle. The court reasoned, "Having found a quantity of illicit drugs in one part of the automobile does not sensibly suggest the probability that no more such substance is present."

Konfrst, 251 Neb. at 230, 556 N.W.2d at 262.

[8] Both this court and the U.S. Supreme Court have relied on the automobile exception to a search warrant requirement in upholding searches of containers found during a probable cause search of a vehicle. When the police have probable cause prior to instituting any search, they may search the entire vehicle (interior compartments and trunk), including any package, luggage, or container that might reasonably hold the item for which they had probable cause to search. See *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984). See, also, *California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991); *United States v. Ross*, 456 U.S. 798, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982).

Konfrst, 251 Neb. at 230-31, 556 N.W.2d at 262.

Stanczyk testified that he initially looked in the console between the seats to search for weapons. Upon opening the console, Stanczyk discovered an alligator clip with a marijuana cigarette. Stanczyk then properly extended his search to include places that could conceal drugs as well as weapons.

Consent.

We are cognizant that Kinney devoted a portion of his brief to a discussion of whether he voluntarily consented to the search. See *State v. Ready*, 252 Neb. 816, 565 N.W.2d 728 (1997) (discussing requirements necessary for determination of whether consent was voluntary). However, in the present case, the trial court did not base its decision on the voluntariness of Kinney's consent, and the State does not argue that Kinney consented. Moreover, because we have already determined that the search was not unreasonable based upon Stanczyk's reasonable, articulable belief that he might be in danger, we need not address this argument. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994) (holding appellate court is not obligated to engage in analysis not needed to adjudicate controversy).

CONCLUSION

Upon our de novo review, we conclude that Stanczyk had a reasonable, articulable belief that Kinney was dangerous and might gain access to a weapon if permitted to return to his vehicle. Upon searching the vehicle for possible weapons, Stanczyk discovered contraband and then properly extended his search to include both contraband and weapons. Having found that the search did not violate Kinney's constitutional right to be free from unreasonable searches and seizures, we find that the trial court did not err in overruling Kinney's motion to suppress.

AFFIRMED.

MARK L. SPRINGER AND CAROLE D. SPRINGER,
HUSBAND AND WIFE, APPELLEES, V.
JOANN C. KUHNS, APPELLANT.
571 N.W.2d 323

Filed October 21, 1997. No. A-96-562.

1. **Equity: Appeal and Error.** In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

2. **Waters.** The owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters. If the natural underground water supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.
3. ___. Nebraska's common law was that ground water could not be transferred off overlying land.
4. **Waters: Legislature.** Since the Nebraska common law of ground water permitted use of water only on overlying land, legislative action was necessary to allow for transfers off overlying land, even for as pressing a need as supplying urban water users.
5. **Waters: Legislature: Public Policy.** The Legislature has the power to determine public policy with regard to ground water, and ground water may be transferred from overlying land only to the extent authorized by the Legislature.
6. **Waters: Agriculture.** Neb. Rev. Stat. § 46-691 (Cum. Supp. 1996) provides for the transfer of ground water off overlying land for agricultural purposes.
7. **Contracts: Legislature: Intent.** A contract that is illegal when formed does not become legal by reason of a change of law, except where the Legislature manifests an intention to validate the bargain.
8. **Statutes: Legislature: Intent: Time.** The general rule is that a legislative enactment operates only prospectively, unless legislative intent and purpose that it should operate retrospectively are clearly disclosed.
9. **Statutes: Contracts: Waters: Agriculture: Time.** Neb. Rev. Stat. § 46-691 (Cum. Supp. 1996) generally operates retroactively to validate contracts made before the legislation was passed for the transfer of ground water for agricultural purposes off overlying land.
10. **Equity: Jurisdiction.** When a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all purposes and will proceed to a final determination of the case, adjudicating all matters in issue, thus avoiding unnecessary litigation.

Appeal from the District Court for Seward County: ALAN G. GLESS, Judge. Affirmed.

Kent F. Jacobs, of Blevens & Jacobs, for appellant.

Mark J. Krieger, of Bowman & Krieger, for appellees.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

This opinion addresses the effect the passage in 1995 of L.B. 251, now codified as Neb. Rev. Stat. § 46-691 (Cum. Supp. 1996), had on the validity of an agreement reached in 1989 to transfer ground water off overlying land to an adjacent tract for agricultural purposes. Inherent in this determination is the

recitation of some history of ground water law and an examination of the intent of the Legislature in enacting L.B. 251.

FACTUAL BACKGROUND

In 1989, Mark L. Springer and Carole D. Springer owned approximately 80 acres located in the east half of the northwest quarter of Section 18, Township 9 North, Range 3 East of the 6th P.M., in Seward County, Nebraska (hereinafter the north 80 acres). In the late summer or early fall of that year, the Springers were approached by JoAnn Kuhns' husband, Eldon Kuhns, who was operating under a durable power of attorney on behalf of his wife. Eldon Kuhns expressed a desire to purchase an easement across the above-mentioned north 80 acres, but no purchase was completed.

Thereafter, the Springers purchased 152 acres of the southwest quarter immediately south of the north 80 acres. After this purchase, the Springers offered to sell the north 60 acres of the north 80 acres to JoAnn Kuhns. This was the same tract of land where Eldon Kuhns had earlier sought to secure an easement. This initial offer to sell was limited to the north 60 acres because the south 20 acres contained a well which was important to the Springers. This well fed an underground pipe attached to an irrigation system in the newly purchased 152 acres of the southwest quarter and enabled the Springers to irrigate the southwest quarter. JoAnn Kuhns refused to purchase less than the entire north 80 acres, but offered to give the Springers an easement if she purchased the entire north 80 acres so that they could continue to draw water from the well on the property and irrigate their new 152-acre tract. The Springers agreed to this proposal, and the parties entered into a purchase agreement on November 14, 1989, containing this language:

> Seller as grantor retains all water rights in and to the south 20 acres of the above-described real estate, for the use upon real estate described as the Southwest Quarter (SW 1/4) . . . . Grantor further retains an easement over and across that portion of the south 20 acres . . . for access, maintenance and repair to an irrigation pipeline and related equipment to the existing or replacement well located thereon.

The property was thereafter conveyed by warranty deed dated December 28, 1989, in which the following reservation was made with regard to water rights:

> Grantor retains all water rights in and to the south 20 acres of the above-described real estate . . . . Grantor further retains an easement over and across that portion of the south 20 acres of the real estate . . . for access, maintenance and repair to an irrigation pipeline . . . or replacement well . . . . This easement and retention of water rights shall be appurtenant to the real estate described as the Southwest Quarter (SW 1/4) . . . .

JoAnn Kuhns honored the Springers' easement for 5 years, until Mark Springer considered accepting an offer to enter into a lease agreement to cash-rent 40 acres from another farmer who had worked with Eldon Kuhns. The Springers allege that Eldon Kuhns, upon discovering the other farmer's offer to lease to the Springers, threatened to cut off the Springers' water supply from the well. This threat was set forth in a letter from JoAnn and Eldon Kuhns' counsel to the Springers' counsel, which stated,

> Since Mr. Springer has chosen to interrupt Mr. Kuhn's [sic] farming operation at other locations, Mr. Kuhns no longer recognizes the reservation of water rights stated in the deed to said East Half of the Northwest Quarter of 18-9-3. Therefore, Mr. Springer is not authorized to enter the premises for the purposes of turning on the well during the 1994 crop year.

Following these threats, and fearing that their southwest quarter acreage was about to become dry land corn cropland rather than irrigated corn cropland, the Springers drilled a test well in the southwest quarter, which found water. Within 1 month of the Springers' drilling the test well, Eldon Kuhns drilled and installed a submersible 150-gallon domestic well within 1,000 feet of the Springers' test well. The Springers contend this was done to eliminate their development and use of the test well because it is necessary for a well to be 1,000 feet from an existing well to obtain natural resources district approval. This action, according to the Springers, forces them to drill far-

ther into their property and away from the Ogallala aquifer where water is readily found.

PROCEDURAL BACKGROUND

The Springers sued JoAnn Kuhns in the district court for Seward County, asking alternatively for rescission of the warranty deed due to a mutual mistake of the parties, rescission of the deed due to fraud, or reformation of the deed and an order quieting title in them to the retention of the water rights. JoAnn Kuhns answered and counterclaimed, alleging that "the reservation . . . of water rights and of rights to drill a replacement well [is] void as against public policy as an attempt to alienate water rights for private usage, and should be stricken from [the] deed." JoAnn Kuhns asked the court to quiet title in her to the water rights.

The Springers also applied for a temporary injunction, which was granted. In granting the temporary injunction, the court set forth that it could "find no authority which prohibits such reservation of water rights and access. Such situation is analogous to the reservation of mineral rights by deed, which is recognized by Nebraska law."

After a bench trial, the court decreed that it "hereby quiets title in [the Springers] in and to water rights and an easement in the [north 80 acres] pursuant to a Warranty Deed . . . ." The easement was equitably reformed to comply with the agreement of the parties and was restated as follows by the court:

> "Grantor retains all water rights in and to the South twenty acres of the above-described real estate for the use upon the real estate described as the Southwest 1/4 of Section 18, Township 9 North, Range 3 East of the 6th P.M., Seward County, Nebraska. Grantor further retains an easement over and across that portion of the South twenty acres of the real estate conveyed hereunder for access, maintenance, *use* and repair to an underground irrigation pipeline and related equipment and to the existing or replacement well located thereon. Grantor's easement hereunder includes the *right to draw water from the well located on the property* herein described *through the existing or replacement well*, and transmit that water through

> the existing or replacement underground pipeline located upon said property. Grantor further retains an easement for the purpose of drilling a replacement well for the existing well upon the South twenty acres; provided that Grantor agrees that any such future replacement well shall not be constructed in such a way as to impede any center pivot irrigation system used upon Grantee's land. Grantor further agrees to pay Grantee for any loss to crops occasioned by maintenance, repair or replacement of said well, underground irrigation pipeline, and related equipment. This agreement and retention of water rights shall be appurtenant to the real estate described as the Southwest 1/4 of Section 18, Township 9 North, Range 3 East of the 6th P.M., Seward County, Nebraska."

(Emphasis supplied.) JoAnn Kuhns and her agents were permanently enjoined from interfering in any way with the Springers' easement, and her counterclaim was dismissed with prejudice. JoAnn Kuhns then appealed to this court.

ASSIGNMENTS OF ERROR

JoAnn Kuhns assigns error to the trial court in that it (1) erred in finding that the reservation of water rights is a legal title which can be severed from the ownership of the overlying land and (2) erred in granting injunctive relief to the Springers when such relief was neither pled nor prayed for in their petition.

STANDARD OF REVIEW

[1] In an appeal from an equitable action, the reviewing court reviews the action de novo on the record and reaches a conclusion independent of the factual findings of the lower court, subject to the rule that where credible evidence is in conflict on material issues of fact, the reviewing court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Omega Chem. Co. v. United Seeds*, 252 Neb. 137, 560 N.W.2d 820 (1997); *Sid Dillon Chevrolet v. Sullivan*, 251 Neb. 722, 559 N.W.2d 740 (1997). We find no dispute of consequence in the facts, and therefore, we approach the matter as a question of law.

ANALYSIS

[2,3] The early development of water law in Nebraska centered on judicial pronouncements rather than legislative enactments. In the important case *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933), the Nebraska Supreme Court rejected the English common-law rule of ownership and adopted instead the American rule that

> the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters . . . .

Id. at 811, 248 N.W. at 308. The Nebraska Supreme Court then modified the American rule by holding, "[I]f the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . ." *Id.* The right to use ground water, then, is in large part tied to ownership of the overlying land. Nebraska's common law was that ground water could not be transferred off overlying land. *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996) (mentioning that transportation of ground water from underlying land for any use, whether interstate or intrastate, is severely curtailed and that transportation of ground water for intrastate use is prohibited except for specific statutory exceptions).

The Legislature passed no laws regulating ground water until 1957. In that session, the Legislature provided for the registration of irrigation wells, the spacing of wells, and preferences for the use of ground water. See, Neb. Rev. Stat. § 46-602 (Cum. Supp. 1996); Neb. Rev. Stat. § 46-609 (Reissue 1993); Neb. Rev. Stat. § 46-613 (Cum. Supp. 1996). At the time the purchase agreement between JoAnn Kuhns and the Springers was executed on November 14, 1989, the specific statutory exceptions to the common law of ground water transfer were contained in Neb. Rev. Stat. §§ 46-638 through 46-650 (Reissue 1988) (Municipal and Rural Domestic Ground Water Transfers Permit Act) and Neb. Rev. Stat. §§ 46-675 through 46-690 (Reissue 1988) (Industrial Ground Water Regulatory Act). The

Municipal and Rural Domestic Ground Water Transfers Permit Act sets forth:

> The Director of Water Resources of the State of Nebraska is hereby authorized to grant and administer permits to public water suppliers: (a) To locate, develop, and maintain ground water supplies through wells or other means and to transport water into the area to be served and (b) to continue existing use of ground water and the transportation of ground water into the area served.

§ 46-638. "An applicant which desires to avail itself of [this act] shall make application in writing to the Director of Water Resources for a permit." § 46-639. "The use of ground water pursuant to a permit . . . shall be subject to and governed by the provisions of section 46-613." § 46-648.

[4,5] Section 46-613 states that preference in the use of ground water shall be given to those using the water for domestic purposes, but that those using the water for agricultural purposes shall have preference over those using the same for manufacturing or industrial purposes. In *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 190, 376 N.W.2d 539, 547 (1985), the Nebraska Supreme Court noted, "By enacting the Municipal and Rural Domestic Ground Water Transfers Permit Act as a part of Nebraska's policy, the Legislature altered certain aspects of common law governing use of ground water. Permitees under the act are exonerated from the common-law prohibition against transfer and transportation of ground water." See, also, *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 706-07, 305 N.W.2d 614, 617 (1981) ("[s]ince the Nebraska common law of ground water permitted use of the water only on the overlying land, legislative action was necessary to allow for transfers off the overlying land, even for as pressing a need as supplying urban water users. . . . [T]he Legislature has the power to determine public policy with regard to ground water and . . . it may be transferred from the overlying land only with the consent of and to the extent prescribed by the public through its elected representatives"), *reversed on other grounds* 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982).

Sorensen, supra, makes it clear that the landowner's right to use ground water is an appurtenance to the ownership of the

overlying land, but that ground water use is not an unlimited private property right under Nebraska law. Because the common law restricted transfer of ground water off overlying land, legislative action was needed to allow public water suppliers to use such ground water by a system of permits granted by the Director of Water Resources. Public water suppliers are defined in § 46-638(2) as cities, villages, natural resource districts, et cetera, supplying water to inhabitants for domestic or municipal purposes. We read *Sorensen* as changing the common law of Nebraska by loosening the restriction against transfers of ground water off overlying land to the extent allowed by the Municipal and Rural Domestic Ground Water Transfers Permit Act. As a result of the act, a public water provider could transfer ground water via a permit provided for by the act. Thus, as shown by *Sorensen*, the common law of Nebraska in 1989 prohibited what JoAnn Kuhns and the Springers did by their 1989 purchase agreement and deed because it was a transfer of ground water off overlying land for agricultural purposes. This was not allowable at that time.

[6] In 1995, the Legislature addressed the matter of the transfer of ground water off overlying land by the owner to an adjacent landowner for agricultural use by introducing L.B. 251. As outlined in *Sorensen*, previous statutory modifications of the common law of Nebraska had allowed transfers of ground water, but only for domestic or municipal purposes. L.B. 251 was introduced to "provide an allowance in State Statute for the transfer of ground water for agricultural purposes." Statement of Purpose, L.B. 251, Committee on Natural Resources, 94th Leg., 1st Sess. (Jan. 27, 1995).

L.B. 251, codified as § 46-691, effective September 9, 1995, provides:

> (1) Any person who withdraws ground water for agricultural purposes . . . from aquifers located within the State of Nebraska may transfer the use of the ground water off the overlying land if the ground water is put to a reasonable and beneficial use within the State of Nebraska and is used for an agricultural purpose . . . after transfer, and if such withdrawal, transfer, and use (a) will not significantly adversely affect any other water user, (b) is con-

sistent with all applicable statutes and rules and regulations, and (c) is in the public interest.

If a proposed intrastate use comes within the purview of the ground water transfer law, § 46-691, the applicable natural resources district is required to conduct an investigation of the withdrawal and transfer of ground water if an affected party objects to the transfer. The natural resources district may also prohibit the transfer if it does not comply with the district's rules and regulations. The district shall request a hearing before the Department of Water Resources if the proposed transfer does not meet the statutory requirements of § 46-691(1). We observe that there is no contention or evidence that the easement and transfer of ground water involved in this case do not meet the four statutory requirements of § 46-691: (1) Other water users are not adversely affected; (2) the transfer is consistent with all statutes, rules, and regulations; (3) the transfer is in the public interest; and (4) the transfer is for a reasonable and beneficial use for agricultural purposes.

Because the 1989 purchase agreement and deed allowed for the transfer of ground water off overlying land before the passage of L.B. 251 and at a time when the common law of Nebraska prohibited such a transfer, we must address the effect that the subsequent enactment of § 46-691 had on the purchase agreement and deed between JoAnn Kuhns and the Springers. It is necessary that we do so because "[i]t is fundamental that a contract for an illegal purpose is void and unenforceable." *Central States Health & Life v. Miracle Hills Ltd.*, 235 Neb. 592, 596, 456 N.W.2d 474, 477 (1990). When the parties are asserting rights founded in an illegal and void contract, the court leaves the parties just where they placed themselves and does not enforce the contract. *Id.* Whether in law or equity and irrespective of whether the contract is executory or executed, the court will not aid either party to an illegal contract. *Northland Transp., Inc. v. McElhose*, 3 Neb. App. 650, 529 N.W.2d 809 (1995). However, there appears to be a potential exception when the law changes and what was unlawful becomes lawful.

[7] The Restatement of Contracts § 609 at 1128 (1932) sets forth:

> A bargain that is illegal when formed does not become legal
>
> (a) by reason of a change of fact, except where both parties when the bargain was made neither knew nor had reason to know the facts making it illegal, or
>
> (b) by reason of a change of law, except where the Legislature manifests an intention to validate the bargain.

See, *Davis v. General Motors Acceptance Corp.*, 176 Neb. 865, 127 N.W.2d 907 (1964) (citing Restatement, *supra*, and 6 Williston on Contracts § 1758 (rev. ed. 1938) in case where Legislature expressly dictated that statute would apply to all transactions made prior to effective date of act, unless action on such transaction had been reduced to final judgment); *Curtis v. Securities Acceptance Corp.*, 166 Neb. 815, 91 N.W.2d 19 (1958) (citing Restatement, *supra*, but finding no legislative manifestation of intent to retrospectively validate illegal bargains or contracts in cases involving legislative change in civil penalties for usurious contracts).

Because there has been an obvious change of the applicable law after the parties made their agreement, we address the retroactivity issue first. The question is whether the Nebraska Legislature manifested an intent to validate previous agreements to transfer ground water off overlying land with the passage of L.B. 251 or whether this very substantial change in the law of Nebraska intended to operate only prospectively. To ascertain the intent of the Legislature, a court may examine the legislative history of the act in question. *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996).

The legislative history of L.B. 251 is rather scant. However, while L.B. 251 was in committee, Senator Curt Bromm stated: "I appreciate you bringing the bill because I think there's a great deal of this happening and we should probably be dealing with it . . ." to which Senator Janis McKenzie replied, "Right, and I believe . . . that many people do transfer water from one area to another currently believing they are in full compliance with the law. They have no . . . really no understanding that . . . that we do not allow that in state statute." Natural Resources Committee Hearing, L.B. 251, 94th Leg., 1st Sess. 7 (Jan. 27, 1995). From these comments and the statement of purpose previously cited,

it is clear that L.B. 251 was intended to be statutory authorization for transfers of ground water off overlying land for agricultural purposes because the common law had prohibited such transfers. Whether the change was to operate retroactively is not so clear. The senators were obviously aware of the existence of such transfers, the common law notwithstanding, but there is no language in the statute or legislative discussion about voiding such preexisting transfers.

[8] The general rule is that a legislative enactment operates only prospectively, unless legislative intent and purpose that it should operate retrospectively are clearly disclosed. *Proctor v. Minnesota Mut. Fire & Cas.*, 248 Neb. 289, 534 N.W.2d 326 (1995). We are to look to the purpose of a statute and give the statute a construction which best achieves its purpose. *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). The fact that the Legislature did not declare that § 46-691 would be retroactive is not determinative. See *Nickel v. Saline Cty. Sch. Dist. No. 163*, 251 Neb. 762, 559 N.W.2d 480 (1997).

[9] We find two facts very significant: First, the Legislature was operating with the knowledge that such transfers had occurred and were occurring, and second, the senators did not act to attempt to void these prior transfers by adopting statutory language making this very important change in the water law of Nebraska prospective only. Water is the lifeblood of this state—it is water which makes our land productive and our agriculture economically viable. The disruptive economic and legal consequences which would flow from a "prospective only" application of L.B. 251 are easily imagined, although we admit the extent thereof is difficult to discern from the scant legislative history and is not revealed by the record here—except in the instant case. Nonetheless, we presume that the Legislature was aware of such potential consequences. Thus, given the Legislature's failure to limit the effect of the legislation to the future only, we believe that the only reasonable construction of the statute is that it was intended to also operate retroactively on existing transfers. Thus, because the Legislature manifested an intention to validate transfers of ground water off overlying

land, which is exactly what the agreement between JoAnn Kuhns and the Springers did, the agreement cannot be voided in this litigation because it was contrary to the common law of Nebraska when made by the parties.

Our reasoning is obviously different from that of the district court. Although we reject the trial court's reasoning that this matter is analogous to "mineral rights," we will not reverse the trial court's decision when it is correct, even though the trial court's reasoning is not. See *Healy v. Landgon*, 245 Neb. 1, 511 N.W.2d 498 (1994).

Inasmuch as the agreement is lawful, we turn to JoAnn Kuhns' final argument that the court erred in granting injunctive relief to the Springers when such relief was neither pled nor prayed for in their petition. JoAnn Kuhns argues that a judgment must be supported by the allegations of the pleading on which it is based, citing *State ex rel. Douglas v. Shroeder*, 212 Neb. 562, 324 N.W.2d 391 (1982), and that since the Springers' petition prayed for rescission of the deed and, in the alternative, quiet title, the Springers' failure to request an injunction made it improper for the trial court to award one.

[10] A quiet title action and an action for rescission are equitable in nature. See, *Schuelke v. Wilson*, 250 Neb. 334, 549 N.W.2d 176 (1996); *Gustin v. Scheele,* 250 Neb. 269, 549 N.W.2d 135 (1996). When a court of equity has obtained jurisdiction of a case for any purpose, it will retain it for all purposes and will proceed to a final determination of the case, adjudicating all matters in issue, thus avoiding unnecessary litigation. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994). When equity once acquires jurisdiction, it will retain it so as to afford complete relief. *Miller v. School Dist. No. 69*, 208 Neb. 290, 303 N.W.2d 483 (1981). Even though the petition did not request a permanent injunction, a temporary injunction was sought and granted by the trial court. The petition alleged that JoAnn Kuhns, through her agent, continually threatened to interfere with the Springers' easement rights. The trial court's order, in decreeing, "Defendant and her agents are permanently enjoined from interfering in any way with Plaintiffs' access, use, maintenance or repair . . ." addressed an issue litigated before

the court and avoided the need for additional litigation in the event JoAnn Kuhns attempted to stop or frustrate the Springers' use of the well. There was no error in granting the injunction.

CONCLUSION

Accordingly, we find that the agreement between JoAnn Kuhns and the Springers to transfer ground water off overlying land for agricultural purposes, although not governed by a specific statute when made, became legal with the subsequent passage of L.B. 251. Furthermore, we find that the trial court's decision to enjoin JoAnn Kuhns and her agents from interfering with the Springers' water rights was well within the court's equity jurisdiction.

AFFIRMED.

JUDY SKOMAL, APPELLEE, V. WORLD OF FOOD, APPELLANT.
570 N.W.2d 542

Filed October 21, 1997. No. A-97-044.

1. **Workers' Compensation.** An employee's return to work does not in every case terminate the employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability continues notwithstanding the return to work.
2. **Workers' Compensation: Words and Phrases.** Total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which a claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.
3. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact.
4. **Workers' Compensation: Appeal and Error.** 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.
5. ____: ____. An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court.
6. **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 suc-

cessful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II and Darin J. Lang, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Richard J. Dinsmore and William G. Garbina for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MUES, Judge.

INTRODUCTION

World of Food appeals from a decision of the Workers' Compensation Court finding that Judy Skomal was permanently and totally disabled. For the reasons set forth below, we affirm.

BACKGROUND

Injury.

In October 1982, Skomal was working as a checker for World of Food when she injured her back lifting a pumpkin. At the time of the accident, Skomal was making $4.40 an hour and working approximately 30 hours a week. Skomal was almost 40 years of age when her injury occurred.

Medical Treatment and Surgeries.

For more than a decade following this injury, Skomal was unable to work because of the intense pain she suffered. During this time, Skomal had at least eight surgeries on her back, including a hemilaminectomy and disk excision at L4-5, and fusions in L3-4 and L5-S1. One of the fusions involved the placement of "pedicle screws" and "VSP plates." In some of the later surgeries, the "VSP pedicle screw system" was removed and the L4-5 site was reexplored.

In addition to these operations, Skomal has had surgery on her back for the insertion of spinal cord stimulators and has also had a tendon released in her hip in an attempt to stop the pain. In November 1994, Skomal was visiting a friend at Immanuel

Medical Center, when she unexpectedly saw Dr. Antonio Manahan. Manahan, a physician referred by World of Food's insurance company, had previously treated Skomal. Manahan informed Skomal that he had been thinking about her because he had a new procedure that he thought might help her. The procedure involved injections of steroids. Medical bills show that Skomal received injections from the end of November 1994 through February 1995.

Shortly after this, Skomal went to see a Dr. Riverro, who was referred by Manahan, because the injections failed to provide Skomal any relief. Skomal testified that Riverro "was attempting to go through the scar tissue . . . in [her] back to get to the point where the nerves c[a]me out of [her] spinal column in order to free up those nerves so that [she] wouldn't have the continuous pain . . . ." The surgery proved unsuccessful because there was too much scar tissue. Riverro informed Skomal that in 2 years he would like to attempt another procedure that he believed might help her. The record is unclear as to why Riverro did not want to attempt the procedure at that time or what the procedure involved.

Although some of the surgeries provided temporary relief, Skomal still requires daily pain medication. Skomal receives her medication under the supervision of Dr. Robert McQuillan of the pain control center at St. Joseph Hospital. Because some of the drugs Skomal has been on are narcotics and are addictive, she cannot take them for an extended period. When the doctors have taken Skomal off some of these drugs, she has exhibited symptoms of withdrawal. At the time of trial, Skomal was taking methadone.

Approximately 6 months after the injury, Skomal began experiencing severe headaches. The headaches are worse when Skomal is suffering from back pain and frequently develop into migraines. Skomal sees Dr. John Donaldson, who is licensed in both medicine and psychiatry, for the headaches and the depression she suffers as a result of her back pain. Skomal takes Imitrex injections or Imitrex pills for her headaches, as well as medication for depression.

Employment.

In recent years, Skomal and Donaldson began discussing the possibility that Skomal might try to find employment. Skomal testified that she had essentially depleted her savings and was "basically on the point of bankruptcy," and she thought that if she got a job it would help to reduce the stress of home pressures and possibly provide a diversion from her pain.

Initially, Skomal obtained a job with an endodontist. Although the record is unclear, this apparently was in late 1993 or early 1994. A week later, Skomal was fired from this job. According to Skomal, the doctor informed her that she

> was the nicest, kindest person he had ever met, but this job he was going to have to let me go, and I was in so much pain that it was hard for me to concentrate on working but I wanted to so badly, but he just said he had to let me go.

Subsequently, Skomal obtained a receptionist's position at a beauty school. Skomal worked there for approximately 9 weeks before she was fired. The termination report stated that Skomal was a loyal and hardworking employee, but her lack of training prevented her from being effective in the job. Skomal testified that she was unable to do the job because she was in so much pain.

After Skomal was fired from the job at the beauty school, a family friend, Dr. John Merritt, gave her a job as a receptionist in his dental office. Merritt was semiretired when he hired Skomal, and he did not work regular hours. Skomal testified that she worked anywhere from 2 to 20 hours a week, depending on when Merritt needed her. Skomal testified that Merritt was "just the best" and that he would let her go home if she had a migraine or was in a lot of pain. If Skomal was scheduled to come in and was not feeling well, Merritt would tell her not to come in. Skomal left this job after Merritt suffered a heart attack and cut his hours back even further.

Skomal was subsequently hired as a receptionist at another dental office. On Skomal's job application, she indicated that she had a "bad back . . . but no problem sitting." This job lasted 5 days, until Skomal was fired. Again, Skomal testified that her firing was related to the pain she had.

This brings us to the job which is at the center of this appeal. On May 2, 1995, Skomal began working as a cashier for ShopKo. Skomal testified that she knew the ShopKo managers because she had gone there for years to get her medication. Skomal testified that she is very outgoing and that when she would come in, the managers would talk to her. The managers kept telling Skomal that when she got better, they would hire her. After being fired from the dental office, Skomal decided to take them up on their offer.

At the time she applied for the job, Skomal informed the manager that she needed to have a stool so she could sit when necessary and that she could not work a lot of hours. The manager agreed to provide a stool for Skomal, and he limited the areas in the store that she worked so that she would not have to do any lifting. Skomal primarily works as a cashier, although occasionally she does some light stocking. Other employees are not provided stools and are required to work throughout the store. Skomal testified that if she is having problems with her back, she is allowed to take off whatever time she needs.

At the time of the hearing held July 7, 1996, Skomal was still employed by ShopKo and was earning $6.53 an hour. Skomal worked an average of 26 to 30 hours a week except during the holiday season, when she occasionally worked more than 30 hours. When Skomal was evaluated in July 1995, her evaluator commented that "[Skomal] is always willing to extend her shift to assist."

PROCEDURAL HISTORY

The first hearing before the Workers' Compensation Court was held December 29, 1987. On April 6, 1988, the compensation court found that Skomal was temporarily totally disabled as a result of a work-related accident. World of Food filed a motion for rehearing, and on December 20, 1988, the judgment was affirmed.

On June 14, 1990, World of Food filed a petition to modify the December 1988 award. World of Food alleged that Skomal had prior work experience as a dental receptionist and was capable of returning to work in that capacity. Although not included in the record, the petition to modify indicates that

World of Food apparently submitted a rehabilitation plan "to train and refresh [Skomal] in the skills necessary for employment as a dental receptionist." World of Food further alleged that Skomal had been informed that World of Food would pay for vocational training, but Skomal did not respond. The petition was later dismissed because Skomal underwent additional back surgery.

On March 10, 1992, World of Food filed another petition to modify. The compensation court observed that since the dismissal of World of Food's 1990 petition to modify, Skomal had undergone two additional surgeries and stated that the compensation court was not persuaded by the "precious little evidence" World of Food submitted that Skomal had experienced a decrease in incapacity. In its order, the compensation court also observed that "[t]his apparently is not the first time that [World of Food] has failed unreasonably to pay certain bills," and the court ordered certain expenses paid.

On December 15, 1995, World of Food filed the current application to modify. World of Food alleged that Skomal had reached maximum medical improvement and had returned to work. World of Food further alleged that as a result of Skomal's return to work, she had experienced a decrease in incapacity. The compensation court agreed that Skomal had reached maximum medical improvement, but found that Skomal was still totally disabled. World of Food filed an application for review. On December 19, 1996, a three-judge panel affirmed the judgment of the trial court. World of Food subsequently filed the current appeal.

ASSIGNMENT OF ERROR

World of Food's three assignments of error can be summarized as alleging that the Workers' Compensation Court erred in finding that Skomal was permanently totally disabled.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment,

order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Sheridan v. Catering Mgmt., Inc.*, 252 Neb. 825, 566 N.W.2d 110 (1997); *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

The findings of fact made by a workers' compensation judge on original hearing have the effect of a verdict and are not to be disturbed on appeal unless clearly wrong. *Zessin v. Shanahan Mechanical & Elec.*, 251 Neb. 651, 558 N.W.2d 564 (1997); *Hale v. Standard Meat Co.*, 251 Neb. 37, 554 N.W.2d 424 (1996).

ANALYSIS

The trial court found that

> [Skomal's] physical limitations would not permit her to perform on a full-time basis the duties required of her in [her] prior employments. . . . [Skomal] is able to hold her present position with Shopko only because of the beneficence of the local Shopko management, because [Skomal] is permitted to use a stool in her position as a cashier so that she can alternate between sitting and standing, and because [Skomal] is not called upon to perform the other duties that other cashiers are called upon to perform.

Accordingly, the court found that Skomal was permanently and totally disabled.

Citing *Thinnes v. Kearney Packing Co.*, 173 Neb. 123, 112 N.W.2d 732 (1962), World of Food alleges that "[a] worker who is capable of obtaining and performing remunerative employment, and in fact has returned to such employment, cannot be totally disabled as a matter of law." Brief for appellant at 9. However, World of Food recognizes that the Nebraska Supreme Court has held that it is possible for an employee to return to work and yet remain permanently totally disabled.

In *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the employee, Heiliger, who was also a shareholder and president of the employer, Heiliger Electric, injured his back while lifting 100 pound spools of copper wire. Heiliger immediately returned to work, but was no longer able to perform any manual labor and could not stand on

his feet for any significant length of time. Approximately 1½ months later, Heiliger's doctor performed a hemilaminectomy. After about 4 months, it became evident that Heiliger could no longer perform the work as he had before the accident, so he left the company's employment and sold his shares in Heiliger Electric to Walters, the company vice president.

[1] Two of the medical experts concluded that Heiliger's injury, combined with a preexisting condition, resulted in a 10- to 20-percent disability. The Workers' Compensation Court found that Heiliger had sustained a 20-percent permanent partial disability to the body as a whole and also awarded him compensation for 8 weeks' temporary total disability. On appeal, the employer argued, inter alia, that the compensation court erred in finding that Heiliger was temporarily totally disabled for 8 weeks because Heiliger continued to work during that time, earning the same salary he had before the accident. The Supreme Court held that "an employee's return to work does not in every case terminate an employee's total disability from a work-related injury and does not preclude a finding that the employee's total disability continues notwithstanding the return to work." *Id.* at 471, 461 N.W.2d at 574.

[2] " 'Total disability' in compensation law is not to be interpreted literally as utter and abject helplessness." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 57.51(a) at 10-283 (1997).

> [T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

Id. at 10-288 and 10-329. See, also, *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992); *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 464 N.W.2d 343 (1991); *Heiliger v. Walters & Heiliger Electric, Inc., supra.*

In *Schlup,* the plaintiff, Schlup, worked on the sewing assembly line of the defendant, Auburn Needleworks. Schlup began experiencing numbness in her fingers and shooting pain in both arms. Doctors diagnosed Schlup's condition as bilateral carpal tunnel syndrome and performed surgery on both of Schlup's wrists. Six months later, Schlup was given a medical release to return to work. After 1 day of work, Schlup's hands began to swell and the pain restricted Schlup's ability to function. Doctors subsequently diagnosed Schlup's condition as reflex sympathetic dystrophy.

Nearly a year after the surgeries, Schlup was again released for work but was restricted from lifting anything in excess of 10 to 15 pounds. The doctor's restrictions also required that Schlup avoid repetitive motion. These restrictions precluded Schlup from returning to her former position. In addition, Schlup suffered from degenerative disk disease. Because of the back pain, Schlup was unable to sit for extended periods of time.

From 1988 through 1990, Schlup underwent occupational and rehabilitation therapy. Aptitude tests performed on Schlup indicated that her learning ability was well below average. Schlup filed a workers' compensation claim alleging that the carpal tunnel syndrome rendered her permanently totally disabled. The Workers' Compensation Court agreed, and Auburn Needleworks appealed.

In affirming the decision of the compensation court, the Supreme Court emphasized that Schlup had few appreciable skills, could not sit for long periods of time, and could no longer earn a living with her hands. Accordingly, the court determined that Schlup's case fell within the "odd-lot" doctrine. The court explained that " '[u]nder the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market.' " 239 Neb. at 865, 479 N.W.2d at 448 (quoting 2 Arthur A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68 (1989)). See, also, *Sherard v. Bethphage Mission, Inc., supra* (holding that test for employability is whether worker can compete in open and normal labor market for worker's services).

In the present case, World of Food argues that Skomal cannot be totally disabled because at the time of the hearing, she had been working at ShopKo for over a year. However, World of Food completely ignores the fact that Skomal was fired from three jobs because of incompetence. According to Skomal, she was unable to concentrate on the job because she was in so much pain. Besides ShopKo, the only other job Skomal has been able to maintain in the 14 years since her accident was working for Merritt, who was a longtime friend of Skomal's.

Skomal testified that she had successfully completed a dental assistant course at Omaha Technical High School; however, Dr. John Brantigan opined that Skomal can no longer perform this type of work because of her injury. Although it appears that Skomal may have participated in some vocational analysis, there is nothing in the record to indicate what jobs, if any, she can perform given her age and the level of her educational and physical limitations.

In a letter dated January 24, 1994, Brantigan opined that Skomal had reached maximum medical improvement and stated that he "believe[s] that she warrants a 100 percent permanent physical impairment due to her back." Brantigan noted that Skomal can no longer do the dental hygiene work for which she had been previously trained and cannot do any type of manual labor. Brantigan further observed that Skomal "has an approximately 30 minute sitting limitation and a 30 minute standing limitation." Brantigan also noted that Skomal will be unable to do any type of bending or lifting and that her total activity during a day should be less than 2 hours.

The deposition of Donaldson was also introduced into evidence. Donaldson is licensed to practice both medicine and psychiatry. Subsequent to Skomal's accident, Donaldson began treating Skomal for depression and for the pain she suffered from her headaches. Donaldson explained that Skomal gets severe headaches when she is up and doing things and that even a normal shopping trip with her daughters can precipitate one of these headaches.

Donaldson had seen Skomal several weeks before his March 11, 1996, deposition. When counsel for World of Food asked

Donaldson whether, in his opinion, Skomal is capable of working as a cashier at ShopKo as long as she can tolerate the pain, Donaldson replied:

> Certainly psychiatrically she is . . . . I know the pain issue and the secondary headache issue is . . . what could be limiting and, yeah, I think if the pain is manageable, she can do it. Now, the question is, could she be substantially gainfully employed. Can she do it full time? Could she really support herself? And that's what I'm uncertain about, whether she could really take over and be the sole support of herself if that were necessary.

During cross-examination, Donaldson explained that

> [Skomal] can do a little bit and be on her feet for awhile, but then the pain begins to build, but after she tolerates so much back pain, there's the secondary headache pain, and the combination of those two are [sic] typically enough to put her in bed and to miss things that she would otherwise enjoy doing . . . .

[3-6] Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Schlup v. Auburn Needleworks*, 239 Neb. 854, 479 N.W.2d 440 (1992). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Scott v. Pepsi Cola Co.*, 249 Neb. 60, 541 N.W.2d 49 (1995). An appellate court is precluded from substituting its view of the facts for that of the compensation court if the record contains evidence to substantiate the factual conclusions reached by the compensation court. *Wilson v. Larkins & Sons*, 249 Neb. 396, 543 N.W.2d 735 (1996). 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. *Pettit v. State*, 249 Neb. 666, 544 N.W.2d 855 (1996); *Larson v. Hometown Communications, Inc.*, 248 Neb. 942, 540 N.W.2d 339 (1995).

In the instant case, in affirming the judgment of the trial court, the three-judge panel of the Workers' Compensation Court aptly summed this case:

> The Court on review as well as the trial court is presented in this case with an admittedly unusual factual circumstance in that the plaintiff, in spite of eight back surgeries and a debilitating ongoing level of pain, has returned to work at a wage exceeding the wage she was earning at the time of her injury in 1982. However, [the trial court's] opinion recognizes but for the benevolence of her present employer, plaintiff's desire to make a financial contribution to her family and her superhuman efforts to work, plaintiff would be unable to work.

We agree.

World of Food argues that the compensation court erred in finding that ShopKo was acting out of "sympathy or pity" for Skomal when it supplied her with a stool to sit on because the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 through 12117 (1994), requires employers to make reasonable accommodations for employees with disabilities.

Assuming that World of Food is correct that the ADA required ShopKo to *accommodate* Skomal's disability, we do not believe the ADA required ShopKo to *create* a job to accommodate Skomal's disabilities. This is essentially what was done here. Skomal testified that the manager at ShopKo is very sympathetic to her injuries and is very careful about what Skomal is allowed to do. Although other employees are required to work throughout the store, Skomal's duties are essentially limited to those of cashier. The manager allows Skomal whatever time off she needs for her back, and Skomal believes that if the current manager ever leaves ShopKo, she probably would not have a job. Given Skomal's employment history since her accident, this is certainly not an unrealistic observation.

CONCLUSION

As stated above, the essence of the test for permanent total disability is the probable dependability with which a claimant can sell his services in a competitive labor market. At the time of the hearing, Skomal was 52 years of age, and up until the

ShopKo job, Skomal had not been substantially gainfully employed for more than a decade. That she has sought employment and convinced an employer to, in essence, create a specialized job just for her with "flexibility" virtually unknown in today's job market is commendable. It is only through her own Herculean efforts and the kindness of her employer that she has been able to maintain this job.

While the arguments of World of Food are somewhat convincing, the bottom line is that the issue of whether an employee is permanently totally disabled is a question of fact, and we cannot say that the Workers' Compensation Court's finding was clearly erroneous. For the foregoing reasons, we affirm.

Pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1993), an award of attorney fees to Skomal is appropriate, and the same will be made upon the filing of a motion in compliance with Neb. Ct. R. of Prac. 9F (rev. 1996).

AFFIRMED.

ROGER D. ELEDGE AND BARBARA ELEDGE, HUSBAND AND WIFE, APPELLANTS, V. FARMERS MUTUAL HOME INSURANCE COMPANY OF HOOPER, NEBRASKA, APPELLEE.

571 N.W.2d 105

Filed November 10, 1997. No. A-96-465.

1. **Insurance: Contracts: Appeal and Error.** The interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below.
2. **Judgments: Appeal and Error.** In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Damages: Appeal and Error.** On appeal, the fact finder's determination of damages is given great deference.
4. ____: ____. The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.

5. **Insurance: Contracts: Intent.** In interpreting an insurance contract, the court construes the policy as any other contract, giving effect to the parties' intentions at the time the contract was made.
6. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
7. **Proximate Cause: Appeal and Error.** Proximate cause is a question of fact to be determined by the trial court as fact finder, and will not be disturbed on appeal unless clearly wrong.
8. **Trial: Witnesses.** A trial court, as the trier of fact, is the sole judge of credibility of the witnesses and the weight to be given their testimony.
9. **Trial: Expert Witnesses.** A fact finder is free to reject the opinion of experts and to choose which witness to believe.
10. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
11. **Statutes: Legislature: Intent: Appeal and Error.** When settling upon the meaning of a statute, an appellate 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, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
12. **Judgments: Costs.** As a general rule, an award of costs in a judgment is a part of the judgment.
13. **Insurance: Contracts: Judgments: Costs: Attorney Fees.** Under Neb. Rev. Stat. § 44-359 (Reissue 1993), in determining whether the insured has obtained judgment for more than the amount offered under Neb. Rev. Stat. § 25-901 (Reissue 1995), costs, excluding attorney fees allowed thereunder, are included in the judgment in addition to the recovery under the insurance policy in question.

Appeal from the District Court for Butler County: ALAN G. GLESS, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

T.J. Hallinan, of Cobb & Hallinan, P.C., for appellants.

Charles H. Wagner and Maureen Freeman-Caddy, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MUES, Judge.

INTRODUCTION

Roger D. Eledge and Barbara Eledge appeal from an order of the Butler County District Court awarding them $1,000 under their homeowner's insurance policy with Farmers Mutual Home Insurance Company (Farmers). The Eledges sought recovery of

$6,331 for damage to the roof and interior ceilings of their home allegedly resulting from a hailstorm or series of hailstorms occurring in May 1991. The trial court awarded them $1,000 for roof damage only. The Eledges appeal the sufficiency of that award, the failure to award ceiling damages, and the denial of attorney fees. Because we conclude that the trial court's findings concerning the damage to the roof and its finding that the hail damage did not cause damage to the interior ceilings are not clearly erroneous, we affirm the district court's order in those particulars. We reverse the denial of attorney fees and remand the cause for further proceedings in that regard.

FACTUAL BACKGROUND

In 1980, the Eledges purchased a home at 510 C Street in Ulysses, Nebraska, for $7,000. Over the next 2 years, they spent approximately $30,000 renovating the home so that they could move into it. These repairs included putting new ceilings and walls in the second floor bedrooms, fixing a basement wall, and replacing the furnaces. The Eledges did not make repairs to the roof because the seller told them the roof was new and also because no repairs appeared to be necessary. After all the renovations were completed, the Eledges moved into the house in 1982.

In August 1990, the Eledges applied for homeowner's insurance with Farmers through its agent, Terry Kirby. They requested, received, and paid for a replacement cost policy on their home. To qualify for such policy, they had to insure their home for at least 80 percent of its actual replacement cost. Kirby helped the Eledges determine this amount to be $73,000, and the Eledges were issued an "Elite 3" policy from Farmers. The clause in issue reads as follows:

> 3. **Loss Settlement.** Covered property losses are settled as follows:
>
> . . . .
>
> b. Buildings under Coverage A [the dwelling] or B [other structures] at replacement cost without deduction for depreciation, subject to the following:
>
> (1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full

replacement cost of the building immediately before the loss, *we will pay the cost to repair or replace*, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

(a) the limit of liability under this policy that applies to the building;

(b) *the replacement cost of that part of the building damaged for like construction and use* on the same premises; or

(c) the necessary amount actually spent to repair or replace the damaged building.

(Emphasis supplied.)

After hailstorms in May 1991, the Eledges noticed that their roof was leaking around the chimney. They asked their friend and neighbor, Gary Davis, a roofer employed by American Roofing with 10 to 12 years of experience, to repair the damage. Davis installed new flashing around the chimney and replaced a few shingles immediately around the chimney. While he was on the roof, he noticed what was, in his opinion, hail damage across the entire roof, and suggested that the Eledges contact their insurance agent about the damage. After inspecting the interior of their home and discovering water damage on several of the second floor ceilings, the Eledges contacted Farmers through its agent, Terri Novak, and were told to get estimates to repair the damage.

The Eledges again contacted Davis and asked him for an estimate to repair the roof and the ceilings. Davis measured the roof and took pictures of some of the damaged areas. Mike McNair, American Roofing's estimator, then estimated the cost to replace the roof at $5,170. This estimate included tearing off the old layers of shingles that were on the roof and installing new felt, edge metals, flashing on the plumbing pipes, and asphalt shingles. Davis testified that the only workmanlike way to repair the hail damage and ensure that the roof would not continue to leak was to tear off the old shingles and replace the edge metals, felt, flashing, and shingles with new materials. Because there were already two layers of shingles on the roof, at least one of which had been damaged by hail, he testified that it would not be good workmanlike procedure to overlay the roof

with a third layer of shingles. Davis also testified that it was possible to simply tear out and replace the damaged shingles, but that he did not feel this was an adequate way to repair the Eledges' roof because those shingles would be a different color than the old shingles and he would not be able to guarantee a proper seal.

Davis also inspected the water damage to the interior ceilings shortly after the storms in May 1991. He testified that some of the stains looked fresh and some looked older, but he could not be certain how long any of them had been there. Davis also testified that he could not tell where the water was entering the house and concluded that it could be an entirely different point from where the ceiling was stained. He admitted that it was possible that all of the water damage originated from the chimney leak. Davis further testified that in his opinion the chimney leak was not caused by hail, and he could not say for sure that the hail damage to the roof caused the roof to leak, but in his opinion the damage was sufficient to cause leaking. The Eledges testified that after Davis fixed the chimney leak, it stopped leaking in that area, but the upstairs ceiling continued to suffer water damage in other areas. American Roofing estimated the cost to fix the water damage to the interior ceilings to be $1,161.

McNair testified that the estimates reflected the fair and reasonable cost to repair the hail and water damage and that each item on the estimates was necessary to make the repairs in a proper, workmanlike manner. Based upon these estimates, the Eledges submitted a proof of loss statement to Farmers in the amount of $6,231 ($6,331 less the $100 deductible).

Farmers contacted Midlands Claim Service and asked that an adjuster be sent to the Eledges' home to adjust the loss. Adjuster Jack Young was sent. Young is a teacher who had adjusted claims for damage caused by summer storms for approximately 8 years before he inspected the Eledges' roof. Young had also done some construction work, including a little roofing during his college years and during the summers. He received on-the-job training for adjusting storm damage by riding along with his boss during his first summer as an adjuster.

Young inspected the roof in June 1991 by climbing onto the roof and counting the hail-damaged spots or "hits" per 10- by

10-foot square. He found some hail damage across the entire roof, but after counting only three to four hits per square, he concluded that there was insufficient damage to replace the entire roof. This was based on an industry custom or standard that 10 hits per square would normally entitle the insureds to have their entire roof replaced. The basis for this standard was not explained. Young determined that it would take 29 squares of shingles to cover the entire roof. Because the damage was minor, he adjusted the claim by allowing a 33-percent damage allowance. In 1991, it cost approximately $65 per square to replace a roof; thus, Young took $65 times 33 percent and allowed $22 per square to repair the Eledges' roof. This allowed $638 for roof repair. According to Young, his estimate did not allow for the old shingle layers to be torn off and replaced; rather, his estimate was based upon the cost to tear out and replace only the shingles that were damaged by the hail. Young also inspected the interior ceilings and allowed $444 to repair that damage. His complete repair estimate, including the roof and the interior ceilings, was for $982 ($1,082 less the $100 deductible).

Based upon Young's investigation, Farmers offered to pay the Eledges $982 for the hail damage. They rejected the offer. After the Eledges' rejection, Leland Belcher, Young's boss, then did a reinspection to make sure Young was correct in his assessment of the damage and in his offer. In Belcher's opinion, only one slope of the roof had received any hail damage; thus, he felt that it was necessary to repair only that one damaged slope. Belcher did not feel that the hail damage had affected the whole roof and observed that the roof was old and had substantial deterioration prior to the hailstorm. He conceded that "wear and tear" was another term for depreciation. Thus, he admitted that the most appropriate way to repair the damaged slope would be to tear off at least one layer of shingles and put down a new layer on the entire slope, a process which he testified Young's $638 estimate would cover.

Approximately 2 years after the damage was reported, Farmers contacted James Belina, an engineer who specializes in analyzing structural failure due to storm damage. Belina inspected the Eledges' roof in July 1993 and took photographs

of the roof. In his testimony, prior to Belina's, Davis was shown these 1993 photographs taken by Belina and agreed that the roof was in essentially the same condition at the time of Belina's 1993 inspection as it was when Davis inspected it in 1991. Belina found that the roof was at the end of its useful life and found no evidence of hail damage. He found no craters or dents, which were characteristic of hail damage, in the roof or the flashing. In fact, he stated that he found nothing on the roof that was characteristic of hail damage. However, he admitted that he deviated from standard industry procedure in inspecting the roof in that he did not get onto the roof and examine each slope; instead, he used a telephoto lens and binoculars to examine parts of the roof. Belina had never been a roofer and conceded that an inspection for hail damage should occur as soon after the damage as is possible. He also testified that he had been told by Midlands Claim Service that an inspection in June 1991 had revealed no hail damage.

During trial, Roger Eledge testified that he assumed the damage occurred during two hailstorms in May 1991 because it was shortly after these storms that he noticed a leak around the chimney. He testified that the Eledges had no problems with the roof before May 1991, but had continually had problems since that time because the roof had not been fixed. Prior to trial, Farmers offered to settle the Eledges' claim for $1,100. This offer was also rejected, and trial was held to the court. The trial court found in favor of the Eledges in the amount of $1,000 for damages to the roof and taxed costs of $399.85 to Farmers, rejecting Farmers' defense that the Eledges did not have adequate replacement value coverage. The court further found that the leakage around the chimney was not caused by hail and that there was insufficient evidence to prove the interior damage was caused by the hailstorms. The court denied the Eledges attorney fees because the Eledges had failed to recover more than the amount offered by Farmers to settle the claim prior to trial. The Eledges timely appeal.

ASSIGNMENTS OF ERROR

The Eledges allege that the trial court erred in (1) awarding them $1,000 to repair the roof when the only competent evidence shows that the fair and reasonable cost to repair/replace

the roof in a workmanlike manner was $5,170; (2) failing to find that the water damage to the interior ceilings was caused by the hail damage to the roof; and (3) failing to award attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1993).

STANDARD OF REVIEW

[1] The interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below. *Luedke v. United Fire & Cas. Co.*, 252 Neb. 182, 561 N.W.2d 206 (1997); *Kast v. American-Amicable Life Ins. Co.*, 251 Neb. 698, 559 N.W.2d 460 (1997); *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997).

[2] In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence, but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997).

[3,4] On appeal, the fact finder's determination of damages is given great deference. *Nichols v. Busse*, 243 Neb. 811, 503 N.W.2d 173 (1993). The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996).

DISCUSSION

Roof Damage.

The Eledges' first assignment of error is that the award of $1,000 for hail damage to the roof was insufficient. They contend that the policy obligated Farmers to pay the reasonable cost necessary to replace their entire roof. Their evidence was that this amount was $5,170. Farmers argues that the policy entitles the Eledges only to sums necessary to repair or replace the part of the house damaged by hail—in this case, portions of the roof and individual shingles. The pertinent portion of the policy reads as follows:

> (1) . . . [W]e will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:
>
> . . . .
>
> (b) *the replacement cost of that part of the building damaged for like construction and use* on the same premises . . . .

(Emphasis supplied.)

[5] The interpretation and construction of an insurance contract ordinarily involve questions of law in connection with which an appellate court has an obligation to reach conclusions independent of the determinations made by the court below. *Luedke v. United Fire & Cas. Co., supra.* In interpreting an insurance contract, the court construes the policy as any other contract, giving effect to the parties' intentions at the time the contract was made. Where the terms of such contract are clear, they are to be accorded their plain and ordinary meaning. *Burke v. Blue Cross Blue Shield, supra.*

The Eledges argue, somewhat inconsistently, that the policy is ambiguous and also that the plain and ordinary meaning of the "replacement cost" provision compels their recovering the cost of replacing the entire roof in this case. We do not agree that the "plain and ordinary meaning" of this policy provision compels replacing the entire roof in every instance where hail damages only a part of the roof. For example, where a single square of shingles is damaged and matching replacements can be found, and where the repair can be made without damage to the remainder of the roof, such interpretation would mean that an insured was nevertheless entitled to the cost of replacing the whole roof as a matter of law. We do not believe a reasonable person would place such an interpretation on this policy. A plain reading of the provision does not require the replacement of the whole when it is factually shown that the whole can be satisfactorily repaired by replacement of a "part," so long as the building is returned to "like construction and use" as a result. The policy language obligates Farmers to pay the reasonable cost to repair or replace, but no more than the replacement cost of that "part of the building damaged." No deduction may be

taken for depreciation of the part damaged by the covered occurrence. Moreover, as a matter of law, we find no ambiguity as to what "replacement cost" means under the policy.

In reality, we believe the Eledges recognize that the result here does not depend so much on contract interpretation as it does on the facts. In essence, their argument is that the evidence shows that the only workmanlike way to repair the hail damage would be to replace the entire roof.

[6] An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994).

[7] The district court made no specific findings regarding the hail damage to the roof. However, several such findings are implicit in its award; first and foremost, that the May 1991 hailstorm caused damage of some kind to the Eledges' roof, obviously less than Davis opined, but more than attested to by Belina, who found none. Proximate cause is a question of fact to be determined by the trial court as fact finder, and will not be disturbed on appeal unless clearly wrong. See *Bean v. State*, 222 Neb. 202, 382 N.W.2d 360 (1986).

Considering the evidence in a light most favorable to Farmers, as we must, Farmers' adjuster Belcher attested that only one slope of the roof sustained minor hail damage, and Farmers' expert, Belina, testified that the roof was badly deteriorated due to its age. While we agree that under the policy the age and deteriorated condition of the Eledges' roof does not itself preclude replacing the whole roof, it does have a bearing on the issue of causation. In other words, while the policy clearly prohibits any "deduction for depreciation," the damage must result from a covered occurrence—here, the hail. Damage caused from normal wear and tear or depreciation is obviously not covered.

[8,9] As stated, the trial court obviously rejected the testimony of both Davis and Belina, and this it was free to do. A trial court, as the trier of fact, is the sole judge of credibility of the witnesses and the weight to be given their testimony. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997). A fact finder is

free to reject the opinion of experts and to choose which witness to believe. See *Sheridan v. Catering Mgmt., Inc.*, 5 Neb. App. 305, 558 N.W.2d 319 (1997).

The district court also implicitly found that a reasonable and workmanlike method to repair the hail damage was to replace only a part of the roof. The Eledges contend that this finding was clearly erroneous because Davis, the only roofer called as a witness, testified that the only workmanlike method to repair the hail damage to the Eledges' roof, and to guarantee that it would not continue to leak, was to tear off the existing shingles down to the subdecking or plywood underneath, and then replace the felt, edge metals, flashing, and shingles with new materials. Davis testified that tearing out and replacing only the damaged shingles was possible, but he could not guarantee a leak-free roof if repaired in such manner. Moreover, the new individual shingles would not match the older ones.

It is true that the policy requires that the repair or replacement must be sufficient for "like construction and use." In other words, the repair must return the structure as nearly as possible to its predamage condition, and no deduction can be taken for depreciation. This plainly requires that if hail damage causes roof leaks, the method of repair must include eliminating these leaks. But a "replacement cost" policy does not, in every case, entitle the insured to a guarantee of a "leak-free" roof. If the roof leaked *before* any hail damage, and if the method to repair the area damaged can otherwise be done in a workmanlike manner, including its being made "leak-free," that the roof might continue to leak from a non-hail-damaged area does not render that method unworkmanlike.

It is implicit in the award below that the district court found that the roof, which, according to witnesses, was 15 to 20 years old and near the end of its useful life and had defective chimney flashing, leaked for reasons unrelated to the hail damage. Davis testified that the chimney leak was unrelated to the hailstorm and that some of the ceiling waterstains, whatever their source, looked "older."

The Eledges cite *Higginbotham v. New Hampshire Indem. Co.*, 498 So. 2d 1149 (La. App. 1986), as authority for the position that they were entitled to the replacement cost of a new roof

rather than to the cost of repairing the roof as allowed. *Higginbotham* is, in many respects, similar to the case here. The trial court found that the amounts tendered by the insurer were sufficient to repair the hail damage. The appellate court amended the trial court's award, finding "manifest error," *id.* at 1151, in the trial court's factual conclusions. The appellate court found that the replacement cost of a new roof was the proper method of valuation based on the evidence presented. In so doing, it relied heavily on the undisputed evidence that spot replacement, while possible, would not guarantee a leak-free roof. The *Higginbotham* court stated: "The testimony of all experts revealed that the proper standard of repair . . . would be to remove and replace the roof." *Id.* at 1153. As here, the main dispute was whether the roof could be repaired or whether the severity of the damage was such that replacement was necessary. There, all experts testified that to guarantee a leak-free roof, the entire roof needed to be replaced. The opinion is silent on predamage leaks.

We believe that the facts in *Higginbotham* make it distinguishable from the case before us. Here, both Young and Belcher testified to repair methods other than replacing the roof. While Young's estimate was based on spot-replacing shingles, Belcher testified that the most appropriate way to fix the damaged area was to tear off the top layer of shingles on the damaged slope and replace it with a new layer, a method which he attested could be accomplished at a cost within Young's estimate of $638. This alternative method took into account the insurance department directive that a third layer not be placed over two or more existing layers and eliminated spot replacement of individual shingles and the leakage and "mismatch" problems that spot replacement would cause according to Davis. Here, unlike in *Higginbotham*, all the experts did not agree on the type or degree of repair necessary to correct the hail damage.

In an action tried to the court, the factual findings of the court will not be disturbed on appeal unless clearly wrong. *Bachman v. Easy Parking of America*, 252 Neb. 325, 562 N.W.2d 369 (1997). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute

its factual findings for those of the district court where competent evidence supports those findings. *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994). The trial court's implicit finding that the proper standard of repair in this case did not require replacing the whole roof is not clearly erroneous.

The court's award of $1,000 was almost 50 percent higher than the roof damage figure of $638 attested to by Young and Belcher. There is nothing to suggest that the trial court diminished the cost of repair because of the predamaged condition of the roof, that is, for depreciation. The reason for awarding more than the witnesses attested to goes unexplained, but Farmers does not cross-appeal. The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved. *World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996). We find no error on the record in the trial court's award for the roof damage.

Damage to Interior Ceilings.

The trial court found that there was insufficient evidence to prove the interior damage was caused by the hailstorm. As stated, proximate cause is a question of fact to be determined by the trial court as fact finder, and will not be disturbed on appeal unless clearly wrong. See *Bean v. State*, 222 Neb. 202, 382 N.W.2d 360 (1986).

Roger Eledge testified that the roof had not leaked prior to the purchase of the insurance policy from Farmers and that he first noticed the wet ceiling around the fireplace shortly after the May 1991 hailstorms. After Davis repaired the chimney flashing, Roger Eledge looked for other ceiling problems and noticed that several of the second floor ceilings had waterstains. He testified that the waterstains on the ceilings were not present prior to May 1991 and were still occurring at the time of trial. Barbara Eledge testified that the leak and staining around the fireplace had stopped after Davis fixed the flashing. Young, the adjuster, included an amount for water damage to the interior ceilings in his appraisal of $1,082. However, Davis testified that when he looked at the ceilings shortly after the May 1991 storms, some of the ceiling damage looked fresh and some

looked older. He also testified that he could not tell where the water was entering the house and that it was possible all the damage originated from the chimney leak, a leak undisputedly unrelated to hail damage. As stated, Farmers' expert, Belina, testified that the roof was at the end of its useful life and described the cracking and curling of shingles due to age.

The trial court obviously was not persuaded that the damage to the interior ceilings was caused by the hail damage to the roof. The evidence supports the conclusion that it was just as likely due to the chimney leak and the age and condition of the roof. As already stated, the findings of the trial court on the question of proximate cause will not be disturbed on appeal unless clearly wrong, see *Bean v. State, supra*, and in reviewing a judgment of the district court for errors appearing on the record, we may not substitute our factual findings for those of the district court where competent evidence supports those findings, *Records v. Christensen*, 246 Neb. 912, 524 N.W.2d 757 (1994). We cannot say that the trial court's findings were clearly erroneous. Thus, we affirm the decision denying recovery to the Eledges for repair to the interior ceilings of their home.

Attorney Fees.

Section 44-359 states in pertinent part:

> In all cases when the beneficiary . . . brings an action upon any type of insurance policy . . . the court, upon rendering judgment against such company . . . shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs . . . except that *if the plaintiff fails to obtain judgment for more than may have been offered by such company . . . then the plaintiff shall not recover the attorney's fee provided by this section.*

(Emphasis supplied.)

Neb. Rev. Stat. § 25-901 (Reissue 1995) provides in pertinent part that "[t]he defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff, or his attorney, an offer in writing to allow judgment to be taken against him for the sum specified therein."

The facts concerning the attorney fees are not in dispute. The trial court awarded the Eledges a judgment of $1,000 plus costs,

the amount of costs not stated. The trial court also found that the Eledges had refused Farmers' pretrial offer to confess judgment in the amount of $1,100, and the court thus denied the request for attorney fees. The Eledges' costs were later taxed at $399.85. Farmers' written pretrial offer stated that it offered "to allow Judgment to be taken . . . for the sum of $1,100." Costs were not mentioned.

The Eledges argue that the trial court erred in failing to award reasonable attorney fees pursuant to § 44-359, because they obtained a judgment for $1,399.85 ($1,000 recovery plus $399.85 costs) which exceeds the $1,100 offer made by Farmers under § 25-901. Therefore, the Eledges argue, § 44-359 mandated an award of fees, since it is only if a plaintiff fails to obtain judgment for more than that offered by the insurer that attorney fees are not recoverable.

The issue is whether costs are included in the term "judgment" as used in § 44-359 for purposes of determining whether the judgment exceeds an offer made under § 25-901. We find no Nebraska case specifically addressing this issue. Farmers first argues that the issue was not presented to the trial court and may not be raised for the first time on appeal. See, e.g., *Hanigan v. Trumble*, 252 Neb. 376, 562 N.W.2d 526 (1997). We disagree. While the Eledges did not make the specific *argument* they now pose, clearly the *issue* of attorney fees under § 44-359 was pled and argued below. Given the sequence of events below, including the taxing of costs after the motion for new trial was argued and denied, we conclude that the issue is properly before us.

[10] Statutory interpretation is a matter of law in connection with which an appellate court has the obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Bank of Papillion v. Nguyen*, 252 Neb. 926, 567 N.W.2d 166 (1997); *Moore v. Eggers Consulting Co.*, 252 Neb. 396, 562 N.W.2d 534 (1997); *State v. Thieszen*, 252 Neb. 208, 560 N.W.2d 800 (1997).

Farmers contends that the Eledges *recovered* less than was offered prior to trial. Farmers argues that § 44-359 should be interpreted to segregate costs from the judgment. Section 44-359 does state that attorney fees allowed under its provisions are to be taxed as costs and that such attorney fees are to be "in addi-

tion to" the "recovery." It is apparently Farmers' contention that since the Legislature requires allowed attorney fees to be segregated from the recovery, and since attorney fees are costs, then § 44-359 should be interpreted to also require "segregation" of costs in general from "judgment." We disagree.

[11] When settling upon the meaning of a statute, an appellate 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, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Kerrigan & Line v. Foote*, 5 Neb. App. 397, 558 N.W.2d 837 (1997). The pertinent part of § 44-359 provides that it is only if the plaintiff fails to obtain *judgment* for more than may have been offered by the company under § 25-901 that attorney fees are precluded. We must assume that the Legislature's selection of the word "judgment" in this portion of the statute rather than the word "recovery," as found in the earlier part, was intentional. Recovery obviously refers to the amount of money determined to be due the insured under the insurance policy in question. By choosing the term "judgment" and placing it in the equation for determining whether the plaintiff has obtained more than that offered under § 25-901, we thus assume the Legislature intended judgment to mean something other than simply that amount found due under the policy. Recovery, as found in § 44-359, is not synonymous with judgment, and we must determine whether the term "judgment," in its plain and ordinary meaning, includes court costs such as those awarded to the Eledges here.

Farmers asserts that "[c]osts have never been considered a portion of the judgment in Nebraska." Brief for appellee at 16. Farmers cites *Metcalf v. Hartford Acc. & Ind. Co.*, 176 Neb. 468, 126 N.W.2d 471 (1964), to support that proposition. *Metcalf* interpreted a predecessor statute to § 44-359 and held that, thereunder, the fees allowed were taxable as costs and constituted no part of the judgment for purposes of accruing interest on the judgment. As stated, the current version of § 44-359 also provides that attorney fees allowed are taxed as costs and are in addition to the recovery. That attorney fees, as costs, are

not included in the judgment for purposes of interest accrual does not answer the question of whether costs in general should be included in the judgment for purposes of § 44-359.

[12] As a general rule, an award of costs in a judgment is a part of the judgment. See, e.g., *Muff v. Mahlock Farms Co., Inc.*, 186 Neb. 151, 181 N.W.2d 258 (1970) (award of costs in judgment is part of judgment, and power of court to change such award is coextensive with its power to vacate or modify judgment); *Rehn v. Bingaman*, 152 Neb. 171, 173-74, 40 N.W.2d 673, 675 (1950) (" 'award of costs to the successful party is as much a part of the judgment entered as the damages allowed, and the court cannot, after the term, change this award except for some statutory cause allowing the court to set aside or modify its judgments at a subsequent term' ") (citing *Smith v. Bartlett*, 78 Neb. 359, 110 N.W. 991 (1907)).

Other jurisdictions have interpreted statutes similar to § 44-359 and have determined that the judgment includes costs. In *Carlson v. Blumenstein*, 293 Or. 494, 651 P.2d 710 (1982), a case strikingly similar to the one at hand, the Oregon Supreme Court interpreted an attorney fees statute in connection with an offer of compromise statute similar to § 25-901. In that case, the defendants offered to allow judgment against them for $3,000. The plaintiffs rejected the offer and were awarded $2,717.04 plus interest, making the total award greater than $3,000. They were awarded $2,000 in attorney fees. This award was upheld on appeal, with the court stating that judgment normally includes an award of damages, costs, disbursements, and attorney fees. The *Carlson* court held that in comparing an offer with the judgment received, a court must compare the offer of compromise against the sum of the award plus the costs and recoverable attorney fees incurred up to the time of service of the offer. In addition, California courts have repeatedly held in several contexts that in determining whether a plaintiff has obtained a more favorable judgment than the settlement offered, attorney fees and costs are included in the judgment. See, e.g., *Wickware v. Tanner*, 53 Cal. App. 4th 570, 61 Cal. Rptr. 2d 790 (1997); *Wilson v. Safeway Stores, Inc.*, 52 Cal. App. 4th 267, 60 Cal. Rptr. 2d 532 (1997).

Obviously, under our statute, the attorney fees allowed thereunder are not included in the judgment for purposes of deter-

mining whether the judgment exceeds the offer, because attorney fees are allowed only *if* the judgment exceeds the offer. Nonetheless, the reasoning of the above cases is persuasive on the issue of whether costs should be included in the amount of the judgment obtained for purposes of determining whether that judgment exceeds the offer under § 25-901.

[13] We hold that under § 44-359, in determining whether the insured has obtained judgment for more than the amount offered under § 25-901, costs, excluding attorney fees allowed thereunder, are included in the judgment in addition to the recovery under the insurance policy in question. The Eledges' judgment, consisting of the $1,000 recovery and $399.85 in costs, is greater than the $1,100 offered by Farmers in its offer made pursuant to § 25-901. Therefore, we reverse the lower court's denial of attorney fees and remand the cause for determination of reasonable attorney fees to be awarded the Eledges.

CONCLUSION

For the foregoing reasons, we hereby affirm the district court's decision as it relates to the award of $1,000 for damage to the roof and to the refusal to award any sum for damage to the interior ceilings. The district court's denial of attorney fees is reversed and the cause is remanded for determination of reasonable attorney fees to be awarded to the Eledges.

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

TEAGUE GILES SUTHERLAND, APPELLEE,
v. IDA M. SHOEMAKER, APPELLANT.
570 N.W.2d 375

Filed November 10, 1997. No. A-96-871.

1. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Appeal and Error.** An appellate court has an obligation to reach a conclusion on a question of law independent from a trial court's conclusion.
3. **Dismissal and Nonsuit: Time.** A plaintiff may dismiss an action without prejudice as a matter of right at any time before final submission.

4. **Small Claims Court: Appeal and Error.** An appeal from small claims court to district court is tried de novo.
5. ____: ____. A trial de novo in district court on appeal from small claims court is held as if no action had been instituted in small claims court.
6. **Dismissal and Nonsuit: Small Claims Court: Appeal and Error.** Neb. Rev. Stat. § 25-601(1) (Reissue 1995) applies to a case on appeal from the small claims court pending in district court, if there has not been final submission to the district court judge.

Appeal from the District Court for Buffalo County, JOHN P. ICENOGLE, Judge, on appeal thereto from the County Court for Buffalo County, GERALD R. JORGENSEN, Judge. Judgment of District Court affirmed.

John S. Mingus, of Mingus & Mingus, for appellant.

No appearance for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

This case is once again before this court on Ida M. Shoemaker's appeal from the district court's dismissal of her appeal from an adverse judgment in small claims court. In our memorandum opinion filed May 1, 1996, case No. A-94-734, we reversed the district court's first dismissal of Shoemaker's appeal. In that case, the district court held that Shoemaker individually was not the proper appellant because she was named in small claims court as an agent for Mormac Corporation and because Mormac and its insurance carrier had paid the judgment instead of appealing. We held that she was a proper appellant and reversed and remanded. On remand, Teague Giles Sutherland once again moved to dismiss the case, this time under Neb. Rev. Stat. § 25-601(1) (Reissue 1995). The district court again dismissed the case pursuant to this statute.

STATEMENT OF FACTS

We quote from our May 1, 1996, memorandum decision the following facts of this case:

> A review of the record shows that Teague Giles Sutherland filed an action in the small claims court for Buffalo County alleging that Shoemaker owed him $686 and costs in connection with a motor vehicle accident on July 9, 1991. Sutherland alleges that while Shoemaker was

operating a tractor-trailer and proceeding eastbound on Highway 30, she crossed the yellow line to make a very wide and long turn into a driveway. At that point, Sutherland, who was also eastbound, struck Shoemaker on the right dual tire of the tractor. Sutherland alleges that because of the improper turn, Shoemaker should be held responsible for the damages to his truck in the amount of $686. Sutherland's claim also indicates that Shoemaker is a driver for Mormac Trucking. However, Sutherland requested that summons be served on Shoemaker at either her home or work address. The record shows that Sutherland and Shoemaker appeared for trial and that the trial court entered judgment against Shoemaker and for Sutherland in the amount of $686 plus $10.79 costs and interest. Shoemaker appealed this decision to the district court for Buffalo County.

On September 25, 1992, the district court found that Shoemaker individually was not a proper appellant in the instant matter for the reason that she was named in the small claims court as an agent or driver for the corporation Mormac. The district court also found that Mormac and its insurance carrier apparently decided not to proceed with the instant matter beyond the small claims court hearing and paid the small claims judgment in full.

Upon remand, Sutherland again made a motion to dismiss, this time proceeding under § 25-601(1), and the district court dismissed the case, assessing costs to Sutherland.

ASSIGNMENT OF ERROR

Shoemaker appeals to this court and assigns as error the district court's dismissal of this action. She argues that § 25-601(1) does not apply to actions in the district court which are on appeal from a judgment in small claims court, because the district court is functioning in an appellate capacity in such cases.

STANDARD OF REVIEW

[1,2] A judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 25-1911 (Reissue 1995). An appellate court has an obligation to reach a conclusion on a

question of law independent from a trial court's conclusion. *VanDeWalle v. Albion Nat. Bank*, 243 Neb. 496, 500 N.W.2d 566 (1993).

ANALYSIS

[3] Section 25-601 provides in part that "[a]n action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court." Additionally, "[i]t is well settled in Nebraska that a plaintiff may dismiss his action without prejudice as a matter of right at any time before final submission. It is a statutory right and not a matter of judicial grace or discretion." *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 426, 299 N.W.2d 435, 436 (1980) (construing § 25-601(1)).

[4] An appeal from small claims court to district court is tried de novo, pursuant to Neb. Rev. Stat. § 25-2734 (Reissue 1995). "A trial de novo in a reviewing court is a trial held *as if no action whatever had been instituted* in the court below." (Emphasis supplied.) *Hornung v. Hatcher*, 205 Neb. 449, 455, 288 N.W.2d 276, 280 (1980).

Shoemaker argues that Sutherland should not be able to collect the small claims judgment from Mormac and then dismiss the case under § 25-601(1). The central point of Shoemaker's argument is that the district court, in reviewing a small claims appeal, is functioning as an appellate court, and thus § 25-601(1) does not apply to that kind of action. In other words, Shoemaker argues that because the case had already been "submitted" to the small claims court and decided, the plaintiff no longer had the absolute right to dismiss the case in district court under § 25-601.

In so arguing, Shoemaker perhaps misunderstands the holdings of *Hornung, supra*, and *Dobrovolny v. Waniska*, 224 Neb. 77, 395 N.W.2d 480 (1986). In *Dobrovolny*, the plaintiff filed a small claim in the county court claiming $770 due for baling hay. The county court awarded the plaintiff $420 plus costs, and the plaintiff appealed. However, the plaintiff did not appear for trial in the district court, and the district court affirmed the county court judgment without hearing evidence, stating: " 'Matter came on for trial; petitioner *failed* to appear; defendant's [sic] appeared pro se. Court affirms judgment entered in County Court. . . .' " *Id.* at 77, 395 N.W.2d at 480. The plaintiff

appealed to the Nebraska Supreme Court, which reversed the judgment of the district court. The court reasoned that because appeals from small claims court are tried de novo, the district court has to *hear evidence* which supports the small claims verdict to affirm the judgment of the small claims court. In *Dobrovolny*, of course, "there [was] no evidence [heard] to support the verdict." *Id.* at 78, 395 N.W.2d at 480.

In *Hornung, supra*, the plaintiff filed an application in the county court to terminate a conservatorship that had been created to manage assets which she and her husband owned. Her daughters filed objections to the application. At trial in county court, the objectors sought to introduce evidence of their mother's condition following the creation of the conservatorship. The county court ruled that this evidence was irrelevant and refused to admit it. The objectors did not make an offer of proof. The county court ruled in favor of the plaintiff and terminated the conservatorship. The objectors appealed, and the matter was eventually heard in district court. At the trial in district court, all parties stipulated that the matter be submitted to the court on the transcript of the proceedings from county court, and no other evidence was offered. The district court later entered an order terminating the conservatorship. On appeal to the Nebraska Supreme Court, the objectors argued that the district court erred in sustaining the county court's rulings limiting evidence of the mother's condition.

[5] In affirming the judgment of the district court, the Supreme Court held that

> Objectors fail to recognize the effect of a de novo trial in the District Court. A trial de novo in a reviewing court is a trial held as if no action whatever had been instituted in the court below. [Citations omitted.] The rulings by the county court ceased to exist with the filing of the appeal in the District Court to the same extent as the judgment itself. Whatever the county court did was not before the District Court for review and is not before us for review. The only matters to be reviewed by this court on appeal are the actions of the District Court in hearing the case as if it had been originally filed in the District Court.

Hornung v. Hatcher, 205 Neb. 449, 455-56, 288 N.W.2d 276, 280 (1980). See, also, *Sutherland v. Shoemaker*, 2 Neb. App.

845, 516 N.W.2d 271 (1994) (trial de novo in district court on appeal from small claims court held as if no action had been instituted in small claims court).

[6] Both *Hornung* and *Dobrovolny* explain the effect of a trial de novo, which is that a completely new proceeding will take place in the district court, as though the small claims action in county court "ceased to exist with the filing of the appeal." *Hornung*, 205 Neb. at 456, 288 N.W.2d at 280. Thus, § 25-601(1) would apply to a case on appeal from the small claims court pending in district court, if there has not been final submission to the district court judge. Even though the case was finally submitted to the small claims court judge, that case in effect ceased to exist for the purposes of a trial de novo on appeal.

However, *Hornung* also stands for the proposition that the small claims court *judgment* ceases to exist with the filing of the appeal from small claims court to district court. Thus, the judgment against Shoemaker was vacated when Shoemaker filed her appeal in district court. The plaintiff chose not to put on evidence in district court, but instead moved to dismiss under § 25-601(1). While our prior discussion demonstrates that the plaintiff had every right to do that, the consequence of that action is that he no longer has a judgment against Shoemaker. In its journal entry of August 2, 1996, the district court made a finding that "the judgment previously entered in the instant matter, in small claims court, was vacated by the appellate procedure from small claims to the district court." The district court was correct in its assessment of this case.

CONCLUSION

We hold that § 25-601(1) is applicable to an action on appeal as a trial de novo to the district court, and the plaintiff may dismiss the action pursuant to that statute at any time prior to final submission to the court. Additionally, the judgment of the small claims court against Shoemaker was vacated with the filing of the appeal to district court. Therefore, the judgment of the district court dismissing this action is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. PEDRO N. VIDALES, APPELLANT.

571 N.W.2d 117

Filed November 18, 1997. No. A-97-006.

1. **Judgments: Appeal and Error.** On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below.
2. **Judges: Parties: Attorneys at Law.** A judge shall be disqualified from acting as such in the district court in any case in which he or she is a party or interested or in which any attorney in any case pending in the county court or district court is related to the judge in the degree of parent, child, sibling, or in-law.
3. **Statutes: Judges.** The principal function of a judicial disqualification statute is to maintain public confidence in the integrity of the judicial process.
4. **Judges.** A judge must be impartial, and his or her official conduct must be free from even the appearance of impropriety.
5. **Statutes: Legislature: Intent.** When construing statutes, an appellate court looks to a statute's purpose and gives it a construction which best achieves that purpose and the appellate court presumes that the Legislature intended sensible rather than absurd results.
6. **Judges: Attorneys at Law: Marriage.** When an attorney in a case is the judge's spouse, the judge is disqualified and may not sit on the case.
7. **Trial: Judges: Witnesses: Testimony.** The judge presiding at a trial may not testify in the trial as a witness. The prohibition applies not only to formal testimony but also to whenever the judge assumes the role of a witness.
8. **Statutes: Judges: Judgments: Collateral Attack.** When there is a statutory prohibition precluding a judge from acting, a judgment given in derogation thereof is void and subject to collateral attack.
9. **Judges: Judgments.** A judgment or other action by a judge disqualified because of his or her relationship with counsel in the case is void and of no effect.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

Adam J. Sipple and Casey J. Quinn, of Quinn & Wright, for appellant.

Don Stenberg, Attorney General, and Jennifer S. Liliedahl for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

This case concerns judicial disqualification under Neb. Rev. Stat. § 24-739 (Reissue 1995). More specifically, we address

the validity of a district court judge's decision to overrule a defendant's motion to suppress when the judge's wife, a deputy county attorney, was the person responsible for filing the information against that defendant.

FACTUAL BACKGROUND

On two separate occasions during November 1994, David Stahr, a known cocaine dealer, informed the Omaha Police Division, through Sgt. Mark Langan, of drug activity at 4756 South 19th Street. Apart from these two reports, Langan had never received information from Stahr. On November 16, at approximately 9:45 p.m., Stahr contacted Langan a third time and urged him to immediately go to 4756 South 19th Street because Pedro N. Vidales (Vidales) was selling cocaine.

After receiving the third tip from Stahr, Langan assigned three officers to perform a "knock and talk" investigation to either (1) obtain permission to search the South 19th Street residence or (2) based on the encounter, develop probable cause to obtain a search warrant. The officers, dressed in plain clothes, approached the residence at approximately 10 o'clock that same night, with Langan waiting in a car nearby. At this point, none of the officers knew what Vidales looked like. In response to the officers' knocks, a Hispanic male, who could speak very little English, answered the door. This man was later identified as Fustino Vidales, Vidales' brother. The officers could not specifically recall the substance of the conversation with Fustino, but after the police officers identified themselves and requested entrance into the apartment, Fustino made a motion indicating they could enter.

After the officers were in the apartment, a second male, who spoke better English and was later identified as Jose Vidales, appeared from the kitchen. Fustino and Jose informed the officers that their brother, Vidales, was in Council Bluffs, Iowa. They further reported that there was no one else present in the apartment. Although the officers had no reason to disbelieve that Vidales was in Council Bluffs, they remained in the apartment. After "some time elapsed," a female came out of one of the bedrooms. While she was being questioned, two more females came out of this same bedroom. All three women

informed the officers that Vidales was in Council Bluffs and that there was no one else in the bedroom. A third Hispanic male then entered the apartment through the front door. All six people were asked to consent to a search of their persons and their belongings. At this point, Langan was called to assist in conducting the searches. The three males agreed and were searched. Two of the females agreed and were also searched. The officers found no drugs or weapons. Four people were then allowed to exit the apartment, leaving the three officers with Jose and Fustino.

Thereafter, according to one of the officers present, "I hear the — like the floor creaking, movement inside the bedroom." After hearing the noise, Officer Brian Bogdanoff and Langan approached the bedroom, and they found the door was closed. Upon entering the bedroom, Bogdanoff and Langan saw Vidales quickly move from his position against the wall to the bed, where he sat on a rumpled blanket and put his hands "underneath his person." As Vidales was being secured, Bogdanoff lifted up the blanket, found an electronic gram scale, and conducted a visual search of the bedroom for weapons. During this visual search, Bogdanoff spotted plastic baggies on a shelf. After Vidales refused to consent to a search, explaining that he did not live in the apartment, he was arrested, handcuffed, and seated in the living room with his brothers, who were also handcuffed. The Vidaleses remained handcuffed for approximately 1½ to 2 hours while other officers obtained a search warrant. Upon returning with the warrant, the officers searched the apartment and found cocaine, a razor blade, a spoon with cocaine residue, sandwich bags, and personal letters addressed to Vidales.

Vidales was taken to the Omaha central police station, where he was advised in English of his *Miranda* rights, which he waived, and he was then interviewed. According to the officer who conducted this interview, Vidales admitted to buying cocaine from Stahr and said that the scales belonged to Stahr. Vidales denied selling cocaine but admitted giving cocaine to his friends. The interview was not recorded, and Vidales was not asked to provide a written statement.

PROCEDURAL BACKGROUND

Vidales was charged on December 14, 1994, by information with unlawful possession with intent to deliver a controlled substance, a Class II felony, in the district court for Douglas County. The information accusing Vidales of the crime was sworn to by Maria R. Moran, Deputy Douglas County Attorney. Prior to the filing of this information, the State of Nebraska sued Vidales for disposition of seized property—money, in the amount of $1,111. This petition was filed November 21, 1994, and was signed under oath by Maria Moran.

At his arraignment on December 22, 1994, Vidales pled not guilty to the charge of unlawful possession with intent to deliver. On January 20, 1995, the amount of $1,111 was forfeited to the State because Vidales failed to answer the petition seeking disposition. Approximately 6 months after the forfeiture, but before his trial on the unlawful possession with intent to deliver charge, Vidales filed a plea in bar seeking to have the possession with intent to deliver charge dismissed because the forfeiture of the money subjected him to double jeopardy in the criminal case. District Judge J. Patrick Mullen overruled Vidales' plea in bar.

Judge Mullen reasoned that a defendant who elects not to contest the forfeiture of his property cannot avoid the adjudication of his personal culpability at that stage and then suddenly assert that the forfeiture has exposed him to double jeopardy when that position becomes advantageous. Vidales filed a motion on Fourth Amendment grounds, seeking to suppress all evidence gained from the search of his person and residence and any and all statements he made to various officers of the Omaha Police Division. Vidales then appealed the judgment on the plea in bar to this court, which we dismissed in our case No. A-95-914.

The felony criminal proceedings were assigned to Judge Gerald E. Moran, who was, at all pertinent times, married to Maria Moran, Deputy Douglas County Attorney and the attorney who filed the two proceedings against Vidales which we have described above.

At the hearing on Vidales' motion to suppress, the State was represented by Anne E. Wilson rather than Maria Moran. Judge Moran took evidence and heard arguments on March 30, 1995,

with respect to the motion to suppress physical evidence. He concluded on that date,

> [T]he Court finds beyond a reasonable doubt that the Defendant's constitutional rights against unlawful search and seizure were not violated and the Motion to Suppress Physical Evidence, therefore, is overruled and the evidence seized as a result of the search in this case shall be admissible at trial.

On April 24, 1995, Judge Moran heard arguments with respect to the motion to suppress statements. At the conclusion of this hearing, Judge Moran again denied Vidales' motion. After these rulings, Judge Moran recused himself from further participation on May 26, citing "conflict." In an affidavit filed March 13, 1996, which appears to have been secured and filed in conjunction with Vidales' request for new hearings on his motion to suppress, Judge Moran stated:

> On December 13th, 1994, an Information charging Pedro N. Vidales with Unlawful Possession With Intent to Deliver Controlled Substance was filed with the Douglas County District Court. The case was assigned to appear before my bench, Courtroom #1. Two separate Motions to Suppress were filed . . . . Subsueqent [sic] to the overruling of the two Motions, the court learned that Maria R. Leslie of the Douglas County Attorney's office, and my wife, had signed the Information. This was brought to my attention on May 19, 1995 and I promptly withdrew myself as judge of Mr. Vidales' case as to not give any appearance of impropriety. At no time prior to the discovery that Maria R. Leslie had signed the Information was this court aware of any reason for this court to disqualify itself.

The case was reassigned to Judge Mullen, and, as mentioned above, Vidales requested another hearing on his motion to suppress. Vidales contended that Judge Moran was disqualified from the case under § 24-739 and that his rulings were thus void. The State objected to an additional hearing, arguing that Judge Moran's order overruling Vidales' previous motion retained its full force and effect. In an order dated April 16, 1996, Judge Mullen stated in part: "Defendant's motion to sup-

press statement and evidence having been previously heard and determined, and no good cause having been shown for further hearing, defendant's motion is overruled."

At Vidales' bench trial, Vidales' counsel objected to the introduction of all the physical evidence and statements covered by the motion to suppress, and secured a continuing objection to the evidence gained by the officers while in the residence and the statements Vidales made to police officers. The objections were overruled. The district court found Vidales guilty of unlawful possession with intent to deliver a controlled substance. After overruling Vidales' motion for new trial, the court sentenced him to a period of 2 to 3 years in the custody of the Nebraska Department of Corrections. Vidales then appealed.

ASSIGNMENTS OF ERROR

We restate Vidales' assignments of errors, which are that the district court committed reversible error (1) when it failed to grant Vidales a new hearing on his motion to suppress after the first hearing was presided over by a disqualified judge, whose decision to overrule the motion was void; (2) when it overruled Vidales' motion to suppress and related objections at trial and allowed the State to introduce evidence discovered as a result of an unlawful, warrantless entry; (3) when it allowed testimony concerning the analysis of the substances seized from Vidales' residence despite the lack of proper and sufficient foundation concerning the process used to identify the nature of such substances; (4) when it overruled Vidales' motion to dismiss at the close of the State's case; and (5) when it found Vidales guilty despite insufficient evidence as to the nature of the substances seized from his residence.

STANDARD OF REVIEW

[1] On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997); *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

ANALYSIS

We first address Vidales' contention that Judge Moran was disqualified from deciding the motion to suppress and that his

rulings thereupon were and are void. Both the information charging Vidales with the crime and the petition to dispose of the seized money were brought by Maria Moran, the wife of Judge Moran. As far as the record reveals, Maria Moran did not actually appear in court before her husband in connection with this case. Judge Moran presided over the hearing on Vidales' motion to suppress and overruled the same before he recused himself from the case.

[2] Vidales contends that the hearings conducted before Judge Moran were improper and that Judge Moran's ruling denying Vidales' motion to suppress was void and of no effect because Judge Moran was disqualified pursuant to § 24-739, which provides:

> A judge shall be disqualified from acting as such in the county court, district court, Court of Appeals, or Supreme Court, except by mutual consent of the parties, which mutual consent is in writing and made part of the record, in the following situations:
>
> (1) In any case in which (a) he or she is a party or interested, (b) he or she is related to either party by consanguinity or affinity within the fourth degree, (c) *any attorney in any cause pending in the county court or district court is related to the judge in the degree of parent, child, sibling, or in-law* or is the copartner of an attorney related to the judge in the degree of parent, child, or sibling . . . .

(Emphasis supplied.)

[3] One of the principal functions of a judicial disqualification statute is to maintain public confidence in the integrity of the judicial process, which in turn depends upon a belief in the impersonality of the judicial decision-making process. 46 Am. Jur. 2d *Judges* § 88 (1994). In *Zimmerer v. Prudential Ins. Co.*, 150 Neb. 351, 34 N.W.2d 750 (1948), the Nebraska Supreme Court indicated that at common law, a judge was not disqualified by a relationship to a party or person interested in the result of litigation. Disqualification statutes, which changed the common law according to the *Zimmerer* court, " 'are not to be understood as effecting any change in the common law beyond that which is clearly indicated.' " *Id.* at 358, 34 N.W.2d at 754.

Subsection (1)(c) of § 24-739 is of primary interest here, but we do note that in the statute the judge "shall be disqualified"

under (1)(b) where the judge is related to a party by affinity (within the fourth degree). In subsection (1)(c), the judge "shall be disqualified" when there is an attorney in the case who is related to the judge in the degree of "parent, child, sibling, or in-law." Curiously, there is no express statutory disqualification in (1)(c) when the judge-to-attorney relationship is a spousal relationship, but we are convinced that this does not mean a judge can rule on matters in a criminal case brought by his prosecutor-wife.

While the relationship of "spouse" is not specifically included in part (1)(c) of § 24-739, the judge is disqualified when his or her "in-law" is counsel in the case. "In laws" is defined as "Persons related by marriage . . . ," Black's Law Dictionary 787 (6th ed. 1990). "In-law" is defined as "a relative by marriage . . . ," Webster's Encyclopedic Unabridged Dictionary 733 (1989). Webster's at 24 also defines "affinity" as "relationship by marriage . . . ." As defined in Roget's International Thesaurus 6 (1977), the terms "in-laws" and "affinity" are interchangeable. While the term "in-law" as used in § 24-739(1)(c) may well be broad enough to include the spousal relationship, we also find that the law accords the spousal relationship an even higher or more "special" status than that of merely "in-laws."

[4] The obvious intent of the statute is to ensure that parties are not forced to litigate before a partial judge or before a judge who appears to be partial, regardless of whether he or she actually is. A judge must be impartial, and his or her official conduct must be free from even the appearance of impropriety. *Jim's, Inc. v. Willman*, 247 Neb. 430, 527 N.W.2d 626 (1995). The opportunity for, and the appearance of, partiality is undoubtedly greater if a judge is presiding over his or her spouse's case rather than a case brought merely by the judge's sister-in-law. Presumably, a judge's love, respect, and trust of his or her spouse are at the very least equal to that which the judge holds for his or her brother-in-law or sister-in-law. Having stated what is quite obvious, we return to how the law views the spousal relationship.

In determining the question as to whether the term "affinity" included the interspousal relationship for purposes of interpret-

ing who could be eligible under the Florida Crimes Compensation Act, the District Court of Appeal for Florida in *Ocasio v. Bureau of Crimes, etc.*, 408 So. 2d 751, 752 (Fla. App. 1982), cited to *State ex rel. Perez v. Wall*, 41 Fla. 463, 26 So. 1020 (1899), for the following proposition: " 'We do not think it can be maintained that a husband is related to his wife by affinity. They are embraced in the definition of neither affinity nor consanguinity, but are regarded in law . . . as one person.' " See, also, *Strauss v. Strauss*, 148 Fla. 23, 3 So. 2d 727 (1941) (estates by entirety are predicated on unity of husband and wife making them one person in law); *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 150 N.W.2d 137 (1967) (historically, by marriage husband and wife are one person in law). See, also, *State v. Hooper*, 140 Kan. 481, 37 P.2d 52 (1934) (holding that doctrine of affinity grew out of canonical maxim that marriage makes husband and wife one).

While there is authority that husband and wife are one, this common-law notion has a limited reach and utility in the modern world. (For a comprehensive discussion of the evolution of the doctrine, we refer the interested reader to *Heino v. Harper*, 306 Or. 347, 759 P.2d 253 (1988), which quotes extensively from William E. McCurdy, *Torts Between Persons in Domestic Relation*, 43 Harv. L. Rev. 1030 (1930), for the purpose of abolishing the rule of interspousal immunity for negligent personal injury. The *Heino* opinion details how many of the rules which are derived from the "oneness" doctrine have fallen away with the advance of time.) See, also, *Imig v. March*, 203 Neb. 537, 279 N.W.2d 382 (1979) (abolishing interspousal tort immunity in Nebraska). Nevertheless, we find that the common-law doctrine of "oneness" retains a certain small vitality as the basis for the doctrine of affinity. We quote from the Court of Appeals for Maryland in *Criminal Inj. Comp. Bd. v. Remson*, 282 Md. 168, 191-92, 384 A.2d 58, 72 (1978):

> The short of it is that the doctrine of affinity, by its definition and terms, requires that husband and wife be considered as one person. Without that axiom there can be no relationship by affinity. The blood relations of each spouse cannot be related in the same degree to the one spouse as by consanguinity to the other unless husband and wife are

> one person so as to exclude the lateral or bridging step between them as a degree. Therefore, no matter to what extent the unity of husband and wife has been otherwise abrogated and the modern doctrine of the equality of husband and wife installed, regardless of the enactment of Married Women's Acts and other legislation under which each of the husband and wife are deemed to be a separate legal personality insofar as disabilities of the wife are abolished, despite however else husband and wife are considered to be separate persons, the unity of the spouses is not obliterated with respect to the doctrine of affinity. When relationship by affinity is recognized, as it is in Maryland, unity of the spouses remains as a necessary element of affinity.

While the common-law notion of "oneness" has been largely abandoned in our modern world, it nonetheless is the underpinning for affinity—without marriage there can be no relation by affinity. Thus, if an attorney's relationship to a judge by affinity or by being an in-law is disqualifying, then surely the spousal relationship from which affinity flows is equally disqualifying. In saying this, we recognize that the spousal relationship is by its very nature broader and deeper than the relationships embraced by affinity.

[5] When construing statutes, we look to the statute's purpose and give it a construction which best achieves that purpose and we presume that the Legislature intended sensible rather than absurd results. *Slagle v. J.P. Theisen & Sons*, 251 Neb. 904, 560 N.W.2d 758 (1997). To construe § 24-739(1) to require disqualification when a judge's brother-in-law appears before the judge but not when his or her spouse does would be the height of absurdity. If a brother-in-law acting as a lawyer in a case causes an automatic disqualification of the judge, a judge's spouse acting as an attorney in a proceeding should also cause a disqualification. This is true regardless of whether the judge and spouse are considered "in-laws" under § 24-739(1)(c) or whether they are "one," which means the judge is sitting on a case in which he is interested, in violation of § 24-739(1)(a). But, there are considerations here beyond § 24-739.

The Code of Judicial Conduct governing disqualification of judges applies to criminal cases, including the arraignment stage of criminal proceedings. 46 Am. Jur. 2d *Judges* § 92 (1994). Neb. Code of Jud. Cond., Canon 3(E) (rev. 1996) provides: "(1) A judge *shall not* participate in any proceeding in which the judge's impartiality reasonably might be questioned, including but not limited to instances where: . . . (d) the judge or the judge's *spouse* . . . (ii) is acting as a lawyer in the proceeding . . . ." (Emphasis supplied.) That there is an absolute disqualification under Canon 3(E)(1)(d)(ii) when a case brought by a spouse-attorney is before the spouse-judge is clear. No one could reasonably suggest that the judge's impartiality could not reasonably be questioned if he or she sits on a case where his or her spouse has been involved as a lawyer. Although Maria Moran did not appear in court in the Vidales prosecution, her instigation of the proceeding by signing the information under oath cannot be considered an act of no consequence. Neb. Rev. Stat. § 23-1201 (Reissue 1991) provides that

> it shall be the duty of the county attorney, when in possession of sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor, to prepare, sign, verify, and file the proper complaint against such person and to appear in the several courts of the county and prosecute the appropriate criminal proceeding on behalf of the state and county.

When Maria Moran signed the information, she attested to her belief in Vidales' guilt and that he can be convicted—implying the belief that the evidence against him was lawfully obtained and admissible in a court of law. Thus, the conflict in the case between what Judge Moran must impartially determine and what Maria Moran officially believes as a prosecutor is clear. Thus, the fact that she did not physically appear in the courtroom does not avoid the problem.

[6] Based on § 24-739 and the Nebraska Code of Judicial Conduct, we hold that when an attorney in a case is the judge's spouse, the judge is disqualified and may not sit on the case. Therefore, it was improper for Judge Moran to preside over the hearing on Vidales' motion to suppress because Maria Moran,

his wife, was the lawyer who initiated the proceedings. We now turn to the effect of this conclusion.

The State argues that Vidales is not entitled to a new hearing on his motion to suppress because he failed to allege any facts demonstrating prejudice or bias. The State contends:

> The mere fact that Maria Moran signed and filed documents in the case before Judge Moran was a aware [sic] of her involvement with the case did not in any way prejudice or bias the Appellant's right to an impartial trial, because Judge Moran did not even know of his wife's involvement so as to be influenced.

Brief for appellee at 22.

The State suggests that Judge Moran had no knowledge at the time of the hearing and rulings on the motion to suppress that he was involved in a case instigated by his wife, a Douglas County prosecutor, and thus there would be no prejudice to Vidales. However, the State's argument against disqualification flows from the doctrine that "[a] defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality." *State v. Richter*, 240 Neb. 913, 918, 485 N.W.2d 201, 205 (1992). Disqualification because a judge is biased or prejudiced is distinct from disqualification of a judge due to his or her relationship to an attorney representing a party in a proceeding. In the first instance, the party alleging such prejudice or bias must overcome the presumption of impartiality. In contrast, the mere existence of the relationship between the judge and the attorney disqualifies the judge, regardless of knowledge or bias, because the statute and the Nebraska Code of Judicial Conduct are mandatory. Section 24-739 says a judge "shall be disqualified" and the Code of Judicial Conduct, Canon 3(E)(1)(d)(ii), says that the judge "shall not participate." The burden is upon the individual judge to determine his qualification to sit on a particular case in the instances of relationships to the parties or their attorneys. *Aetna Life & Casualty Company v. Thorn*, 319 So. 2d 82 (Fla. App. 1975). No showing of bias or prejudice is required—the relationship alone disqualifies.

[7] We turn briefly to Judge Moran's affidavit, which appears in our record. There, he states that he disqualified himself as

soon as he became aware that his wife had signed the pleadings to which we have earlier referred, but that before acquiring such knowledge, he had no basis to disqualify himself. Neb. Rev. Stat. § 27-605 (Reissue 1995) provides: "The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point." The law is clear that the prohibition applies not only to formal testimony but also to whenever the judge assumes the role of a witness. *State v. Rodriguez*, 244 Neb. 707, 509 N.W.2d 1 (1993). A judge's taking the role of a witness in a trial before him or her is manifestly inconsistent with the judge's customary role of impartiality. *State ex rel. Grape v. Zach*, 247 Neb. 29, 524 N.W.2d 788 (1994).

The affidavit obviously puts the judge in the role of a witness, even though it is not formal testimony. Because we view the disqualification as absolute, which dispenses with any need to show prejudice, and Judge Moran may not be a witness in this case, we consider the affidavit no further.

[8,9] When there is a statutory prohibition precluding a judge from acting, a judgment given in derogation thereof is void and subject to collateral attack. *Walters v. Wiley*, 1 Neb. (Unoff.) 235, 95 N.W. 486 (1901). In *Harrington v. Hayes County*, 81 Neb. 231, 115 N.W. 773 (1908), the claim of disqualification involved a foreclosure action brought by a person with the same name as the district judge who later confirmed the sale. The court first found that identity of names was prima facie evidence of identity of persons and that the disqualification of the judge to act was apparent from the inspection of the record. The court held:

> We have no doubt that where the disqualification of the judge affirmatively appears upon the record, and there is no waiver of such disqualification, as required by statute, the acts of such disqualified judge are void, and it follows in this case that the order of confirmation and proceedings subsequent thereto are invalid and of no effect.

Id. at 235, 115 N.W. at 774. The court in *Harrington* also specifically rejected the notion that the confirmation of the sale was a mere formality, saying: "The disqualification of the statute is not a disqualification to decide erroneously. It is a dis-

qualification to decide at all." *Id.* at 236, 115 N.W. at 774. In short, a judgment or other action by a judge disqualified because of his or her relationship with counsel in the case is void and of no effect. See, *King v. Ellis*, 146 Ga. App. 157, 246 S.E.2d 1 (1978); *T. P. B., Jr. v. Super. Ct. for Cty. of Alameda*, 66 Cal. App. 3d 881, 136 Cal. Rptr. 311 (1977); 48A C.J.S. *Judges* § 158 (1981).

Therefore, in the case at hand, it is abundantly clear that Judge Moran was disqualified to act because Maria Moran had acted as an attorney in a case pending before him. Due to this disqualification, Judge Moran's decisions in the case are void and of no effect. Consequently, we do not reach the question of whether he correctly decided the motions to suppress. However, we do observe in passing that drug possession cases, in our experience, are often decided in large part by the outcome of the hearings on motions to suppress. The facts of the case present issues of substance for a judge ruling on a suppression motion, and the ruling thereupon was not inconsequential. Thus, because Judge Moran's decision to deny suppression of evidence was void and of no effect, a new suppression hearing was required and the decision of Judge Mullen that "no cause" had been shown for such a hearing was incorrect.

We therefore reverse the conviction and remand the matter to the district court for new suppression hearings. Although there are other assignments of error, the only other one we touch upon is the claim that the evidence was wholly insufficient as to the nature of the substances seized from Vidales' apartment. The law is that when there is a claim of trial error and a claim of insufficient evidence, we must remand the cause for a new trial if the evidence appears sufficient to uphold the conviction when the claim of trial error is sustained. *State v. Christner*, 251 Neb. 549, 557 N.W.2d 707 (1997). In this case, we find that there appears to be sufficient evidence to sustain the conviction, if such evidence were ultimately deemed admissible—a matter upon which we neither express nor imply any opinion. Therefore, we remand the matter for a new suppression hearing and such further proceedings thereafter as may be appropriate.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GEORGE FULLER, APPELLANT.

571 N.W.2d 638

Filed November 18, 1997. No. A-97-028.

1. **Courts: Appeal and Error.** Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record.
2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
3. **Prosecuting Attorneys: Statutes: Ordinances.** A prosecutor generally has discretion in choosing whether to file charges under a city ordinance or a state statute for crimes addressed by both the ordinance and the statute.

Appeal from the District Court for York County, MICHAEL OWENS, Judge, on appeal thereto from the County Court for York County, GARY F. HATFIELD, Judge. Judgment of District Court affirmed.

Michael J. Hansen, of Berry, Kelley & Hansen, for appellant.

Jane K. Brogan, York City Attorney, for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

George Fuller was convicted in the county court for York County of second-offense driving under the influence, in violation of an ordinance of the city of York. His conviction was affirmed by the York County District Court. For the reasons recited below, we affirm the order of the district court.

BACKGROUND

On June 8, 1995, in response to a citizen's report, York police officer Michael Hanke was sent to check on the welfare of a person seen passed out or sleeping in a parked vehicle in the city of York, York County, Nebraska. Hanke arrived at the scene to find the vehicle with its lights on; the engine running; and the

occupant, who was later identified as Fuller, slumped forward in the driver's seat. The citizen who had called the police made contact with Hanke and told him that the vehicle had been parked for at least 45 minutes and that the person inside had not moved. Hanke stated that he could see that Fuller was breathing, but that he had to rap on the window for quite a long time before he was able to arouse Fuller. When Fuller awakened, he rolled down his window and spoke with Hanke, who noticed a slight odor of alcohol coming from Fuller's car. When Hanke asked Fuller if he knew where he was, Fuller responded that he was in Grand Island. Hanke asked Fuller several times for his driver's license. Initially, Fuller did not appear to understand what Hanke wanted, and after several more requests, Fuller merely rubbed the back of his head. After additional requests, Fuller eventually gave Hanke his driver's license.

Hanke then asked Fuller to perform some field sobriety tests. Hanke noted that Fuller, when getting out of his car, had to hold onto the car to steady himself. Hanke administered the "one-leg-stand" test and the "walk-and-turn" test, each of which, in Hanke's opinion, Fuller failed. Hanke stated that Fuller also failed a preliminary breath test. An inventory search of Fuller's car revealed two empty beer cans and four full beer cans. Hanke testified that, in his opinion, Fuller was in physical control of a motor vehicle while under the influence of alcohol.

Mikki Hoffman, a corrections officer with the York County Sheriff's Department, stated that when Fuller was brought to the jail, he was weaving from side to side and had red, watery eyes. Hoffman said that there was a strong odor of alcohol about Fuller's person.

On June 13, 1995, the State of Nebraska filed a complaint in which it charged Fuller with second-offense driving under the influence, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 1993). On July 12, Fuller was arraigned, and he requested a jury trial, as was his prerogative. See, e.g., *State v. Hingst*, 251 Neb. 535, 557 N.W.2d 681 (1997). See, also, Neb. Rev. Stat. § 25-2705 (Reissue 1995). The court set November 14 as the date for jury selection.

On July 28, 1995, the Deputy York County Attorney filed a motion to dismiss the foregoing complaint against Fuller, which

motion was granted. Also on July 28, the deputy county attorney filed a complaint in the York County Court charging Fuller with second-offense driving under the influence, in violation of a York city ordinance. It was undisputed that a defendant so charged under the city ordinance is not entitled to a jury trial.

On April 4, 1996, a hearing was held in which Fuller moved to dismiss the charge filed against him on July 28, 1995, based on city ordinance, arguing that prosecutorial vindictiveness resulted in the original charge being dismissed and new charges being filed under the city ordinance so that Fuller was not eligible for a jury trial. The county court overruled Fuller's motion. Following a bench trial, the court found Fuller guilty of the charge and sentenced him to 1 year's probation, a 6-month suspension of his license, a $500 fine, and 48 hours' jail time to be served immediately plus an additional 58 days should Fuller not successfully complete probation. Fuller's conviction was affirmed in the district court. Fuller appeals.

ASSIGNMENTS OF ERROR

Fuller argues that the county court erred in overruling his motion to dismiss based on prosecutorial vindictiveness designed to deny him a jury trial. Fuller also claims that there was insufficient evidence to convict him of driving under the influence, second offense.

STANDARD OF REVIEW

[1] Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. McCurry*, 5 Neb. App. 526, 561 N.W.2d 244 (1997).

[2] In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.*

ANALYSIS

Refiling of Charges.

Fuller argues that the county court erred in refusing to grant his motion to dismiss the charges against him because the refiling of the charges under the city ordinance was done as an act of prosecutorial vindictiveness and the refiling of charges precluded him from receiving a jury trial. At oral argument before this court, Fuller's counsel conceded that the jury trial available to Fuller when charged under the state statute was a statutory right, not a constitutional right, such as the jury trial required for a state statutory charge for the more serious third-offense driving under the influence under *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992). As such, Fuller was not deprived of a constitutional right by the refiling of the charge.

[3] In *State v. Blair*, 230 Neb. 775, 433 N.W.2d 518 (1988), the defendant argued that he was aggrieved because the city prosecutor consistently converted all state statutory charges to ordinance violations with the express purpose of avoiding jury trials. The Nebraska Supreme Court held that the city attorney, as prosecutor for the city, did not abuse his discretion in filing a charge under a city ordinance for crimes committed within the city limits that were addressed by both municipal ordinance and state statute.

The *Blair* court cited the holding in *State v. Belitz*, 203 Neb. 375, 278 N.W.2d 769 (1979), *cert. denied* 444 U.S. 933, 100 S. Ct. 278, 62 L. Ed. 2d 191, in which the Supreme Court held that the Omaha city prosecutor had not abused his discretion in filing a misdemeanor charge under city ordinance rather than a felony charge under the state's sexual assault statutes, even though there was sufficient evidence to file the greater charge. In *Belitz*, the Supreme Court commented on prosecutorial discretion in bringing charges, stating that

> "[various factors] require that the prosecutor view the whole range of possible charges as a set of tools from which he must carefully select the proper instrument to bring the charges warranted by the evidence. In exercising discretion in this way, the prosecutor is not neglecting his public duty or discriminating among offenders. The public interest is best served and even-handed justice best dis-

> pensed not by a mechanical application of the 'letter of the law' but by a flexible and individualized application of its norms through the exercise of the trained discretion of the prosecutor as an administrator of justice."

Id. at 382-83, 278 N.W.2d at 774.

Based on Nebraska jurisprudence and the facts of this case, we conclude that the refiling of the charge against Fuller under the city ordinance by the deputy county attorney was not prosecutorial vindictiveness, but, rather, a proper exercise of prosecutorial discretion.

Sufficiency of Evidence.

Fuller argues that his conviction was not supported by relevant evidence, because many of his behavioral manifestations can be explained by his being awakened by Hanke. We disagree.

The city of York's ordinance No. 1645 (March 4, 1993) amended § 36-158 of the city's traffic rules to provide, in part, that "[i]t shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle: (a) while under the influence of alcoholic liquor or of any drug . . . ."

In finding Fuller guilty of driving under the influence under the city ordinance, the trial court in its written order of August 6, 1996, specifically based its finding of guilt on the following:

> 1. The defendant was asleep and slumped forward over the steering wheel;
>
> 2. The arresting officer testified to a slight odor of alcoholic beverage, and the jailer testified to a strong odor of alcohol;
>
> 3. The defendant's [incorrect] statement that he was in Grand Island;
>
> 4. It took several requests for the [d]efendant to provide his driver's license;
>
> 5. The defendant had to steady himself on his car;
>
> 6. He put his foot down three times during the one-leg stand;
>
> 7. He did not walk heel-to-toe on the walk-and-turn test;
>
> 8. He was weaving and did not walk straight at the jail[;] and
>
> 9. His eyes were red, blood shot and watery.

The court stated that none of these items of evidence alone would be sufficient, but that taken together they are sufficient to show a violation of driving under the influence under the city ordinance No. 1645 which makes it an offense to operate or be in actual physical control of any vehicle while under the influence of alcoholic liquor or of any drug.

The evidence was sufficient to support the county court's finding that Fuller was driving under the influence of alcohol, in violation of the city ordinance, as affirmed by the district court.

CONCLUSION

In accordance with the foregoing analysis, we affirm Fuller's conviction for driving under the influence of alcohol, second offense.

AFFIRMED.

CONNIE L. LAHM, APPELLANT, V. BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, APPELLEE.

571 N.W.2d 126

Filed November 25, 1997. No. A-95-1267.

1. **Federal Acts: Damages: Limitations of Actions.** The Federal Employers' Liability Act, 45 U.S.C. § 51 et seq. (1994), provides that no action for recovery of damages may be maintained pursuant to the act unless commenced within 3 years from the date the cause of action accrues.
2. **Federal Acts: Limitations of Actions.** In actions arising under the Federal Employers' Liability Act, the "discovery" rule applies in determining when a cause of action accrues for purposes of the statute of limitations. As such, a cause of action accrues for purposes of the statute of limitations when a reasonable person knows, or in the course of exercising reasonable diligence should have known, of both the injury and its governing cause.
3. **Negligence: Limitations of Actions.** The determination of whether acts of alleged negligence occurred within the period of limitations is a task for the trier of fact.
4. **Directed Verdict.** A directed verdict is appropriate only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
5. **Verdicts: Juries: Presumptions: Appeal and Error.** The "general verdict" rule provides that where a general verdict is returned for one of the parties, and the mental processes of the jury are not tested by special interrogatories to indicate which issue was determinative of the verdict, it will be presumed that all issues were

resolved in favor of the prevailing party, and, where a single determinative issue has been presented to the jury free from error, any error in presenting another issue will be disregarded.

6. **Verdicts: Juries: Appeal and Error.** A jury verdict will not be set aside unless clearly wrong, and it is sufficient if any competent evidence is presented to the jury upon which it could find for the successful party.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

C. Marshall Friedman, P.C., Kenneth E. Rudd, Daniel J. Cohen, Bret E. Taylor, and John J. Higgins, for appellant.

Samantha B. Trimble, and, on brief, Terry C. Dougherty, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Connie L. Lahm brought this action seeking recovery for personal injuries allegedly caused by her employment with the Burlington Northern Railroad Company (BNRR), pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. (1994). At trial, a jury returned a general verdict for BNRR, and Lahm brings this appeal. On appeal, Lahm challenges various rulings made by the trial court, as well as the jury instructions submitted by the court. Because we find that the jury could reasonably have concluded from the evidence presented that Lahm's action was barred by the statute of limitations, we affirm.

II. BACKGROUND

During the late 1970's, Lahm was employed as a "carman" for BNRR. In November 1981, she was placed on furlough. In October 1987, Lahm received a recall notice from BNRR offering her the opportunity to return to work effective November 9, 1987. Lahm was initially assigned to a location known as Building 33 to complete an apprenticeship. In Building 33, Lahm engaged in welding, cutting with a torch, and grinding. The apprenticeship lasted until February 1988. Lahm spent sev-

eral days doing airbrake work, also in Building 33, before receiving her carman "card" on February 8, 1988.

After becoming "carded," Lahm was assigned to a location known as "three line" to do welding work on railroad cars. Among her job duties was extensive welding and patching work. Additionally, Lahm did some grinding work in conjunction with her welding duties.

On approximately February 17, 1988, Lahm visited her family doctor, complaining of pain in her fingers, stinging and numbness in her hands and arms, and difficulty sleeping. Lahm's family doctor referred her to a specialist, a neurologist named "Dr. Richard C. Sposato," within approximately 1 to 2 weeks of her initial visit. Sposato diagnosed Lahm as suffering from bilateral carpal tunnel syndrome, worse on her right side. On March 23, surgery was performed on Lahm's right wrist.

Lahm returned to light duty at BNRR, which still included welding responsibilities. On March 29, 1988, Lahm completed a personal injury report for BNRR, with the assistance of Marshall Tracy. Tracy actually filled out the report, under Lahm's direction, because Lahm's right wrist was still in a cast. On the personal injury report, in response to the "Date of Incident" inquiry, Lahm responded "on or about Jan[uary] 15." The report also indicated that Lahm's "Seniority Date" was "1-8-88," instead of the correct date of February 8. Tracy signed Lahm's name to the form, with Lahm's permission, and Lahm initialed the form, indicating "Permission Given to Marshall Tracy to fill out this form . . . by Connie."

Lahm was eventually relocated at BNRR to a location known as the "truck station." At the truck station, Lahm operated a piece of machinery known as a hydraulic "gagger," which Lahm contends that she and her coworkers found never worked properly. In order to complete the job, Lahm often was required to strike the gagger repeatedly with a sledge hammer. Lahm continued working in the truck station for an extended period of time, until approximately November 1990.

In December 1988, Lahm had surgery on her left wrist. In May 1989, she began experiencing pain in the palm and fingers of her right hand, and her doctors concluded that she was suffering from a trauma known as tendosynovitis in her trigger fin-

ger. In October 1989, surgery was completed to relieve pressure in her wrist associated with the tendosynovitis.

On approximately October 23, 1990, Lahm was using a hammer when a fragment broke off of a block she was striking and struck her in the head. After the fragment was removed, Lahm returned to light duty at BNRR until she was removed from service on March 1, 1991. On July 3, 1991, she underwent another surgery on her right hand and wrist.

Lahm brought suit against BNRR in the Circuit Court of Jackson County, Missouri, on February 8, 1991. In her petition filed in the district court for Douglas County, Nebraska, on July 27, 1992, Lahm alleges two counts: first, that she suffered from carpal tunnel syndrome which was caused or contributed to by her employment with BNRR; and second, that she suffered injuries when struck in the head by the block fragment. The only issues raised on this appeal concern the first count of Lahm's complaint, namely, the carpal tunnel syndrome allegations. We note that the parties have agreed in their pleadings that the lawsuit was commenced, for statute of limitations purposes, on February 8, 1991.

At trial, Lahm testified that she began developing symptoms of carpal tunnel syndrome after becoming carded and being assigned to three line, sometime after February 8, 1988. However, during cross-examination, BNRR elicited testimony from Lahm that indicated she began developing symptoms of carpal tunnel syndrome during her apprenticeship; specifically, that the symptoms began in January 1988 and that she was immediately aware that the symptoms were caused or contributed to by her employment. In addition, BNRR asserted in its answer that Lahm's suit was barred by the statute of limitations. BNRR further asserted that there was no negligence on its part and that Lahm's alleged injuries were caused solely by nonemployment factors.

During the jury instruction conference, BNRR sought a special verdict form which would require the jury to specifically answer, inter alia, whether the action was brought within the statute of limitations, whether BNRR was negligent, whether Lahm had proved causation, what the extent of the money damages would be, and whether the damages should be reduced

because of a preexisting condition or failure to mitigate. Lahm strongly resisted the giving of a special verdict form, alleging that BNRR was attempting to place an undue emphasis on one part of Lahm's case, thereby causing the jury to focus unduly on the statute of limitations question. The court refused to give the special verdict form. The jury returned a general verdict in favor of BNRR. Lahm brings this timely appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Lahm assigns various errors concerning rulings made by the trial court during the course of the trial, as well as the jury instructions given by the trial court. One of the issues Lahm raises on appeal is whether or not the trial court should have allowed the issue of the statute of limitations to go to the jury or whether the court should have granted Lahm a directed verdict on the issue. Because we conclude that the court properly overruled Lahm's motion for directed verdict on the statute of limitations issue and that the jury could reasonably have concluded that Lahm's claim was barred by the statute of limitations, we need not specifically address any of Lahm's other assigned errors.

IV. ANALYSIS

1. Statute of Limitations

[1,2] FELA provides that no action for recovery of damages may be maintained pursuant to FELA unless commenced within 3 years from the date the cause of action accrues. See 45 U.S.C. § 56. In FELA actions, the "discovery" rule applies in determining when a cause of action accrues for purposes of the statute of limitations. See, e.g., *Monaghan v. Union Pacific RR. Co.*, 242 Neb. 720, 496 N.W.2d 895 (1993). As such, a cause of action accrues for purposes of the statute of limitations when a reasonable person knows, or in the course of exercising reasonable diligence should have known, of both the injury and its governing cause. *Id.* Both of these requirements, knowledge of the injury and knowledge of its governing cause, require an objective inquiry into when the plaintiff knew or should have known the essential facts of the injury and its cause. *Id.* Concerning traumatic injuries, the Nebraska Supreme Court noted that when the symptoms are immediately manifested so

that the employee is aware of the event causing the injury, the cause of action is deemed to have accrued upon the occurrence of the injury, regardless of whether the full extent of the disability is known at that time. *Id.*

[3] The determination of whether acts of alleged negligence occurred within the period of limitations is a task for the trier of fact. *Kocsis v. Harrison*, 249 Neb. 274, 543 N.W.2d 164 (1996). Additionally, the point in time at which a statute of limitations begins to run must be determined from the facts of each case. *Zion Wheel Baptist Church v. Herzog*, 249 Neb. 352, 543 N.W.2d 445 (1996). As such, the issue of when Lahm's cause of action accrued, pursuant to the discovery rule, was a question of fact for the jury to decide.

2. Directed Verdict

[4] Lahm moved the trial court for a directed verdict on the issue of the statute of limitations. Lahm asserted that the evidence established that she did not reasonably discover her injuries and their cause until sometime after February 8, 1988, and that the cause of action was brought within 3 years thereof. The trial court overruled her motion and submitted the issue to the jury for determination. As the Nebraska Supreme Court has noted, a directed verdict is appropriate only where reasonable minds cannot differ and can draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *McWhirt v. Heavey*, 250 Neb. 536, 550 N.W.2d 327 (1996); *Lindsay Mfg. Co. v. Universal Surety Co.*, 246 Neb. 495, 519 N.W.2d 530 (1994).

In the present case, Lahm testified that she had no numbness, tingling, or pain in either wrist during the time she was completing her apprenticeship. She testified that she began suffering symptoms within approximately 1 week after receiving her card and becoming a carman on three line, which occurred on February 8, 1988. Lahm also offered testimony from her apprenticeship supervisor, who confirmed that she did not complain to him of any symptoms while she was completing her apprenticeship.

BNRR disputed Lahm's claim of when her symptoms began by pointing to two primary pieces of evidence. First, BNRR relied upon the personal injury report completed under Lahm's

direction on March 29, 1988. In the personal injury report, Lahm indicated that the "[d]ate of [i]ncident" was "on or about *Jan[uary] 15[, 1988]*." (Emphasis supplied.) Lahm argued at trial that the date was simply an error, and pointed out that her seniority date as listed on the personal injury report was off by 1 month, because the form indicated her seniority date was "1-8-88" instead of February 8, when she actually received her card. Lahm acknowledged, however, that she provided the information on the report and that she read the form after it was completed and initialed and dated the form.

Second, BNRR relied upon a transcription of a tape-recorded statement made by Lahm to a claims manager, Pat Heather, on November 3, 1989. During the interview, Heather asked Lahm at what particular location she had been working "[a]t the time of the accident," and Lahm responded, "I was still an apprentice in Building [3]3." Heather also asked Lahm if "the first time [Lahm] really notice[d] [the problem] was in January of [19]88," to which Lahm responded, "[y]es." Heather offered Lahm an opportunity to review the tape in its entirety and to add, correct, or take out anything that she had said, and Lahm declined to do so. Lahm also attested that everything said was true and correct to the best of her knowledge.

It is apparent that the personal injury report and the transcribed conversation provided the jury with some evidence to suggest that Lahm began developing symptoms in January 1988, not February 1988. Additionally, Lahm acknowledged during cross-examination that there had been no other significant changes in her life prior to the onset of the symptoms, except for her return to BNRR, and that the presence of the symptoms was enough to lead her to believe that the problem was job related. From this evidence, we conclude that reasonable minds could differ as to when the symptoms began and, accordingly, when Lahm's cause of action accrued. As such, the trial court was correct in denying Lahm's motion for directed verdict.

3. General Verdict

We are compelled to note the difficulties presented in this case because of the general verdict form. Because the jury was instructed about the statute of limitations issue as well as the

merits of the case, but was not given special interrogatories to answer, the fact that the jury returned a verdict in favor of BNRR does not provide us with any insight as to whether the jury found that the claim was barred by the statute of limitations or whether the jury found that the claim was not barred, but nonetheless found for BNRR on the merits of the case. The difficulties presented by such a situation are compounded in the present case because BNRR requested and argued in favor of a special verdict form, specifically arguing that a special verdict form should be utilized in this case so that if the jury did find for BNRR, the parties as well as this court would be able to determine upon which issue the jury found for BNRR. Despite BNRR's request, Lahm adamantly and strenuously argued against the giving of special interrogatories. As a result, we are left with a general verdict in favor of BNRR, without guidance as to the basis of that verdict.

Assuming, without expressly deciding, that Lahm is correct in asserting that the trial court committed errors in the jury instructions concerning the merits of this case, then the question presented on this appeal becomes whether the general verdict returned by the jury can stand where one issue, namely, the statute of limitations rule, was submitted to the jury without error, while another issue, namely, the merits of Lahm's FELA claim, may have been submitted upon erroneous instructions. Our review of Nebraska law has revealed no cases which deal with this specific issue.

[5] In cases such as this, other jurisdictions have recognized and followed a rule known as the "general verdict" rule or the "two issue" rule. The general verdict rule provides that where a general verdict is returned for one of the parties, and the mental processes of the jury are not tested by special interrogatories to indicate which issue was determinative of the verdict, it will be presumed that all issues were resolved in favor of the prevailing party, and, where a single determinative issue has been presented to the jury free from error, any error in presenting another issue will be disregarded. *Fulwiler v. Schneider*, 104 Ohio App. 3d 398, 662 N.E.2d 82 (1995). See, also, *Sheridan v. Desmond*, 45 Conn. App. 686, 697 A.2d 1162 (1997); *Jack Rabbit Lines v. Neoplan Coach Sales*, 551 N.W.2d 18 (S.D.

1996); *Barhoush v. Louis By and Through Julien*, 452 So. 2d 1075 (Fla. App. 1984); *Everett v. Everett*, 150 Cal. App. 3d 1053, 201 Cal. Rptr. 351 (1984); *Orr v. Crowder*, 173 W. Va. 335, 315 S.E.2d 593 (1983); *Chambers v. Holland*, 524 S.W.2d 941 (Tenn. App. 1975); *Lisowski v. Milwaukee Automobile Mut. Ins. Co.*, 17 Wis. 2d 499, 117 N.W.2d 666 (1962).

The rule is considered to be a policy rule, designed to simplify the work of trial courts and to limit the range of error in proceedings brought before appellate courts. *Orr v. Crowder, supra.* In the trial court, the rule relieves the judicial system from the necessity of affording a second trial if the result of the first trial potentially *did not* depend upon the trial errors claimed by the appellant. *Sheridan v. Desmond, supra.* On the appellate level, the rule relieves an appellate court from the necessity of adjudicating claims of error that may not arise from the actual source of the jury verdict that is under appellate review. *Id.* Therefore, unless an appellant can provide a record to indicate that the result of the trial was a result of the trial errors claimed on appeal, rather than from proper determination of the error-free issues, there is no reason to spend the judicial resources to provide a second trial. See *id.*

The general verdict rule has been adopted and applied in the states of Alabama, Arizona, California, Connecticut, Florida, Illinois, Ohio, South Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin to avoid reversing or remanding cases for a new trial where at least one determinative issue was properly submitted and could have supported the general verdict. See, *Automotive Acceptance Corporation v. Powell*, 45 Ala. App. 596, 234 So. 2d 593 (1970); *Reese v. Cradit*, 12 Ariz. App. 233, 469 P.2d 467 (1970); *Everett v. Everett, supra*; *Sheridan v. Desmond, supra*; *Rogers v. Northeast Utilities*, 45 Conn. App. 23, 692 A.2d 1301 (1997); *Small v. Stop and Shop Companies, Inc.*, 42 Conn. App. 660, 680 A.2d 344 (1996); *Munson v. United Technologies Corporation*, 28 Conn. App. 184, 609 A.2d 1066 (1992); *Barhoush v. Louis By and Through Julien, supra*; *Moore v. Jewel Tea Co.*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Fulwiler v. Schneider, supra*; *Bowman v. Davis*, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976); *Anderson v. West*, 270 S.C. 184, 241 S.E.2d 551 (1978); *Jack Rabbit Lines v. Neoplan Coach Sales,*

supra; *Bankwest, Inc. v. Valentine*, 451 N.W.2d 732 (S.D. 1990); *Aschoff v. Mobil Oil Corp.*, 261 N.W.2d 120 (S.D. 1977); *Limmer v. Westegaard*, 251 N.W.2d 676 (S.D. 1977); *Chambers v. Holland, supra*; *Orr v. Crowder, supra*; *Lisowski v. Milwaukee Automobile Mut. Ins. Co., supra.* Contra, *Ga. Power Co. v. Busbin*, 242 Ga. 612, 250 S.E.2d 442 (1978); *Martin v. Northern Pacific Ry. Co.*, 51 Mont. 31, 149 P. 89 (1915); *Heinen v. Heinen*, 64 Nev. 527, 186 P.2d 770 (1947); *Maccia v. Tynes*, 39 N.J. Super. 1, 120 A.2d 263 (1956); *Salinas v. John Deere Co., Inc.*, 103 N.M. 336, 707 P.2d 27 (1984); *Hamilton v. Presbyterian Hosp. of City of N. Y.*, 25 A.D.2d 431, 267 N.Y.S.2d 656 (1966); *Bredouw v. Jones*, 431 P.2d 413 (Okla. 1966); *Norfolk & W. Ry. Co. v. Mace*, 151 Va. 458, 145 S.E. 362 (1928).

[6] The Nebraska Supreme Court has repeatedly held that a jury verdict will not be set aside unless clearly wrong and that it is sufficient if *any competent evidence is presented to the jury upon which it could find for the successful party. World Radio Labs. v. Coopers & Lybrand*, 251 Neb. 261, 557 N.W.2d 1 (1996); *German v. Swanson*, 250 Neb. 690, 553 N.W.2d 724 (1996); *Patterson v. City of Lincoln*, 250 Neb. 382, 550 N.W.2d 650 (1996); *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). See, also, *Nerud v. Haybuster Mfg.*, 215 Neb. 604, 340 N.W.2d 369 (1983), *overruled on other grounds by Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987) (in bench trial, trial court's judgments are to be affirmed if evidence sustains any theory of recovery pled by plaintiff, irrespective of theory relied on by trial court). In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence in the light most favorable to the successful party and resolves any evidentiary conflicts in favor of such party, who is entitled to the benefit of every reasonable inference deducible from the evidence. *Patterson v. City of Lincoln, supra*; *Solar Motors v. First Nat. Bank of Chadron, supra.*

As noted above, BNRR provided sufficient evidence from which the jury could reasonably have concluded that Lahm began experiencing symptoms and was aware the symptoms were job related in January 1988. This conclusion would have

dictated a finding by the jury that Lahm did not bring her cause of action within the statute of limitations, because she did not bring the cause of action until February 8, 1991. On the unique facts of this case, where BNRR specifically sought a special verdict form, but Lahm adamantly resisted such a special verdict form, we feel it is appropriate to apply the general verdict rule as set out above. Because the statute of limitations issue was properly submitted to the jury free from error, and because there was sufficient evidence to support a finding in favor of BNRR on that determinative issue, we cannot say that the verdict is clearly wrong.

Lahm's remaining assignments of error concern rulings which go to the merits of her FELA claim. Because of our application of the general verdict rule, we need not reach the merits of these claims. The judgment of the district court is affirmed.

AFFIRMED.

HANNON, Judge, concurring.

I write separately to concur with the majority's opinion because it seems to me the opinion implies that the "general verdict" rule, or the "two issue" rule, is the law of the State of Nebraska. I do not believe it is or that it should be. However, in view of the fact that Lahm successfully resisted BNRR's request for a special verdict form on the statute of limitations issue, I do not believe Lahm should now be able to take advantage of the confusion that her own actions created, particularly in view of the fact that the statute of limitations issue is a completely separate issue which should have been submitted under a separate verdict. Therefore, I concur.

STATE OF NEBRASKA, APPELLEE, V.
HOWARD BASSETTE, JR., APPELLANT.
571 N.W.2d 133

Filed November 25, 1997. No. A-96-681.

1. **Judgments: Speedy Trial: Complaints: Indictments and Informations: Appeal and Error.** A trial court's determination of whether a complaint or information should be dismissed because of the failure of the State to provide the defendant with

a speedy trial is a factual question which will be affirmed by an appellate court unless the determination was clearly erroneous.

2. **Speedy Trial: Appeal and Error.** The denial of a motion for discharge that is based on speedy trial grounds is an appealable order.
3. **Speedy Trial: Indictments and Informations.** Every person informed against for any offense shall be brought to trial within 6 months from the date the information is filed.
4. **Speedy Trial: Proof.** When a defendant is not tried within 6 months, the burden of proof is on the State to show that one or more of the excluded time periods under Neb. Rev. Stat. § 29-1207(4) (Reissue 1995) is applicable.
5. **Speedy Trial: Indictments and Informations: Proof.** Where a defendant moves for discharge on denial of speedy trial grounds and the record shows that 6 months has not elapsed between the filing of the information and the defendant's motion, the initial burden to show a denial of the right to a speedy trial is on the defendant.
6. **Speedy Trial: Complaints.** Statutory speedy trial provisions apply to complaints.
7. **Speedy Trial: Complaints: Indictments and Informations: Lesser-Included Offenses.** The time which elapses during the pendency of complaints or informations charging the same or lesser-included offenses shall be combined and charged against the State in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act.
8. **Records: Appeal and Error.** It is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed.
9. **Trial: Evidence: Attorneys at Law.** Oral argument by counsel at the trial level is not evidence.

Appeal from the District Court for Dakota County: MAURICE REDMOND, Judge. Affirmed.

Martin G. Cahill, Dakota County Public Defender, for appellant.

Don Stenberg, Attorney General, and Jay C. Hinsley for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Howard Bassette, Jr., appeals the denial of his motion for discharge, which was based on speedy trial grounds, entered by the district court for Dakota County on June 14, 1996. For the reasons recited below, we affirm.

BACKGROUND

An information was filed in Dakota County on January 17, 1996, charging Bassette with "driving under suspension after

driving under the influence of alcohol third conviction," a Class IV felony under Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993). This information is in the record on appeal. The body of the information alleges, inter alia, that Bassette was operating a motor vehicle in Dakota County on May 28, 1995, even though his operator's license had been revoked for 15 years on June 20, 1989, pursuant to the predecessor to § 60-6,196(1)(a) and (c).

Bassette filed a motion for discharge pursuant to Neb. Rev. Stat. § 29-1208 (Reissue 1995) on March 18, 1996. In his motion, Bassette claimed, in effect, that the time during which a prior dismissed case was pending when combined with the pendency of the current case violated his right to a speedy trial. This motion is in the record on appeal. Bassette specifically alleged in the motion that he had been charged with driving under suspension, subsequent offense, on June 21, 1995; that said case was dismissed on November 1, 1995; that a new case refiled as a felony was filed on November 2, 1995; that the instant information was filed on January 17, 1996; and that 193 days had elapsed since the filing of the first complaint. There is no other reference in the record or in the briefs to a case alleged to have been filed on November 2, 1995. There were no exhibits attached to the motion for discharge, and the record as it existed when presented to the trial judge for disposition of the motion for discharge did not contain the charging documents in the prior case or cases, or the related dismissal order, to which Bassette refers in his motion. On appeal, Bassette attached such documents to his brief in an apparent attempt to supplement the record.

A hearing was held on the motion for discharge on April 9, 1996. The hearing consisted of oral argument by counsel for Bassette and the State. No evidence was offered or received at the hearing. No order of dismissal or charging documents are in the bill of exceptions made at the oral argument on the motion for discharge. However, as noted above, the controlling information of January 17, 1996, and the motion for discharge filed March 18, 1996, were filed in this case at the trial level and are in the appellate transcript.

The motion for discharge, referred to as a "plea in abatement" by the trial judge, was denied by written order entered June 14, 1996.

Bassette appeals.

ASSIGNMENT OF ERROR

Bassette claims that the trial court erred in denying his motion for discharge made pursuant to § 29-1208.

STANDARD OF REVIEW

[1] A trial court's determination of whether a complaint or information should be dismissed because of the failure of the State to provide the defendant with a speedy trial is a factual question which will be affirmed by an appellate court unless the determination was clearly erroneous. *State v. Richter*, 240 Neb. 223, 481 N.W.2d 200 (1992); *State v. Stubbs*, 5 Neb. App. 38, 555 N.W.2d 55 (1996).

ANALYSIS

[2] We note preliminarily that although the order of June 14, 1996, refers to the pending motion as a "plea in abatement," there is no dispute that the motion ruled on and from which this appeal was taken is a denial of Bassette's motion for discharge. The denial of a motion for discharge that is based on speedy trial grounds is an appealable order. See, *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997); *State v. Nearhood*, 2 Neb. App. 915, 518 N.W.2d 165 (1994).

[3] Bassette argues in his brief that he was denied his right to a speedy trial. Neb. Rev. Stat. § 29-1207(1) and (2) (Reissue 1995) provides that "[e]very person . . . informed against for any offense shall be brought to trial within six months . . . from the date . . . the information [is] filed." The record shows that in the instant case the information was filed on January 17, 1996, and that Bassette moved for discharge on March 18. Six months had not elapsed between the filing of this information and the filing of the corresponding motion for discharge. There is no showing of a denial of Bassette's right to a speedy trial in this record.

[4,5] Under Nebraska jurisprudence, when a defendant is not tried within 6 months, the burden of proof is on the State to show that one or more of the excluded time periods under § 29-1207(4) is applicable. *State v. Richter, supra*; *State v. Beck*, 212 Neb. 701, 325 N.W.2d 148 (1982); *State v. Stubbs, supra*. It logically follows that where a defendant moves for discharge on denial of speedy trial grounds and the record affirmatively shows that 6 months has not elapsed between the filing of the information and the defendant's motion, the burden to show a denial of the right to a speedy trial is then placed on the defendant.

[6,7] In his brief on appeal, Bassette correctly notes that the statutory speedy trial provisions apply to complaints. See *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). Bassette also correctly notes that the time which elapses during the pendency of complaints or informations charging the same or lesser-included offenses shall be combined and charged against the State in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act. See *State v. Sumstine*, 239 Neb. 707, 478 N.W.2d 240 (1991).

The essence of Bassette's argument that he is entitled to an absolute discharge rests on the allegation that the State had previously filed a complaint in county court charging Bassette with driving under suspension, subsequent offense, and then dismissed this case prior to filing the present information in district court. Bassette contends that the previously filed offense is a lesser-included offense of that with which he is currently charged and that, therefore, any time which had elapsed during the pendency of the original complaint for driving under suspension must be added to the time which has elapsed during the pendency of the current information for violation of § 60-6,196(6). Specifically, relying on *State v. Sumstine, supra*, Bassette argues that the time during which the complaint filed on June 21, 1995, was pending should be tacked on to the time during which the information filed January 17, 1996, was pending for speedy trial act purposes. Based on the foregoing, Bassette claims that the time of pendency of the June 21, 1995, complaint, allegedly dismissed November 1, 1995, combined with the time of pendency of the January 17, 1996, information

shows a violation of the speedy trial act as of the time the motion for discharge was filed on March 18, 1996.

As noted above, the record contained in the transcript on appeal from the trial court includes the current information filed January 17, 1996; the motion for discharge filed March 18, 1996; and the order denying the motion entered June 14, 1996. The hearing on the motion conducted on April 9, 1996, consisted solely of counsels' arguments. Those arguments referred to the existence of a prior dismissed case, which was not identified with any particularity. No evidence was offered or received which might have demonstrated the existence of the prior case in county court on which Bassette relies for his tacking argument and his claim that he was denied a speedy trial. The record on appeal shows only that an information was filed January 17, 1996, and that Bassette moved for an absolute discharge on March 18, 1996. The proper record before this court does not show a violation of the speedy trial provisions of § 29-1207(1) or (2); therefore, we cannot say that the trial court's determination denying the motion for discharge was clearly erroneous.

[8,9] It is well settled that it is incumbent upon the appellant to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court as to those errors is to be affirmed. *State v. Price*, 252 Neb. 365, 562 N.W.2d 340 (1997). It is also well settled that oral argument by counsel at the trial level is not evidence. See *Schroeder v. Barnes*, 5 Neb. App. 811, 565 N.W.2d 749 (1997), citing *In re Interest of Amanda H.*, 4 Neb. App. 293, 542 N.W.2d 79 (1996). Finally, a brief may not be used to expand the record. *Sindelar v. Canada Transport, Inc.*, 246 Neb. 559, 520 N.W.2d 203 (1994).

Bassette's argument on appeal is unsupported by the record. The decision of the district court denying the motion for discharge is affirmed.

AFFIRMED.

IN RE INTEREST OF DAVID C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. DAVID C., APPELLEE, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, INTERESTED PARTY, APPELLANT.

572 N.W.2d 392

Filed November 25, 1997. Nos. A-97-576, A-97-691, A-97-728.

1. **Double Jeopardy: Pleadings: Waiver.** The defense of double jeopardy must be asserted and proved, and in the absence of such issue being raised by the pleadings, the defense is waived.
2. **Juvenile Courts: Appeal and Error.** In reviewing questions of law, an appellate court in proceedings under the Nebraska Juvenile Code reaches a conclusion independent of the lower court's ruling.
3. **Judgments: Jurisdiction: Appeal and Error.** When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts.
4. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
5. **Juvenile Courts.** The juvenile court's commitment of a juvenile to a youth rehabilitation treatment center does not constitute a discharge within the meaning of Neb. Rev. Stat. § 43-247 (Cum. Supp. 1996).
6. **Juvenile Courts: Probation and Parole.** A juvenile court's order requiring the Office of Juvenile Services to submit a treatment and placement plan prior to the juvenile's release, to notify the court before release or parole, to report any change in placement to the court, or to submit monthly progress reports is beyond the powers of the juvenile court.
7. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
8. ____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
9. **Juvenile Courts: Probation and Parole.** Neb. Rev. Stat. § 43-286 (Reissue 1993) provides no authority for a court to place a juvenile on probation under the care of the Office of Juvenile Services.
10. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

Appeal from the County Court for Dodge County: DANIEL J. BECKWITH, Judge. Judgment in No. A-97-576 reversed, and cause remanded with directions. Appeal in Nos. A-97-691 and A-97-728 dismissed.

Don Stenberg, Attorney General; Royce Harper; and Sam Kaplan, Special Assistant Attorney General, for appellant.

No appearance for appellee David C.

HANNON, IRWIN, and SIEVERS, Judges.

HANNON, Judge.

This opinion disposes of three appeals involving the disposition of one minor, David C., who had previously been adjudicated as a juvenile under Neb. Rev. Stat. § 43-247(1) (Cum. Supp. 1996) and placed on probation. Upon the motion of the county attorney to revoke David's probation, the juvenile court committed him to the Youth Rehabilitation and Treatment Center (YRTC) in Kearney, Nebraska, a facility now operated by the Office of Juvenile Services (OJS), which has recently been made a part of the newly created Nebraska Department of Health and Human Services (Department). In the order of commitment, the juvenile court announced that it would retain jurisdiction over David subject to completion of treatment at the YRTC and that further disposition would take place upon completion of such treatment. The juvenile court also ordered OJS to prepare a treatment and placement plan and submit it to the court prior to David's release from the YRTC, to notify the court prior to David's release, to submit monthly progress reports to the court, and to immediately report to the court any temporary change in David's placement. The Department appealed from this order in case No. A-97-576, contending that the juvenile court could not retain jurisdiction over David once it had committed him to OJS. After that appeal was perfected, the juvenile court entered two additional orders concerning David's temporary disposition. Each of these has been separately appealed and has been combined by this court in the instant case.

We now conclude that under the present Nebraska Juvenile Code, Neb. Rev. Stat. § 43-245 et seq. (Reissue 1993 & Cum. Supp. 1996), a juvenile court's jurisdiction over an adjudicated minor continues after he or she is committed to a YRTC. However, we further conclude that the juvenile court does not have jurisdiction over OJS in placing, managing, or discharging the committed juvenile.

In any event, we find plain error in the juvenile court's failure to adequately advise David of his right to counsel before accepting his admission that he violated the terms of his probation. We therefore reverse the juvenile court's order and remand the cause with directions to vacate the order and to entertain new proceedings on the county attorney's motion alleging that David violated the terms of his probation. Our conclusion renders the two subsequent appeals moot.

PROCEDURAL AND FACTUAL BACKGROUND

On December 6, 1996, the Dodge County Attorney filed a petition in juvenile court alleging that David had committed theft by receiving stolen property of a value of less than $200, a Class II misdemeanor, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1995). David admitted the allegations, and the court found that he was a juvenile as defined in § 43-247(1). The court placed David on indefinite probation and further placed him with his parents under the supervision of the probation office. On January 23, 1997, the court ordered that David be evaluated by the YRTC in Geneva, Nebraska, for a period of time not to exceed 30 days. On March 10, the court modified David's probation and placed him with his grandparents.

Later, the county attorney filed a motion alleging that David had violated the terms of his probation by breaking curfew and by failing to obey his grandparents. When that motion came on for hearing on April 30, 1997, David admitted the allegations, but the record shows that David did not have counsel at the time and that the court did not adequately advise him of his right to counsel as required by §§ 43-286(4)(b) and 43-272(1). The record reveals that counsel was appointed for David on June 4.

Upon David's admission, the juvenile court committed him to the YRTC-Kearney. Because the instant appeal centers around the court's order of commitment, we set forth its relevant provisions:

> 1. It is in the best interests of the juvenile, the family, and the community, that the custody of the juvenile shall be committed to the Nebraska Health and Human Services, Office of Juvenile Services for placement and treatment at the [YRTC-Kearney], as permitted under

Section 43-247(1). In order to maximize local determination and to ensure the achievement of measurable outcome, the Dodge County Juvenile Court shall retain jurisdiction subject to completion of treatment at the [YRTC-Kearney].

2. Further disposition shall take place upon the juvenile's completion of treatment at the [YRTC-Kearney].

3. The Nebraska Health and Human Services, Office of Juvenile Services shall submit a Treatment and Placement Plan to the Court prior to his release from the [YRTC-Kearney].

4. The [YRTC-Kearney] shall notify the Dodge County Juvenile . . . Court prior to [David's] parole/release in order that arrangements can be made for transportation to the Dodge County Juvenile Court for further disposition. . . .

5. The [YRTC-Kearney] shall submit monthly progress reports to the Court.

. . . .

Any temporary change in placement of the juvenile by the Nebraska Health and Human Services, Office of Juvenile Services must be reported to the Court immediately.

On May 30, 1997, the Department appealed the juvenile court's order. This is the subject of the appeal in case No. A-97-576. After the Department filed its appeal, the juvenile court entered two more orders concerning the placement and management of David. These orders are the subjects of the appeals in cases Nos. A-97-691 and A-97-728.

On June 26, 1997, the Department filed a motion requesting this court to order the juvenile court to cease and desist from entering further dispositional orders or other substantive orders during the pendency of the appeal and further, to direct that OJS be given the latitude and discretion, pursuant to statute, to determine the appropriate placement for David without further interference from the juvenile court. The cases were consolidated by this court upon the Department's motion. We concluded that David was in no immediate danger and that without a resolution of the jurisdictional issue in case No. A-97-576, a temporary order stood a good chance of doing more harm than good.

Knowing that no further briefs would be filed, we set the case for argument on the next argument date and resolved to dispose of the case as quickly as proper consideration of the difficult questions presented would allow.

ASSIGNMENTS OF ERROR

The Department contends that the court erred in its order of April 30, 1997, in the following respects: (1) in requiring David to return to juvenile court for further disposition after he was released on parole from the YRTC-Kearney, (2) in professing to retain jurisdiction of the matter subject to David's completing treatment at the YRTC, (3) in requiring OJS to submit a treatment and placement plan to the court prior to David's release and to share information with the local probation office, (4) in requiring OJS to notify the court prior to David's release for purposes of further disposition, and (5) in requiring without any statutory authorization that OJS submit a monthly progress report to the court.

[1] The Department also contends that the juvenile court's actions were unconstitutional because they violated the separation of powers clause, Neb. Const. art. II, § 1, and because by requiring David to return to juvenile court after having been committed to the YRTC, they subjected David to double jeopardy, in violation of U.S. Const. amend. V and Neb. Const. art. I, § 12. We do not consider the latter argument, because the defense of double jeopardy must be asserted and proved, and in the absence of such issue being raised by the pleadings, the defense is waived. See *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980). See, also, *State v. Hoffman*, 227 Neb. 131, 416 N.W.2d 231 (1987). The Department failed to raise the issue in its pleadings, and, moreover, any such claim would be David's.

Except in the most unusual of cases, for a question of constitutionality to be considered on appeal, it must have been properly raised in the trial court, and if not so raised, it will be considered to have been waived. *State v. Criffield*, 241 Neb. 738, 490 N.W.2d 226 (1992) (separation of powers argument not presented to, considered by, or ruled upon by district court was deemed waived). In the instant case, neither constitutional argu-

ment was presented to, considered by, or ruled upon by the juvenile court. Additionally, to the extent the Department's arguments concern the constitutionality of statutes, this court has no jurisdiction to make such determinations. However, this court may, when necessary to the decision of the case before us, determine whether a constitutional question has properly been raised. *Bartunek v. Geo. A. Hormel & Co.*, 2 Neb. App. 598, 513 N.W.2d 545 (1994). See, also, Neb. Rev. Stat. § 24-1106 (Reissue 1995). Thus, these issues are not properly before us.

STANDARD OF REVIEW

[2] In reviewing questions of law, an appellate court in proceedings under the Nebraska Juvenile Code reaches a conclusion independent of the lower court's ruling. *In re Interest of Tabatha R.*, 252 Neb. 687, 564 N.W.2d 598 (1997).

[3,4] When a jurisdictional question does not involve a factual dispute, its determination is a matter of law, which requires an appellate court to reach a conclusion independent from the decisions made by the lower courts. *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997); *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). In addition, statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Interest of Jeffrey R., supra.*

REVIEW OF APPLICABLE STATUTES

The Department asserts that when a juvenile court commits a juvenile to a YRTC, the court loses jurisdiction over that juvenile, and, consequently, any orders issued by the court after commitment are void. Although we are not favored with a brief in opposition to the Department's position, it is nevertheless clear that the issues of this appeal involve interpretation of the statutes which control the jurisdiction of the juvenile court over juveniles adjudicated under § 43-247 in light of those statutes which provide for the management of the YRTC's.

Jurisdiction of Juvenile Court.

Section 43-247 provides, in relevant part, that "the juvenile court's jurisdiction over any individual adjudged to be within

the provisions of this section shall continue until the individual reaches the age of majority or the court otherwise discharges the individual from its jurisdiction." Section 43-295 further provides that, except in the case of adoption, "the jurisdiction of the court shall continue over any juvenile brought before the court or committed under the Nebraska Juvenile Code . . . ." Thus, it is difficult to imagine what words the Legislature could have used to make it more clear that the jurisdiction of the juvenile court over an adjudicated juvenile continues even after the juvenile is committed under the code.

Commitment to OJS.

On the other hand, the statutes seem to be equally clear that a juvenile committed to one of the YRTC's is placed under the control of OJS. See § 43-286(2). Neb. Rev. Stat. § 83-925.12 (Cum. Supp. 1996) was newly adopted by 1996 Neb. Laws, L.B. 1044, and provides that whenever any juvenile is committed to OJS or to any facility operated by OJS, the juvenile shall be deemed "sentenced or committed" to OJS. See § 83-925.12(1). It then goes on to provide:

> The Juvenile Services Director may designate as a place of confinement or placement of a juvenile . . . any available, suitable, and appropriate residence facility or institution, whether or not operated by the state, or other placement appropriate to the needs of the juvenile, whether or not operated by the state, and may at any time transfer such juvenile from one place of placement to another . . . .

§ 83-925.12(2).

Additionally, as amended by § 956 of L.B. 1044, Neb. Rev. Stat. § 83-472 (Cum. Supp. 1996) now provides (with additions noted by underscoring and deletions by striking out) as follows:

> (1) Every juvenile committed to the Youth Rehabilitation and Treatment Center-Kearney or Youth Rehabilitation and Treatment Center-Geneva or other facility or placement of the Office of Juvenile Services under sections 83-465 to 83-470 pursuant to the Nebraska Juvenile Code or subsection (3) of section 29-2204 shall remain there until he or she attains the age of nineteen unless sooner paroled or legally discharged.

(2) The Office of Juvenile Services shall adopt and promulgate rules and regulations for the promotion, parole, and final discharge of juveniles such as shall be considered mutually beneficial for the Office of Juvenile Services and facilities under its direction ~~institution~~ and the juveniles.

(3) The discharge of any juvenile pursuant to the rules and regulations or upon his or her attainment of the age of nineteen shall be a complete release from all penalties incurred by conviction or adjudication of the offense for which he or she was committed.

Before 1994, the YRTC's were clearly under the control of the Division of Juvenile Services of the Department of Correctional Services. See, e.g., Neb. Rev. Stat. §§ 83-925 to 83-930 (Reissue 1987 & Supp. 1993). In 1994, the agency's name was changed to the Office of Juvenile Services, but it nevertheless remained part of the Department of Correctional Services. See, Neb. Rev. Stat. §§ 83-925.02 and 83-925.04 (Reissue 1994); 1994 Neb. Laws, L.B. 988, §§ 10 and 12. The enactment of 1996 Neb. Laws, L.B. 1044, much of which became effective January 1, 1997, made substantial changes in several departments in the executive branch of state government. Among other changes, OJS, which had long been a part of the Department of Correctional Services (or the predecessors to that department), was transferred for administration purposes to the newly organized Department of Health and Human Services, but its name, OJS, remained the same. See, Neb. Rev. Stat. § 81-3006 (Cum. Supp. 1996); Neb. Rev. Stat. § 83-925.02 (Cum. Supp. 1996) (creating, within the Department, OJS). See, also, Neb. Rev. Stat. § 83-925.01 et seq. (Reissue 1994 & Cum. Supp. 1996). However, L.B. 1044 did not change the fact that OJS was to administer the YRTC's and to supervise and coordinate juvenile parole and aftercare services. See § 83-925.05. L.B. 1044 also transferred the Department of Social Services (DSS) to the Department of Health and Human Services. See § 81-3006.

Statute Governing Placement or Commitment of Juveniles.

L.B. 1044 necessarily amended the statutes governing placement and commitment of juveniles by the juvenile court to

accommodate the new names given to the executive agencies. We will display the sections of L.B. 1044 as they are recorded in 1996 Neb. Laws so the changes can be easily observed.

Section 43-286 provides where a juvenile court may place or commit a juvenile once he or she is adjudicated under subdivisions (1), (2), (3)(b), or (4) of § 43-247. In significant part, it provides:

> (1) The court may . . . :
>
> . . . .
>
> (c) Cause the juvenile to be placed in a suitable family home or institution, subject to the supervision of the probation officer. If the court has committed the juvenile to the care and custody of the ~~Department of Social Services~~ Department of Health and Human Services, the department shall pay [certain costs].
>
> . . . .
>
> (2) Except as provided in section 43-287, the court may commit such juvenile to ~~the care and custody of~~ the Office of Juvenile Services, ~~or the Department of Correctional Services,~~ but a juvenile under the age of twelve years shall not be committed . . . unless [certain conditions exist].
>
> . . . .
>
> (4) . . . .
>
> . . . .
>
> (e) If the juvenile is found by the court to have violated the terms of his or her probation, the court may . . . in the case of the juvenile adjudicated to be within the definitions of subdivision (3)(b) of section 43-247, the court . . . may in addition commit such juvenile to the ~~Department of Public Institutions, the~~ Office of Juvenile Services~~, or the Department of Correctional Services~~ under section 43-287 . . . .

We observe that in L.B. 1044, the name "Office of Juvenile Services" was substituted for the name "Department of Correctional Services" or the name "Department of Public Institutions," and the name "Department of Health and Human Services" was substituted for the name "Department of Social Services." We also observe that the phrase "care and custody" was stricken from subsection (2), where the commitment of a

juvenile to OJS is mentioned, but also that this phrase was retained in subdivision (1)(c), which requires the Department to pay certain costs. Additionally, we note that §§ 43-285 and 43-284 retain the word "care" or the phrase "care and custody" with reference to the Department or other caregivers.

Statutes Concerning Management of Juveniles.

Section 43-285 provides the only statutory basis for the juvenile court to control a juvenile after disposition. L.B. 1044 amended only the introductory paragraph, which now provides:

> When the court awards a juvenile to the care of the ~~Department of Social Services~~ Department of Health and Human Services, an association, or an individual in accordance with the Nebraska Juvenile Code, the juvenile shall, unless otherwise ordered, become a ward and be subject to the guardianship of the department, association, or individual to whose care he or she is committed. Any such association and the department shall have authority, by and with the assent of the court, to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it.

The latest version of § 43-285 is a page and a half in length and difficult to summarize. Our summary of § 43-285 focuses on the power and authority of the department, association, or individual to whom the care of an adjudicated juvenile is given (hereinafter caregiver) and the juvenile court's power over that caregiver. As provided in the above quote, the Department and any association, but apparently not an individual, have authority with the consent of the court to determine the care, placement, medical services, psychiatric services, training, and expenditures on behalf of each juvenile committed to it. Of importance in the instant case, § 43-285(3) also provides that the caregiver shall (1) within 30 days, file a report with the court stating the location of the juvenile's placement and the needs of the juvenile in order to effectuate the purposes of § 43-246(1); (2) file a report with the court once every 6 months or at shorter intervals if ordered by the court or deemed appropriate by the caregiver; and (3) file a report and notice of placement change

with the court and send copies of the notice to all interested parties at least 7 days before the placement of the juvenile is changed.

Section 43-285 further provides that the court can consent to the caregiver's determination of care, placement, et cetera. Apparently, in order to enable the court to exercise that power, § 43-285 provides that the court can (1) determine placement in the first instance, (2) order a hearing to review a change upon its own motion or upon the objection of a party, (3) stay a change until the completion of the hearing, and (4) approve a change of placement on an ex parte basis. (The Department can make an immediate change in placement without court approval where the juvenile is in a harmful or dangerous situation.)

ANALYSIS

After comparing the aforementioned statutes, several observations are in order.

Continuing Jurisdiction of Juvenile Court.

Sections 43-247 and 43-295 clearly give the juvenile court jurisdiction of an adjudicated minor until the juvenile reaches his or her majority, unless the minor is adopted or the court discharges the individual. Somewhat conversely, § 83-472 provides that a juvenile that has been committed to OJS shall remain there until he or she reaches age 19 unless sooner paroled or legally discharged. Essentially, the Department now contends that David's commitment to OJS amounts to a discharge by the court under § 43-247. We observe that it is equally possible that an order removing a minor from OJS, by a juvenile court with jurisdiction under § 43-247, would serve as a legal discharge of that minor under § 83-472.

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *In re Interest of Jeffrey R.*, 251 Neb. 250, 557 N.W.2d 220 (1996). In discerning the meaning of a statute, we 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, it

being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Id.*

The relevant language in § 83-472 has been in place since the initial version of the statute was enacted in 1879. See 1879 Neb. Laws, p. 416, § 11. In *Brown v. Doeschot*, 185 Neb. 293, 175 N.W.2d 280 (1970), the juvenile court found that the juvenile was a delinquent and committed him to the care and custody of the Department of Public Institutions, see Neb. Rev. Stat. § 43-210(2) (Reissue 1968) (juvenile court may commit delinquent child to care and custody of Department of Public Institutions), at what was then known as the Boys' Training School at Kearney (now YRTC-Kearney). See Neb. Rev. Stat. § 83-463 et seq. (Reissue 1966 & Cum. Supp. 1967). Soon thereafter, the court suspended the commitment and placed the juvenile in the temporary custody of the Omaha Home for Boys. Upon a motion filed on behalf of the State by the assistant chief probation officer of the juvenile court, which alleged that the juvenile had absented himself from the Omaha Home for Boys, the court terminated the responsibility of the Omaha Home for Boys and committed the juvenile back to the Department of Public Institutions, Division of Corrections, at the Boys' Training School at Kearney. On appeal, the Nebraska Supreme Court affirmed the actions of the juvenile court. The court found that the Juvenile Court Act, see Neb. Rev. Stat. § 43-201 et seq. (Reissue 1968), specifically § 43-209 ("[e]xcept [cases involving termination of parental rights or adoption,] the jurisdiction of the court shall continue over any child . . . committed under the provisions of this act . . . ."), gave the juvenile court continuing jurisdiction over any child brought before the court or committed under the provisions of the act. Moreover, the court stated that the juvenile court has "broad discretion as to the disposition of a child found to be delinquent." *Brown v. Doeschot*, 185 Neb. at 295, 175 N.W.2d at 281.

While the Juvenile Court Act has since been repealed and replaced with the Nebraska Juvenile Code, see Neb. Laws 1981, L.B. 346, and § 43-245 et seq. (Supp. 1981), the language previously found in § 43-209 giving juvenile courts continuing jurisdiction is now found in § 43-295. Although juvenile courts now commit juveniles to OJS rather than the Department of

Public Institutions (or, for that matter, the Department of Corrections or the Department of Correctional Services), the effect of *Brown v. Doeschot, supra*, is still applicable—a commitment to a YRTC does not terminate the juvenile court's jurisdiction. This is consistent with the view of legal commentators:

> Where the court retains its jurisdiction over a minor found to be delinquent, it may, in the exercise of its discretion, amend or revoke former orders, as to the care, custody or probation of the minor, and the court may entirely terminate its jurisdiction when it is satisfied that further supervision is unnecessary. . . .
>
> Accordingly, the court may commit a minor who has been previously granted probation, if he engages, while on probation, in delinquent conduct, or commits an offense. Also, the court may change the place of commitment whenever the circumstances require it, as where the minor fails, after a reasonable period of time, to make a reasonable adjustment at the institution to which he has been committed.

43 C.J.S. *Infants* § 82 at 302 (1978). See, also, *In re Glen J.*, 97 Cal. App. 3d 981, 159 Cal. Rptr. 148 (1979) (juvenile court's modification of commitment upheld).

[5] Based on the foregoing authorities, it would appear that under § 43-247, § 43-295, and *Brown v. Doeschot, supra*, the juvenile court retains jurisdiction over minors committed to OJS without an order of commitment specifically so providing. We conclude, therefore, that the juvenile court's commitment of a juvenile to a YRTC does not constitute a discharge within the meaning of § 43-247, and, therefore, that the juvenile court retains jurisdiction. This is not to say that a juvenile court may exercise such jurisdiction at the whim of the judge, but only after a proposed change is brought before the court with appropriate pleadings, notice, and a hearing with evidence which justifies a change in placement.

Court-Ordered Reports from OJS.

The Department also contends that the juvenile court erred in requiring OJS to submit treatment and placement plans to the court, to submit monthly progress reports to the court, and to notify the court prior to releasing the juvenile. We observe that

there is an important distinction between a juvenile court's continuing to exercise jurisdiction over a juvenile and a juvenile court's directing OJS in its management of a juvenile that has been committed to OJS.

It is clear that OJS may adopt and promulgate rules and regulations to carry out its duties. § 83-925.09; § 83-472. See, generally, § 83-925.01 et seq. Although § 83-925.12 provides OJS with the authority to designate the place of confinement of juveniles committed to it, the only statute which can be interpreted to allow the juvenile court to have a say in the management of a juvenile committed to OJS is § 43-285. As set forth above, § 43-285 clearly allows the juvenile court to require the Department to file reports concerning location of placement and notice of placement changes. It further allows the court on its own motion to order a hearing to review a change in placement. The question before us now is whether § 43-285 applies to OJS because it is a part of the Department or whether it applies only to the Department exclusive of OJS.

The history of § 43-286 provides some indication that the Legislature intended to give juvenile courts such powers only when the Department was acting in a capacity other than as OJS. Prior to 1989, § 43-286 allowed juvenile courts to commit juveniles who had been adjudicated under § 43-247(1), (2), (3)(b), or (4) to the "care and custody" of the Department of Correctional Services, see § 43-286 (Reissue 1988), but it did not provide for the placement of such juveniles with DSS. See, e.g., *In re Interest of C.G. and G.G.T.*, 221 Neb. 409, 377 N.W.2d 529 (1985). In 1989, the Legislature enacted 1989 Neb. Laws, L.B. 182, effective August 25, 1989, which amended § 43-286 to provide that juveniles adjudicated under § 43-247(1), (2), (3)(b), or (4) could be committed to the care and custody of DSS. See § 43-247(1)(c) (Reissue 1993). Because OJS was a part of the Department of Correctional Services, a separate and distinct agency from DSS, it could not be argued that § 43-285 gave the juvenile court the power to manage juveniles committed to OJS by giving the court power over juveniles placed with DSS. In 1996 Neb. Laws, L.B. 1044, the Legislature struck the words "care and custody" when providing for commitment to OJS but kept them when referring to the Department.

The introducers' statement of intent to L.B. 1044 and the testimony of the witnesses before the Health and Human Services Committee show that in enacting the bill, the proponents and the Legislature were preoccupied with reorganizing a substantial part of the executive branch of state government and were not at all interested in modifying the powers of the juvenile courts. We find no mention of the juvenile courts in any of the recorded discussion on L.B. 1044. In the floor debate, Senator David Bernard-Stevens asked a question about the changes the bill was making in OJS. Senator Don Wesely answered in part:

> We feel that Corrections has too long been outside of the health and human service area in trying to meet the needs of families that are in trouble. And so [we are] trying to bring them out of Corrections and into this new entity and merge them together so they can jointly address problems . . . . *We have taken all existing language, not tried to recreate, add or subtract to it, but simply realign it administratively. . . . So in fact there should be nothing in this bill or the committee amendment that has any new direction in it.*

(Emphasis supplied.) Floor Debate, 94th Leg., 2d Sess. 10982 (Feb. 12, 1996).

[6] We therefore conclude that the portion of the court's order requiring OJS to submit a treatment and placement plan prior to David's release, to notify the court before release or parole, to report any change in placement to the court, or to submit monthly progress reports is beyond the powers of the juvenile court. If we were to conclude otherwise, we would essentially be holding that the Legislature, in reorganizing the executive branch of state government, intended to substantially increase the power of the juvenile court. That clearly was not the case.

At first blush, it may seem inconsistent to hold that the juvenile court retains jurisdiction of a juvenile committed to a YRTC and, at the same time, hold that the court does not have the power to obtain the information necessary to enter orders exercising that jurisdiction. First of all, we point out that we are not changing the system that has apparently existed for many years. Second, by their very nature, courts are not administrative organizations.

David's Right to Counsel.

[7,8] Lastly, we note that at the April 30, 1997, hearing on the State's motion to revoke probation, David was not adequately informed of his right to counsel. Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.* Pursuant to §§ 43-286(4)(b) and 43-272(1), on a motion to revoke probation, the court must (1) advise the juvenile and his or her parent or guardian of their right to retain counsel, (2) inquire of the juvenile and his or her parent or guardian as to whether they desire to retain counsel, and (3) inform the juvenile and his or her parent or guardian of the juvenile's right to counsel at county expense if none of them is able to afford counsel. The court failed to comply with the aforementioned statutes, and therefore, we conclude that the court erred in failing to advise David of his rights. Thus, the April 30 order, which is based upon David's admission, must be reversed.

We observe that at the hearing on the motion to revoke David's probation, the judge did not revoke David's probation either verbally or in writing. The bill of exceptions reveals that in response to a question concerning the status of David's probation, the judge responded, "Well, the probation, as I indicated, is an ongoing disposition." The court further stated:

> And so I've acknowledged that he is in violation of his ongoing dispositional probation. The placement will be with the Youth Rehabilitation Treatment Center. The Court will be having ongoing jurisdiction. At the conclusion of the treatment at Kearney, then they will be submitting a plan to the Court for further placement, and then we'll be coming back into this Court.

[9] It is clear that the court intended to commit David to the YRTC without actually revoking his probation. We can find no statutory basis for this procedure. Section 43-286 provides for the possible dispositions that a court may make, including con-

tinuing the disposition portion of the hearing and (1) placing the juvenile on probation subject to the supervision of a probation officer; (2) permitting the juvenile to remain in his or her own home, subject to the supervision of the probation officer; (3) placing the juvenile in a suitable home or institution or with the Department; or (4) committing him or her to OJS. Section 43-286 provides no authority for a court to place a juvenile on probation under the care of OJS. Section 43-286(4)(e) provides that if the court finds that the juvenile violated the terms of his or her probation, the court may modify the terms and conditions of the probation order, extend the period of probation, or enter "any order of disposition that could have been made at the time the original order of probation was entered . . . ." The court could not have originally entered an order providing for probation with commitment to YRTC, and it necessarily follows that the court could not enter such an order upon finding that the juvenile had violated the terms of his or her probation. The attempt to continue probation while committing David to a YRTC would also require a reversal of the order of April 30.

Additional Orders.

In its brief, the Department argues that once it appealed the April 30, 1997, order, the juvenile court lost jurisdiction to enter any further orders, specifically the June 4 order and the June 11 order. Briefly, the court, in these latter two orders, continued to control the management, supervision, and placement of David. With regard to the most recent order, David was removed from the YRTC and placed with his mother.

[10] There appears to be a conflict between § 43-2,106, which provides that the county court shall continue to exercise supervision over the juvenile until a hearing is had in the appellate court and the appellate court enters an order making other disposition, and *In re Interest of Joshua M. et al.*, 251 Neb. 614, 558 N.W.2d 548 (1997), which holds that once an appeal has been perfected to an appellate court, the trial court is without jurisdiction to hear a case involving the same matter between the same parties. Though discussed in its brief, the Department failed to assign such as error. Errors which are argued but not assigned will not be considered by an appellate court. *Boettcher*

v. Balka, 252 Neb. 547, 567 N.W.2d 95 (1997). Moreover, because we reverse the district court's order for failure to adequately advise David of his right to counsel, these issues are moot.

CONCLUSION

We conclude that the juvenile court exceeded its statutory authority in its order of April 30, 1997, when it attempted to control OJS' management of David. However, because David was not adequately advised of his right to counsel, the same order must be reversed and the cause remanded with directions to vacate the order and to hold another hearing on the county attorney's motion to revoke probation. With regard to the succeeding two orders, cases Nos. A-97-691 and A-97-728, they have been rendered moot and are therefore dismissed.

JUDGMENT IN NO. A-97-576 REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.
APPEAL IN NOS. A-97-691 AND A-97-728 DISMISSED.

M & D MASONRY, INC., A NEBRASKA CORPORATION, APPELLEE, V. UNIVERSAL SURETY COMPANY AND L.E. WEAVER CONSTRUCTION, INC., APPELLANTS.

572 N.W.2d 408

Filed December 2, 1997. No. A-96-433.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although a denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, a reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions.

4. **Pleadings: Motions to Strike: Appeal and Error.** Whether the allegations in a pleading should be stricken presents a question of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
5. **Pleadings: Proof.** The party who pleads a setoff bears the burden of proving it.
6. **Debtors and Creditors: Words and Phrases.** A setoff is a debt for which an action might be maintained by the defendant against a plaintiff, that is, a debt for a certain specific pecuniary amount, recoverable in an action "ex contractu"; the claim must be such that at the date of the commencement of the plaintiff's suit, the defendant could have maintained an action against the plaintiff.
7. **Pleadings: Actions.** A defendant may set forth in his answer as many grounds of defense, counterclaim, and setoff as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer.
8. **Pleadings: Contracts: Claims.** The counterclaim mentioned in Neb. Rev. Stat. § 25-812 (Reissue 1995) must be one in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action. The cross-claim mentioned in § 25-812 must be one in favor of a defendant and against a coparty and arise out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim or connected with the subject of the action.
9. **Pleadings: Contracts: Actions.** A setoff can only be pleaded in an action founded on contract and must be a cause of action arising upon contract or ascertained by the decision of the court.
10. **Claims: Recoupment: Actions: Words and Phrases.** Recoupment differs from setoff in that any claim or demand the defendant may have against the plaintiff may be used as a setoff, while it is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Reversed and remanded.

Kenneth F. George, of State, Yeagley & George, for appellants.

Bruce Smith and, on brief, Michael R. Snyder, for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Universal Surety Company (Universal) and L.E. Weaver Construction, Inc. (Weaver), defendants below, appeal from an April 11, 1996, order of the district court for Buffalo County, granting summary judgment in favor of M & D Masonry, Inc. (M & D), a Nebraska corporation. Universal and Weaver claim that the trial court erred in granting M & D's motion for sum-

mary judgment, seeking judgment in the amount of $33,504.60, and in overruling Universal and Weaver's motion for summary judgment, asking the trial court to enter judgment in favor of M & D limited to the amount of $11,468. Universal and Weaver claim that M & D's $33,504.60 claim should be set off by $22,036 and that the trial court erred in striking the $22,036 setoff raised in their joint answer. For the reasons recited below, we reverse, and remand for treatment consistent with this opinion.

BACKGROUND

On July 14, 1995, M & D filed an amended petition against Universal, alleging that Universal was Weaver's surety on a labor and material payment bond given in connection with a construction subcontract entered into between M & D and Weaver. M & D alleged that it entered into the subcontract with Weaver in August 1993 and that it agreed to perform masonry work for Weaver in connection with a construction project for the Pleasanton Public Schools. M & D alleged that it had properly completed the work at Pleasanton and that Weaver had failed to pay it $33,504.60, the subcontract price. In its petition, M & D prayed for judgment against Universal in this amount.

In its answer filed August 30, 1995, Universal admitted that it had executed a labor and material payment bond as surety for Weaver but denied that Weaver owed M & D $33,504.60. Universal alleged that Weaver had tendered payment in full by issuing to M & D a check for $11,468 and that Weaver had exercised its right to set off $22,036 from the $33,504.60 balance. The alleged setoff arose from another subcontract between M & D and Weaver in connection with a construction project for the Holdrege Public Schools. Universal stated that M & D failed to complete the masonry work under the subcontract for the Holdrege Public Schools in a "workmanlike manner," that M & D failed to repair the defects after several requests, and that Weaver incurred damages in the amount of $22,036, fixing these defects. Universal alleged that as surety on the bond, it is entitled to all defenses and/or setoffs available to Weaver and prayed that the court allow the setoff and enter judgment in favor of M & D limited to $11,468.

On September 5, 1995, Weaver filed a motion for leave to intervene in which Weaver asked for an order allowing it to enter its appearance and become a party by way of intervention. Weaver requested that the court allow it to assert all defenses and setoffs available at law or in equity and attached a petition of intervention to its motion, setting forth the facts of the alleged setoff and praying that the court allow the setoff and enter judgment in favor of M & D limited to $11,468.

On September 21, 1995, M & D filed a motion to strike the setoff allegations from Universal's answer, since the setoff did not arise out of or relate to the facts set forth in its petition concerning the Pleasanton Public Schools and because Universal purported to allege a setoff in favor of Weaver, a party other than Universal.

On September 29, 1995, M & D filed an objection to Weaver's motion for leave to intervene, stating that Weaver's petition for intervention alleged a setoff arising from a separate contract or transaction. In the alternative, M & D moved to strike the setoff allegations from Weaver's petition in intervention, since those allegations related to a separate and distinct contract or transaction.

In a journal entry filed November 9, 1995, the trial court sustained M & D's motion to strike, stating that generally a surety, such as Universal, is not allowed to plead a setoff based on a dispute between its principal and the plaintiff and arising from a separate and distinct contract. The court also stated that an intevenor, such as Weaver, was also prohibited from alleging a setoff.

On December 21, 1995, Universal and Weaver filed a motion to join Weaver as a defendant pursuant to Neb. Rev. Stat. § 25-317 (Reissue 1995). In a journal entry filed on January 9, 1996, the trial court granted the motion, and Weaver became an additional defendant. The court granted Weaver 10 days to file an answer. On January 16, Universal and Weaver (hereinafter referred to as the "defendants") filed a joint answer, alleging that they had a right in the present suit to set off $22,036 of damages arising out of the Holdrege Public Schools subcontract. Additionally, Weaver alleged that it had assigned and transferred to itself and Universal jointly all the rights attached

to the $22,036 setoff. The defendants prayed that the court order judgment in favor of M & D limited to the amount of $11,468.

On January 22, 1996, M & D filed a new motion to strike, asking the court to strike the setoff allegations in the defendants' joint answer. In its motion, M & D claimed that the defendants' alleged setoff did not refer in an intelligible manner to the claim set forth in M & D's amended petition and arose from a set of facts unrelated to the facts in its petition.

In a journal entry filed February 23, 1996, the trial court sustained M & D's motion, striking the portions of the defendants' joint answer relating to the setoff. The court held that Nebraska has refused to recognize a distinction between a counterclaim and a setoff and further held that a setoff is a form of counterclaim arising in contract and is controlled by Neb. Rev. Stat. § 25-813 (Reissue 1995), which limits counterclaims to actions arising out of the contract or transaction set forth in the plaintiff's petition. The court also referred to Neb. Rev. Stat. § 25-812 (Reissue 1995), which states that defenses, counterclaims, setoffs, and cross-claims must "refer in an intelligible manner to the cause of action which they are intended to answer." The trial court further stated that the foregoing language of § 25-812 suggests that a setoff must have a relationship with the plaintiff's cause of action. The court stated that the defendants' setoff is not allowable, since it is based upon a separate and distinct contract.

In a reply filed February 29, 1996, M & D denied each and every affirmative allegation in the defendants' joint answer except those constituting admissions against Universal's interests.

On February 29, M & D filed a motion for summary judgment, stating that there was no longer a genuine issue of material fact and praying that the court enter a judgment for M & D. The defendants also filed a motion for summary judgment on March 22, asking the court to enter summary judgment in M & D's favor "against Defendants for $11,485.00 [sic]." In an attached affidavit signed by Lawrence E. Weaver, the defendants alleged that no genuine issue of material fact existed and that M & D was not entitled to the full $33,504.60, but, rather, only $11,468.

In an order filed April 11, 1996, the trial court granted M & D's motion for summary judgment, overruled the defendants' motion for summary judgment, and entered judgment in favor of M & D in the amount of $33,504.60, plus interest and costs.

On April 12, 1996, the defendants filed a motion for new trial, which the trial court overruled after hearing.

The defendants appeal.

ASSIGNMENTS OF ERROR

On appeal, the defendants contend that the trial court erred in striking the $22,036 setoff raised in their joint answer and in subsequently granting summary judgment in favor of M & D and against the defendants for the full amount of M & D's $33,504.60 claim, without any reduction for the $22,036 setoff. The defendants do not explicitly raise as error the denial of their motion for summary judgment.

STANDARD OF REVIEW

[1,2] 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. *Elliott v. First Security Bank*, 249 Neb. 597, 544 N.W.2d 823 (1996). Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

[3] Although a denial of a motion for summary judgment is not a final order and thus is not appealable, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, a reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions. *Id.*

[4] Whether the allegations in a pleading should be stricken presents a question of law, in connection with which a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Westgate Rec.*

Assn. v. Papio-Missouri River NRD, 250 Neb. 10, 547 N.W.2d 484 (1996).

ANALYSIS

[5,6] The party who pleads a setoff bears the burden of proving it. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995). A setoff is a debt for which an action might be maintained by the defendant against a plaintiff, that is, a debt for a certain specific pecuniary amount, recoverable in an action "ex contractu"; the claim must be such that at the date of the commencement of the plaintiff's suit, the defendant could have maintained an action against the plaintiff. *Id.*

The defendants contend that the court erred in striking their setoff allegations and in granting M & D's summary judgment motion, claiming that under Nebraska case law, a setoff may arise from an independent cause of action, arising in contract, which may be extrinsic to the plaintiff's cause of action. The defendants contend that setoff and counterclaim have been distinguished under both Nebraska case law and in Nebraska statutes. The defendants claim that the setoff alleged in their joint answer is not subject to the requirement set out in § 25-813 that a counterclaim arise out of the contract or transaction set forth in the plaintiff's petition. We agree.

M & D contends that counterclaim and setoff are synonymous and that under the language of § 25-813, the defendants' setoff allegations must arise "out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim," and that under the language of § 25-812, both setoffs and counterclaims must "refer in an intelligible manner to the cause of action which they are intended to answer." Relying on the foregoing phrases in §§ 25-812 and 25-813, and a series of cases from the 1930's which are not repeated here and have been superseded by more recent case law, M & D argues that the defendants' setoff does not arise out of the contract or transaction set forth in the petition nor does it refer in an intelligible manner to the plaintiff's cause of action in the petition, since the defendants' setoff arises from a separate and distinct contract. M & D, therefore, claims that the setoff was properly disallowed. For the sake of completeness, we also note that in its

brief M & D also implies that the subject matter of the defendants' setoff is time barred. We make no comment regarding this inference that there may be a timeliness issue surrounding the setoff proposed by the defendants. In sum, M & D contends that the trial court correctly struck the setoff allegations in the defendants' joint answer and entered summary judgment in its favor in the amount of $33,504.60. We disagree with M & D's reading of these statutes and Nebraska jurisprudence.

The law generally states that "[a] set-off is a counterdemand which a defendant holds against a plaintiff, arising out of a transaction extrinsic of the plaintiff's cause of action . . . ." 80 C.J.S *Set-Off and Counterclaim* § 3 at 7 (1953). "Generally, in set-off, it is not necessary that the defendant's claim arise from the contract or transaction sued on or be connected with the subject matter thereof." *Id.*, § 35 at 44. "As a general rule, the distinguishing feature of counterclaim, as opposed to set-off, is that it arises out of the same transaction as that described in the complaint . . . ." *Id.*, § 36 at 46. See, generally, 20 Am. Jur. 2d *Counterclaim, Recoupment, Etc.* § 2 (1995).

[7] By the use of different words, Nebraska statutes distinguish between "defense," "counterclaim," and "setoff." Thus, § 25-812 states that "[t]he defendant may set forth in his answer as many grounds of defense, counterclaim, and setoff as he may have. Each must be separately stated and numbered, and they must refer in an intelligible manner to the cause of action which they are intended to answer."

[8] Section 25-813, which is entitled "Counterclaim; cross-claim; when allowed," does not refer to "setoff" and defines counterclaim and cross-claim. Section 25-813 states in relevant part:

> The counterclaim mentioned in section 25-812 must be one in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and *arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action.* The cross-claim mentioned in section 25-812 must be one in favor of a defendant and against a coparty arising out of the contract or transaction set forth in the petition as the foundation of

> the plaintiff's claim, or connected with the subject of the action.

(Emphasis supplied.)

[9] In contrast, Neb. Rev. Stat. § 25-816 (Reissue 1995), entitled "Setoff; when allowed," does not refer to "counterclaim" or "cross-claim" and states: "A setoff can only be pleaded in an action founded on contract, and must be a cause of action arising upon contract, or ascertained by the decision of the court." Unlike § 25-813 relating to counterclaims and cross-claims, § 25-816 does not contain a requirement that a setoff arise out of the same contract or transaction set forth in the plaintiff's petition, nor does Nebraska case law impose such a requirement.

[10] In 1993 in *Ed Miller & Sons, Inc. v. Earl*, 243 Neb. 708, 718, 502 N.W.2d 444, 452 (1993), the Nebraska Supreme Court distinguished recoupment from setoff and defined setoff, stating:

> "'"Recoupment" differs from "set-off" in this respect: that *any claim or demand the defendant may have against the plaintiff may be used as a set-off*, while it is not a subject for recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action. . . .'"

(Emphasis supplied.) See, also, *In re Estate of Massie*, 218 Neb. 103, 353 N.W.2d 735 (1984), *overruled on other grounds, In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986). But see, *Continental Nat. Bank v. Wilkinson*, 124 Neb. 675, 247 N.W. 604 (1933); *American Gas Construction Co. v. Lisco*, 122 Neb. 607, 241 N.W. 89 (1932).

Therefore, in Nebraska, both the statutes and the case law distinguish between a counterclaim and a setoff and impose differing requirements for each. While a counterclaim must arise out of the contract or transaction set out in the plaintiff's petition or be connected with the subject of the plaintiff's action, a setoff may arise from a transaction extrinsic to that set forth in the plaintiff's petition. In the instant case, the defendants' setoff is not controlled by § 25-813, but, rather, by § 25-816. The limiting language of § 25-813 which pertains to counterclaims and cross-claims does not restrict the assertion of a setoff under § 25-816. When considering a series or collection of statutes

pertaining to a certain subject matter, which are in pari materia, the statutes may be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions of the act are perceived as consistent and sensible. *Kuebler v. Abramson*, 4 Neb. App. 420, 544 N.W.2d 513 (1996).

A review of the record shows that as required by those statutes, the defendants' setoff allegations were separately stated and numbered and both M & D's action and the defendants' setoff allegations are founded on contract. Additionally, the defendants' setoff allegations referred in an intelligible manner to M & D's cause of action as may be required by § 25-812. In their setoff allegations, the defendants stated that Weaver did not owe M & D $33,504.60 on the Pleasanton school contract, but, rather, only $11,468 after setting off the sum of $22,036 for damages Weaver incurred by M & D's faulty work on the Holdrege school contract. The setoff allegations were sufficiently pleaded, and the court erred in striking the defendants' setoff.

CONCLUSION

Based on the foregoing, we hold that the trial court erred in striking the defendants' setoff from the defendants' joint answer, and this order is reversed. The trial court also erred in granting M & D's summary judgment motion. We make no comment on the propriety of granting or denying M & D's motion for summary judgment after the defendants' setoff was filed. The judgment is reversed and the cause remanded for treatment consistent with this opinion.

REVERSED AND REMANDED.

MYRON ANDERSEN, APPELLANT, V.
JAMES R. GANZ, JR., APPELLEE.
572 N.W.2d 414

Filed December 2, 1997. No. A-96-576.

1. **Trial: Pleadings: Pretrial Procedure.** A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented.

2. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
3. **Malpractice: Attorney and Client: Claims: Assignments.** Legal malpractice claims are not assignable.
4. **Assignments.** Although generally the law supports assignability of rights, it does not permit assignments for matters of personal trust or confidence, or for personal services.
5. **Malpractice: Attorney and Client: Claims: Assignments.** A legal malpractice claim which is held by two or more persons jointly may be assigned by one joint holder to one or more of the other joint holders.
6. **Actions: Pleadings.** The objection that a petition does not state a cause of action may be raised at any time.
7. **Actions: Pleadings: Waiver.** Under Neb. Rev. Stat. § 25-808 (Reissue 1995), one does not waive the objection that a petition does not state facts sufficient to constitute a cause of action by failing to raise the issue, either by demurrer or by answer.
8. **Trial: Pleadings: Demurrer: Pretrial Procedure.** A motion for a judgment on the pleadings is in the nature of a demurrer. Like a demurrer, it admits the truth of all well-pled facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

William A. Wieland, of Healey Wieland Law Firm, for appellant.

Francis T. Belsky, of Katskee, Henatsch & Suing, for appellee.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

By a petition which alleged four separate causes of action, Myron Andersen sued James R. Ganz, Jr., an attorney at law, for legal malpractice. The second cause of action is one that was assigned to Andersen by Steven Walters, and the third cause of action, alleged to have accrued to Andersen and his wife jointly, is one in which Andersen's wife assigned her interest to Andersen. The trial court granted Ganz' motion for judgment on the pleadings on the second and third causes of action because it held that under *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), the causes of action were not assignable. Andersen now appeals from that order. We conclude that the second cause of action is an attempt to assign

a nonassignable cause of action. However, we further conclude that a cause of action for legal malpractice which accrues to two people jointly may be assigned by one joint holder to the other. Accordingly, we affirm the trial court's dismissal of the second cause of action, but reverse its dismissal of the third cause of action, and remand that cause for further proceedings.

FACTUAL BACKGROUND

In order to attempt a clearer portrayal of the issues presented by this appeal, we will summarize the transactions as alleged in the petition and then summarize the separate causes of action upon which Andersen seeks to recover.

Andersen, Walters, and Donn Nelson entered into an agreement to build a 144-unit apartment complex (Huntington project) in Papillion, Nebraska, on land purchased from William Olson. The complex was to be owned by Huntington Park Apartments, Inc., a corporation formed for that purpose, with Nelson serving as incorporator and manager. Nelson, Andersen, and Walters all became stockholders in the corporation. When they were unable to obtain financing for construction cost overruns, they were forced to convey their stock to two investors identified as "Young" and "Johnston" in consideration for Young and Johnston's promise to assume all financial obligations of the project and to hold Andersen and Walters harmless from all claims, liens, debts, and obligations of the Huntington project.

From the beginning, Ganz had been employed by both Andersen and Walters to represent their interests in the Huntington project. It is alleged that on October 12, 1988, both Andersen and Walters delivered their stock to Ganz with directions not to deliver it to Nelson unless (1) the proposed agreement with Young and Johnston was sufficient to hold Andersen and Walters harmless against all creditors and Andersen and his wife harmless upon a promissory note they had given to Olson (presumably, for the purchase of the land for the Huntington project), and (2) Nelson also delivered his stock in Huntington Park to Young and Johnston. Andersen further alleged that Ganz told Andersen and Walters the agreement would hold them harmless when it did not and that Nelson had delivered his stock when in fact he had not. Andersen also alleged that on

November 1, 1988, Ganz delivered Andersen's and Walters' stock to Nelson.

The allegations of Ganz' negligence in the first, second, and fourth causes of action were all in connection with his delivery of the stock without compliance with the conditions, and the damages sought by Andersen were allegedly the proximate result of that negligence. However, the third cause of action was based upon an additional allegation of negligence on the part of Ganz in defending an action by Olson against Andersen and his wife on the above-referred-to promissory note. Andersen alleged that Olson took judgment against him and his wife for $196,737.64.

The original petition was not filed until November 20, 1990. There were several allegations intended to avoid the effect of the statue of limitations, but their sufficiency is not at issue in this appeal. Consequently, these allegations will not be summarized.

Andersen's operative petition is his fifth amended petition. In that petition, Andersen sought to recover damages as a result of Ganz' negligence as follows: First cause of action—Andersen's personal loss of ownership of Huntington stock and damage to his reputation in the building and construction industry; second cause of action—Walters' personal loss of ownership of Huntington stock and damage to his reputation in the building and construction industry; third cause of action—Andersen and his wife's loss in having the Olson judgment rendered against them; fourth cause of action—the cost of having to employ additional attorneys to represent Myron Andersen Construction, Inc. Andersen also alleged, in his second cause of action, that Walters had assigned his "causes" of action to Andersen and, in his third cause of action, that Andersen's wife assigned her "causes" of action to Andersen. The fourth cause of action is not before us, and therefore, the allegations in it need not be summarized.

Ganz' answer to the fifth amended petition admitted some formal allegations and denied allegations of negligence or damages. In substance, it pled the statute of limitations and contributory negligence as affirmative defenses. The reply was essentially a general denial.

Ganz filed a motion for judgment on the pleadings on the second and third causes of action, arguing that these causes of

action were not assignable. An accompanying notice provided that the hearing on the motion would take place on November 17, 1995. The motion contained the designation "19" (as opposed to "18" for Ganz' previously filed demurrer). The trial docket stated that No. 19 came on for hearing on November 17 with both parties represented by counsel and that the motion was argued and submitted. A trial docket note dated November 20 referred to "#19. Demurrer of Defendant to Fifth Amended Petition," but then went on to state that the claims in the second and third causes of action were not assignable and, further, that the motion was sustained. According to the note, "[t]he 2nd and 3rd causes of action are stricken from the 5th Amended Petition." (We therefore treat the court's action as a judgment on the pleadings, notwithstanding the court's use of the term "demurrer.") Andersen's motion for new trial was later overruled.

ASSIGNMENTS OF ERROR

Andersen alleges that the trial court erred in (1) failing to find that "the assignor's [sic] of appellant's second and third causes of action were clients of the appellee, to whom the appellee owed a duty to practice in accordance with the applicable standard of care," (2) finding that the legal malpractice claims in the second and third causes of action were not assignable, (3) finding that Ganz did not waive any defect in the assignment of causes of action by his failure to timely object in a demurrer or answer, (4) failing to treat Ganz' motion for judgment on the pleadings as a demurrer, (5) failing to grant leave to amend the petition, and (6) failing to allow amendments in the furtherance of justice.

STANDARD OF REVIEW

[1,2] A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented. *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Union Ins. Co. v. Land and Sky, Inc.*, 253 Neb. 184, 568 N.W.2d 908 (1997).

ANALYSIS

[3,4] The outcome of this appeal is controlled by whether Walters and Andersen's wife can assign their legal malpractice claims against Ganz to Andersen. In *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994) (finding defendants owed no duty to plaintiff because plaintiff was not client), the Nebraska Supreme Court, following the rule of the majority of other jurisdictions, clearly held that legal malpractice claims are not assignable. In doing so, the court reiterated the well-established rule that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them. The court explained:

> Although generally the law supports assignability of rights, it does not permit assignments for matters of personal trust or confidence, or for personal services. *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 993). See, also, *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978).
>
> ". . . [T]he assignment of legal malpractice claims involve matters of personal trust and personal service and do not lend themselves to assignability because permitting the transfer of such claims would undermine the important relationship between an attorney and client." *Roberts v. Holland & Hart*, 857 P.2d at 495.
>
> We are persuaded by the reasoning in *Roberts* and other jurisdictions which refuse to permit the assignment of legal malpractice claims because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship.

Earth Science Labs., 246 Neb. at 801-02, 523 N.W.2d at 257. See, generally, 7 Am. Jur. 2d *Attorneys at Law* § 212 (1997); Annot., 40 A.L.R.4th 684 (1985).

For ease of analysis, we now apply this holding to Andersen's two causes of action, in reverse order.

Third Cause of Action (Andersen and Wife).

In contrast to the second cause of action which accrued solely to Walters, the third cause of action accrued to both Andersen and his wife jointly. According to the allegations in

the third cause of action, Olson took judgment against Andersen and his wife together under their promissory note, and Andersen and his wife pledged their personal assets in consideration of Olson's forbearance from execution on that judgment. The difficulty with the third cause of action is that Andersen himself, together with his wife, holds a cause of action against Ganz for legal malpractice.

The basis for the nonassignability of a cause of action for legal malpractice is the personal trust and confidential nature of the attorney-client relationship. When one of two joint alleged victims of legal malpractice assigns it to the other, no violence is done to the confidential relationship of the parties. The effect of such assignment is merely to allow one of the possible plaintiffs to avoid participation in a lawsuit.

Furthermore, the rule prohibiting the assignability of legal malpractice claims is analogous to the ancient notions of champerty and maintenance. The principles utilized in these doctrines throw some light on the issues in this case. "Champerty consists of an agreement whereby a person without interest in another's suit undertakes to carry it on at his own expense, in whole or in part, in consideration of receiving, in the event of success, a part of the proceeds of the litigation." 14 C.J.S. *Champerty and Maintenance* § 2 a. at 146 (1991). "Maintenance exists when a person without interest in a suit officiously intermeddles therein by assisting either party with money or otherwise to prosecute or defend it." *Id.*, § 2 b. at 147. The general rule is as follows:

> Maintenance or champerty does not avoid a contract concerning litigation where the contracting parties both have an interest in the subject of the litigation or in the litigation itself; . . . one who has an interest in the subject of litigation may properly purchase an additional interest free from a valid charge of maintenance.

14 Am. Jur. 2d *Champerty and Maintenance* § 9 at 847 (1964).

> Where a person promoting the suit of another has any interest whatever, legal or equitable, in the thing demanded, distinct from that which he may acquire by an agreement with the suitor, he is in effect also a suitor according to the nature and extent of his interest; accordingly any interest whatever in the subject matter of the suit

> is sufficient to exempt a party giving aid to the suitor from the charge of illegal champerty or maintenance.

14 C.J.S., *supra*, § 14 at 157.

[5] The same logic applies to the nonassignability of legal malpractice claims. We conclude that a legal malpractice claim which is held by two or more persons jointly may be assigned by one joint holder to one or more of the other joint holders.

Second Cause of Action (Walters).

The second cause of action is Walters' legal malpractice claim against Ganz. While Walters' cause of action is possibly distinguishable from that of the plaintiff in *Earth Science Labs. v. Adkins & Wondra, P.C.*, 246 Neb. 798, 523 N.W.2d 254 (1994), in that it arose out of the same conduct as Andersen's personal claim (first cause of action) against Ganz, the alleged damages suffered by the alleged common negligence were clearly suffered by each injured party separately. Thus, the rule against assignments of legal malpractice claims applies, and Walters' claim is not assignable to Andersen.

Other Assigned Errors.

In order to avoid the clear import of the holding of *Earth Science Labs., supra*, Andersen relies upon three points: (1) that Ganz waived the issue of nonassignability by failing to file a demurrer, (2) that the trial court erred in not treating the motion for judgment on the pleadings as a demurrer, and (3) that the trial court erred in not granting Andersen leave to amend the fifth amended petition or to file another amended petition.

[6] Andersen contends that Ganz waived any objection he might have had to the assignability of the causes of action by not filing a demurrer or alleging the defect in the answer. Andersen argues, relying on Neb. Rev. Stat. § 25-808 (Reissue 1995), that any defect enumerated in Neb. Rev. Stat. § 25-806 (Reissue 1995) is waived if not taken by demurrer or answer. Although Andersen does acknowledge that, pursuant to § 25-808, the objection that the petition does not state a cause of action may be raised at any time, he argues that the defense that a cause of action for legal malpractice cannot be assigned is one that the plaintiff does not have legal capacity to sue, an enumerated defect in § 25-806.

[7] Under § 25-808, one does not waive the objection that a petition does not state facts sufficient to constitute a cause of action (or that the court lacks jurisdiction) by failing to raise the issue, either by demurrer or by answer. A legal malpractice claim that has been assigned to the party bringing the claim does not state a cause of action because such cause cannot be lawfully assigned. Thus, an objection to such a defect is not waived by failure to raise it by a demurrer or in the answer.

[8] A motion for a judgment on the pleadings is in the nature of a demurrer. Like a demurrer, it admits the truth of all well-pled facts in the pleadings of the opposing party, together with all reasonable inferences to be drawn therefrom. *Watkins Products, Inc. v. Rains*, 175 Neb. 57, 120 N.W.2d 368 (1963). A motion for judgment on the pleadings is properly granted when it appears from the pleadings that only a question of law is presented. *County of Seward v. Andelt*, 251 Neb. 713, 559 N.W.2d 465 (1997). Such is the case here: Because the only unresolved issue was a question of law, the matter could properly be decided on a motion for judgment on the pleadings. Moreover, the court in *Earth Science Labs.*, 246 Neb. at 802, 523 N.W.2d at 257, stated: "Because a legal malpractice claim is not assignable, there is no reasonable possibility that the plaintiff can amend its petition to state a cause of action . . . ." This particular observation by the Supreme Court disposes of the third, fifth, and sixth errors claimed by Andersen. See, also, *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993) (when court grants judgment on pleadings and dismisses case, losing party does not have right to amend pleadings); *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996) (even when demurrer is sustained, court need not allow plaintiff to amend petition if it is clear that no reasonable possibility exists that such amendment will correct defect).

CONCLUSION

We conclude that legal malpractice claims cannot be assigned unless they are from one joint holder of the claim to another. Thus, we affirm the trial court's dismissal of the second cause of action, but reverse its dismissal of the third cause of action, and remand that cause for further proceedings.

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

PAUS MOTOR SALES, INC., A NEBRASKA CORPORATION, APPELLEE, V. WESTERN SURETY COMPANY, A SOUTH DAKOTA CORPORATION, APPELLANT.

572 N.W.2d 403

Filed December 2, 1997. No. A-96-580.

1. **Summary Judgment: Appeal and Error.** 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. ____: ____. 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. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment is not a final order and thus may not be appealed, 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 of the motions, may determine the controversy which is the subject of those motions, and may make an order specifying the facts which appear without substantial controversy and directing such further proceedings as it deems just.
4. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
5. **Statutes: Contracts: Principal and Surety: Liability.** The liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement.
6. **Bonds: Motor Vehicles.** Any loss by reason of a motor vehicle dealer's conduct in engaging in acts prohibited by law entitles the offended party recourse on a motor vehicle dealer's bond.
7. **Fraud: Pleadings: Actions.** Fraud is generally a question of fact and, to be sufficient as a cause of action or defense, must be pleaded by suitable allegations of fact from which fraud may be concluded.
8. **Fraud: Contracts: Proof.** A person cannot be prosecuted for the failure to pay a contractual obligation without proof of fraud.
9. **Debtors and Creditors.** The failure to pay debts is not a misappropriation of funds of purchasers, nor is it a violation of law.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions to dismiss.

Joseph C. Byam, of Byam & Byam, for appellant.

Jeffrey A. Silver for appellee.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

The plaintiff, Paus Motor Sales, Inc. (Paus), brought this action against the defendant, Western Surety Company (Western), to recover under a motor vehicle dealer's bond issued to William E. Haning, doing business as Haning Auto Sales, by the defendant. On the parties' motions for summary judgment, the district court found that Western was liable under that provision of the bond which covered dealers' misappropriation of funds belonging to purchasers. Consequently, the court sustained Paus' motion and denied Western's motion. We now conclude that under the undisputed facts Haning, as a matter of law, did not misappropriate the funds of anyone. Therefore, Paus is not entitled to recover on the bond, and Western is entitled to summary judgment. Consequently, we reverse the judgment of the district court and remand the cause with directions to dismiss the petition.

UNDISPUTED FACTS

Paus is a licensed automobile dealership in West Point, Nebraska, doing business in both new and used vehicles. Steve Paus is the vice president of the corporation, and Brooks Barnes is the general sales manager. Haning and Barnes are prior acquaintances, dating back to when they both worked in the auto sales industry in Florida. Sometime in the spring of 1994, Haning moved to West Point and was interested in starting his own used-car business. To that purpose, Haning applied for a Nebraska license and in connection therewith obtained a bond from Western, as surety, in the statutorily required amount of $25,000. After Haning received his license, Paus and Haning entered into a number of vehicle sale transactions, the first of which occurred on November 20, 1994.

The record reflects that Paus, through Barnes, sold used vehicles to Haning to help Haning start his business. In exchange for the vehicle and its title, Paus would receive a check for the sale price. However, Haning asked Paus not to cash the checks until Haning had given his approval. The overall number of sales to Haning is not known. While Haning did make payment on many of the vehicles, it is undisputed that by August 1995, Haning

had failed to pay for 13 vehicles, totaling somewhere between $19,075 and $20,775.

PROCEDURAL BACKGROUND

On October 20, 1995, Paus filed a petition against Western, seeking to recover under the motor vehicle dealer's bond that Western issued to Haning in accordance with Neb. Rev. Stat. § 60-1419 (Reissue 1993). In the petition, Paus alleged that Haning had failed to pay for 13 vehicles (although the petition includes the paperwork on 14 different sale transactions, we note that one is a duplicate copy) "in violation of the provisions of the Bond including, but not limited to the misappropriation of funds and the false and fraudulent misrepresentations and/or deceitful practices," and that as a direct and proximate result, Paus had incurred losses of $20,775. Paus also alleged that it had submitted the loss to Western for payment and that Western had "failed, refused and neglected to pay such loss." Paus prayed for judgment in the amount of $20,775, plus costs and attorney fees. In its answer, Western generally alleged that Paus' losses were not compensable under the provisions of the bond. Both parties then moved for summary judgment. The district court found that there was no genuine issue of material fact—Paus' loss was caused by Haning's breach of subsection (2)(c) of the bond (see, also, § 60-1419(2)(c)) concerning dealers' misappropriation of funds belonging to purchasers. Therefore, the court sustained Paus' motion for summary judgment in the amount of $20,775 and denied Western's motion. Western now appeals.

ASSIGNMENTS OF ERROR

Western contends that the district court erred in (1) sustaining Paus' motion for summary judgment and overruling its motion for summary judgment, because Haning's failure to pay Paus was not a misappropriation of any funds belonging to the purchaser under the provisions of the bond and § 60-1419(2)(c); (2) failing to find that Haning was "the purchaser" under the bond and § 60-1419(2)(c) and that there was no coverage under the bond for Paus' claim against Haning; (3) finding that Haning's failure to pay Paus was a covered loss under the bond and § 60-1419(2)(c); (4) failing to sustain its objections to cer-

tain portions of the affidavits of Paus and Haning; and (5) calculating the amount owed under the bond as $20,775, rather than $19,075.

STANDARD OF REVIEW

[1,2] 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. *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997). 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. *Id.*

[3] Although the denial of a motion for summary judgment is not a final order and thus may not be appealed, 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 of the motions, may determine the controversy which is the subject of those motions, and may make an order specifying the facts which appear without substantial controversy and directing such further proceedings as it deems just. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993); *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 470 N.W.2d 772 (1991).

[4] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

ANALYSIS

Paus seeks to recover under the motor vehicle dealer's bond issued to Haning by Western. In deciding whether Paus can recover under the bond, we must determine (1) if Paus is protected under the bond and (2) whether Haning misappropriated the funds of any purchasers.

[5] Though not determinative of the instant appeal, we note that the law at the time of the execution of a statutory bond is

part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein. *State Surety Co. v. Peters*, 197 Neb. 472, 249 N.W.2d 740 (1977); *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 98 N.W.2d 692 (1959). Further, the liability of a surety on statutory undertakings is measured by the terms of the statute rather than by the terms set forth in the agreement, where the two are in conflict, as the statute forms a controlling part of every such agreement. *State Surety Co. v. Peters, supra.* Thus, although the 1989 amendments to § 60-1419 (Reissue 1993), see 1989 Neb. Laws, L.B. 608, were not made part of the bond issued by Western to Haning in 1994, they automaticaliy became part of the bond. Consequently, we consider this case as though the bond provided according to § 60-1419:

> (1) [t]hat the applicant will faithfully perform all the terms and conditions of such license; (2) that the licensed dealer will first fully indemnify any holder of a lien or security interest created pursuant to section 60-110 or article 9, Uniform Commercial Code, whichever applies, in the order of its priority and then any person or other dealer by reason of any loss suffered because of (a) the substitution of any motor vehicle or trailer other than the one selected by the purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer so as to deceive the purchaser as to the year model of any motor vehicle or trailer, (e) any false and fraudulent representations or deceitful practices whatever in representing any motor vehicle or trailer, and (f) the dealer's failure to remit the proceeds from the sale of any motor vehicle which is subject to a lien or security interest to the holder of such lien or security interest; and (3) that the motor vehicle, motorcycle, motor vehicle auction, or trailer dealer or wholesaler shall well, truly, and faithfully comply with all the provisions of his or her license and the acts of the Legislature relating to such license. The aggregate liability of the surety shall in no event exceed the penalty of such bond.

Is Paus Protected Under Motor Vehicle Dealer's Bond?

Western contends that motor vehicle dealer's bonds issued under § 60-1419 were designed only to protect consumers and not "to serve as an insurance policy for the business dealings between car dealers in Nebraska." Brief for appellant at 29. We disagree. The statute protects car dealers as well as other persons, but only from the acts enumerated in the statute—it does not protect against all losses. In *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. at 110, 98 N.W.2d at 701-02, the Nebraska Supreme Court stated the following concerning what is now codified as § 60-1419:

> As we interpret section 60-619, R. S. Supp., 1955, upon which the plaintiff's bond is based, the Legislature intended that persons other than purchasers might sustain damage or loss by reason of a motor vehicle dealer's misrepresentations, false and fraudulent acts, and misappropriation of funds or deceitful practices in representing a motor vehicle to the purchaser thereof. It is obvious that the Legislature intended that any person sustaining loss by reason of a motor vehicle dealer's conduct in engaging in acts prohibited by law would be entitled to recourse on such a bond as the plaintiff's bond in the instant case, regardless of the particular status of such person as defined in section 60-601, R. S. Supp., 1955.

Moreover, the court has commented: "In *Sun Ins. Co. v. Aetna Ins. Co.*, [*supra*,] and *Sterner v. Lehmanowsky*, 173 Neb. 401, 113 N.W.2d 588 (1962), we stated that persons in addition to purchasers of automobiles are protected under the bond against loss resulting from misappropriation of funds belonging to the purchasers." *Adams Bank & Trust v. Empire Fire & Marine Ins. Co.*, 235 Neb. 464, 467, 455 N.W.2d 569, 571 (1990) (bank financing dealer's used-car operation through floor plan arrangement and security agreement recovered under misappropriation provision of bond for vehicles which dealer sold "out of trust"). See, also, *Havelock Bank v. Western Surety Co.*, 217 Neb. 560, 352 N.W.2d 855 (1984) (bank entitled to recover under misappropriation provision of bond because it had suffered loss when dealer sold vehicles "out of trust"). But see, *Sterner v. Lehmanowsky, supra* (suggesting that those who do not qualify as purchasers can only recover for fraud).

[6] Based on the foregoing authorities, we conclude that any loss by reason of a motor vehicle dealer's conduct in engaging in acts prohibited by law and enumerated in § 60-1419 entitles the offended party recourse on a motor vehicle dealer's bond.

[7] While Paus alleged that it could recover under the bond for "false and fraudulent representations and/or deceitful practices," it does not allege any such supporting facts. In particular, fraud is generally a question of fact and, to be sufficient as a cause of action or defense, must be pleaded by suitable allegations of fact from which it may be concluded. *Preferred Pictures Corp. v. Thompson*, 170 Neb. 694, 104 N.W.2d 57 (1960). Moreover, Paus does not contend on appeal that there was any fraud. Thus, we limit our discussion to misappropriation of purchaser's funds.

Misappropriation of Purchaser's Funds.

As first stated in *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 110, 98 N.W.2d 692, 701 (1959), "the Legislature intended that any person sustaining loss by reason of a motor vehicle dealer's conduct in engaging in *acts prohibited by law* would be entitled to recourse on such a bond . . . ." (Emphasis supplied.) Such acts are those found in § 60-1419(2), which include misrepresentation, fraud, and misappropriation of purchaser's funds.

[8] In *Adams Bank & Trust v. Empire Fire & Marine Ins. Co., supra*, and *Havelock Bank v. Western Surety Co., supra*, banks that had entered into floor plan arrangements and security agreements with dealers were able to recover under motor vehicle dealer's bonds for the dealers' sale of vehicles that were "out of trust." While the sale of personal property "out of trust" with fraudulent intent is a Class IV felony, see Neb. Rev. Stat. § 69-109 (Reissue 1996) and *State v. Hocutt*, 207 Neb. 689, 300 N.W.2d 198 (1981), a person cannot be prosecuted for the failure to pay a contractual obligation without proof of fraud. See *State ex rel. Norton v. Janing*, 182 Neb. 539, 156 N.W.2d 9 (1968) (holding that statute which failed to require finding of fraud and which permitted prosecution for criminal offense for failure to pay contractual obligation without proof of fraud was unconstitutional).

The record reveals that Haning purchased the 13 motor vehicles in question from Paus, in exchange for which he issued

checks. At the time Haning issued the checks, he received not only possession of the vehicles but also the certificates of title. In his affidavit, Haning testified that he asked Paus to hold the checks and that "payment would be made when the vehicles were sold." Haning further testified that he sold each of the vehicles to purchasers, that he received funds from each of the purchasers, and that he failed to pay over any such funds to Paus. It is undisputed that Paus never asked Haning to sign a security agreement and never took a lien on any of the vehicles.

[9] Upon delivery of the vehicles to Haning, Paus did not in any way retain or reserve titles to the vehicles, see Neb. U.C.C. § 2-401(1) (Reissue 1992) (any retention or reservation by seller of title in goods shipped or delivered to buyer is limited in effect to reservation of security interest), through a written security agreement. See, Neb. U.C.C. § 9-203 (Cum. Supp. 1994); § 9-203, comment 1 (Reissue 1992) (for security agreement to attach, one of requirements is that agreement be in writing, unless collateral is in possession of secured party). In fact, Paus gave the titles directly to Haning. Thus, the vehicles were Haning's, and upon their subsequent sale, the proceeds were also Haning's. Haning's failure to remit that money did not constitute sales "out of trust" and was not otherwise unlawful. It was merely a failure to pay his debts; and the failure to pay debts is not a misappropriation of funds of purchasers, nor is it a violation of law.

Of the cases considering the sureties' liability under an automobile dealer's bond, only *Sterner v. Lehmanowsky*, 173 Neb. 401, 113 N.W.2d 588 (1962), is concerned with the failure to fulfill a promise as a misappropriation or a fraudulent act under the dealer's bond, and only one of the four transactions litigated in that case involved the failure to fulfill a promise. Lehmanowsky had promised to turn over certain insurance proceeds but failed to do so. The *Lehmanowsky* court said:

> We do not believe Lehmanowsky's failure to keep his promise to turn over the proceeds is a misappropriation within the terms of the bond on the evidence in this record.
>
> . . . We agree the bond does protect against willful fraud, but willful fraud is not proved by the mere failure to keep a promise or to pay a debt.

Id. at 411-12, 113 N.W.2d at 595. Paus' evidence proves only that Haning failed to pay for the vehicles as he promised.

We conclude, as a matter of law, that Haning's oral promise to repay Paus upon the subsequent sales of the vehicles did not create a security interest. Therefore, Haning's failure to remit the proceeds to Paus did not amount to a misappropriation of anyone's funds, nor was his failure to pay an unlawful act.

CONCLUSION

Having concluded that Paus' action must be dismissed, the other issues presented need not be considered. The judgment of the district court is hereby reversed and the cause remanded with directions to dismiss the petition, and Paus' motion for attorney fees is denied.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

SHARON L. WORM, APPELLANT,
V. VERNON A. WORM, JR., APPELLEE.
573 N.W.2d 148

Filed December 9, 1997. No. A-97-075.

1. **Parental Rights: Appeal and Error.** In reviewing a termination of parental rights case held in the district court, an appellate court reviews the record de novo to determine whether the district court abused its discretion.
2. **Parental Rights: Evidence: Proof.** In cases of termination of parental rights in district court, the standard of proof must be by clear and convincing evidence.
3. **Modification of Decree.** If, in a domestic relations case, a material change in circumstances has occurred, a former decree may be modified in light of those circumstances.
4. **Parental Rights: Courts: Jurisdiction.** Under Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 1994), whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the district court is a more appropriate forum.
5. **Parental Rights: Evidence: Notice.** Under Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 1994), a court may terminate the parental rights of one or both parents after notice and hearing when the court finds such action to be in the best interests of the minor child and it appears by the evidence that one or more conditions of a list of conditions in § 42-364(7) exist.
6. **Parental Rights: Abandonment: Words and Phrases.** Abandonment, for purposes of determining whether termination of parental rights is warranted under Neb. Rev.

Stat. § 43-292(1) (Cum. Supp. 1996), has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child.

7. **Parental Rights: Abandonment: Intent.** The question of whether a parent has abandoned a child so as to justify termination of parental rights is largely one of intent, to be determined in each case from all of the facts and circumstances.
8. **Parental Rights: Abandonment: Intent: Circumstantial Evidence.** Circumstantial evidence of intent may be used to establish abandonment for purposes of termination of parental rights.
9. **Parental Rights: Abandonment: Time: Proof.** Under the juvenile code, to prove abandonment of a child sufficient to terminate parental rights, the evidence must clearly and convincingly show that a parent for at least 6 months has acted toward a child in a manner evidencing a subtle purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and abandonment of parental rights and responsibilities; mere inadequacy is not the test.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Thomas Blount, of Bertolini, Schroeder & Blount, for appellant.

No appearance for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MILLER-LERMAN, Chief Judge.

Sharon L. Worm appeals from the December 18, 1996, order of the district court for Sarpy County denying her petition to modify the decree of dissolution of May 1, 1995, dissolving her marriage to Vernon A. Worm, Jr. In her petition to modify, Sharon sought to terminate the parental rights of Vernon to their only child, Elizabeth, born February 1, 1987. The trial court declined to terminate Vernon's parental rights under Neb. Rev. Stat. § 42-364(7) (Cum. Supp. 1994). Sharon appeals, claiming that clear and convincing evidence shows that Vernon had abandoned Elizabeth and that termination of Vernon's rights is in Elizabeth's best interests. For the reasons recited below, we affirm.

BACKGROUND

On February 14, 1996, Sharon filed a petition to modify the decree of dissolution entered May 1, 1995, dissolving her mar-

riage to Vernon. The record shows that the decree awarded Sharon custody of Elizabeth and that the decree ordered Vernon to pay $460 per month in child support. The decree also allowed Vernon the following visitation with Elizabeth: every other weekend, every other Wednesday evening, alternating major holidays, visits on special occasions, and 3 to 5 weeks of summer visitation. The decree contains other provisions not relevant here.

In her petition to modify the decree, Sharon alleged that Vernon owed more than $4,000 in back child support, that he had left the state without leaving an address or phone number, and that he had failed to exercise his visitation rights since July 1995.

In an affidavit also filed on February 14, 1996, Sharon detailed Vernon's last visitation with Elizabeth. Sharon stated that the visit occurred from July 6 through July 29, 1995. Sharon stated further that Elizabeth told her that during the visit, Vernon took Elizabeth to the horseraces with his girl friend and her children and that Vernon's girl friend's 15-year-old daughter drove them home, because Vernon and his girl friend were too intoxicated to drive. Sharon attested also that Elizabeth said that Vernon and his girl friend smoked continuously around Elizabeth, even though Elizabeth is asthmatic, and that Vernon refused to give Elizabeth her allergy medication. Finally, Sharon stated in the affidavit that Elizabeth told her that Vernon did not prepare meals, that there was only beer in the refrigerator, and that Elizabeth was required to sleep with Vernon's girl friend's 13-year-old son, either on the floor or in a bed.

In her petition to modify the decree, Sharon alleged that Vernon's conduct constituted abandonment and that such abandonment was a material change in circumstances, warranting the modification of the decree. Sharon asked the court to terminate Vernon's parental rights to Elizabeth or, alternatively, to modify the decree, restricting Vernon's visitation.

The record shows that Sharon attempted to personally serve Vernon with a copy of the modification petition at his last known address and at his last known place of employment and that Vernon could not be found. On March 20, 1996, Sharon

filed a motion for leave to serve Vernon by publication, which was granted on March 29. An affidavit included in the record shows that the notice of the petition to modify the divorce decree was published in The Papillion Times on April 4, 11, 18, and 25. In accordance with Neb. Rev. Stat. § 25-520.01 (Reissue 1995), copies of the notice were sent to Vernon's last known address and his last known place of employment. Copies were also sent to Vernon's mother, two of his brothers, and a sister.

In a motion filed June 18, 1996, pursuant to § 42-364(7), Sharon asked the court to transfer the modification proceedings to the juvenile court for Sarpy County or, alternatively, to determine that the district court was the more appropriate forum. After hearing, the court found that the district court was the more appropriate forum and appointed a guardian ad litem to protect Elizabeth's interests.

On December 3, 1996, a hearing was held on Sharon's petition to modify the decree. Sharon, her attorney, and the guardian ad litem were present. Vernon did not appear, nor was he represented by counsel. Sharon testified. Sharon stated that Vernon ceased paying child support in November 1995 and offered exhibit 1, a copy of a printout of Vernon's child support payment history, which appears to be a copy of a court record. Sharon testified that Vernon is an alcoholic and that he is drunk most of the time.

Sharon testified further that Vernon last exercised his visitation rights in July 1995 and that Elizabeth had told her that during this visit, Vernon's girl friend's 13-year-old son was in charge of watching Elizabeth. Sharon testified also that Elizabeth said that there was nothing to eat at Vernon's house, that the only thing in Vernon's refrigerator was beer, and that Elizabeth was required to sleep in the same bed as Vernon's girl friend's 13-year-old son.

In her testimony, Sharon acknowledged that Vernon had left four or five messages on her answering machine in the last year. In the first message, left on December 1, 1995, Vernon stated that he was leaving town and told Elizabeth "to take care of herself." Sharon testified that in another message, Vernon asked them to call him, although he did not leave a phone number. Sharon testified that she does not have Vernon's phone number,

nor does she know to where he has moved. Sharon testified that Vernon last left a message in June 1996, after the petition to modify had been filed. Sharon stated that she recently changed her phone number because she was getting a lot of late night phone calls and a lot of hangups. Sharon stated that other than these phone calls, Vernon had not made any attempt to contact Elizabeth and had not sent Elizabeth any cards or gifts.

Sharon testified that in her opinion it is in Elizabeth's best interests to terminate Vernon's parental rights. She testified that she feared that Vernon would take Elizabeth away from her if he returned and that she feared that Elizabeth would be in danger and unable to take care of herself if Vernon did so.

In argument to the court, the guardian ad litem indicated that she was unsure as to whether termination of Vernon's parental rights was warranted, although she did state that Elizabeth's relationship with her mother provides Elizabeth with the stability she needs and that Elizabeth is in need of permanency and closure.

The court took the matter under advisement. In an order filed December 18, 1996, the court declined to terminate Vernon's parental rights and denied the petition to modify. The court found that clear and convincing evidence did not exist to support the finding that Vernon had abandoned Elizabeth, nor did the evidence support a finding that termination of Vernon's parental rights would be in Elizabeth's best interests. The court noted that Vernon had had very minimal contact with Elizabeth, that he had not paid child support since November 1995, and that Vernon had not seen Elizabeth since July 1995. The court noted, however, that Vernon had attempted to maintain contact with Elizabeth by calling and leaving messages. The court found that termination would be premature and that it remained to be seen whether Vernon could rehabilitate himself.

Sharon appeals.

ASSIGNMENTS OF ERROR

On appeal, Sharon contends that the court erred in determining that (1) there was insufficient evidence of abandonment to warrant terminating Vernon's parental rights, (2) there was insufficient evidence to support a finding that termination of

Vernon's parental rights was in Elizabeth's best interests, and (3) termination of Vernon's parental rights was premature.

STANDARD OF REVIEW

[1-3] In reviewing a termination of parental rights case held in the district court, an appellate court reviews the record de novo to determine whether the district court abused its discretion. *Joyce S. v. Frank S., ante* p. 23, 571 N.W.2d 801 (1997). In cases of termination of parental rights in district court, the standard of proof must be by clear and convincing evidence. *Id.* If, in a domestic relations case, a material change in circumstances has occurred, a former decree may be modified in light of those circumstances. *Id.*

ANALYSIS

Sharon argues that the evidence at trial clearly and convincingly established that Vernon had abandoned Elizabeth and that it is in Elizabeth's best interests to terminate Vernon's parental rights. She contends that termination of Vernon's parental rights is not premature.

[4] This proceeding to modify the decree to terminate Vernon's parental rights falls under § 42-364(7). As required by statute, Sharon initially made a motion pursuant to § 42-364(7), asking the district court to transfer the case to the juvenile court or to determine that the district court was a more appropriate forum. The district court found that the district court was a more appropriate forum pursuant to § 42-364(7), which provides in pertinent part: "Whenever termination of parental rights is placed in issue by the pleadings or evidence, the court shall transfer jurisdiction to a juvenile court established pursuant to the Nebraska Juvenile Code unless a showing is made that the district court is a more appropriate forum."

[5] As noted above, Sharon sought to modify the decree and terminate Vernon's parental rights. Termination of parental rights in the context of a dissolution is available under § 42-364(7), which further provides that a "court may terminate the parental rights of one or both parents after notice and hearing when the court finds such action to be in the best interests of the minor child and it appears by the evidence that one or more [conditions of a list of conditions in § 42-364(7)] exist."

In the instant case, Sharon sought to terminate Vernon's rights under § 42-364(7)(a), which allows for termination of a parent's rights if "[t]he minor child has been abandoned by one or both parents." Because § 42-364(7) only recently provided for the termination of a parent's rights in district court in the context of a domestic relations action, no appellate cases could be found in Nebraska appellate jurisprudence in which a parent's rights were terminated for abandonment under § 42-364(7)(a). Thus, we logically look to cases in which a parent's rights have been terminated for abandonment in juvenile court pursuant to the juvenile code, Neb. Rev. Stat. § 43-292(1) (Cum. Supp. 1996). See *Joyce S. v. Frank S., supra.*

[6-8] Abandonment, for purposes of determining whether termination of parental rights is warranted under § 43-292(1), has been described as a parent's intentionally withholding from a child, without just cause or excuse, the parent's presence, care, love, protection, maintenance, and opportunity for the display of parental affection for the child. *In re Interest of Theodore W.*, 4 Neb. App. 428, 545 N.W.2d 119 (1996). The question of whether a parent has abandoned a child so as to justify termination of parental rights is largely one of intent, to be determined in each case from all of the facts and circumstances. *Id.* Circumstantial evidence of intent may be used to establish abandonment for purposes of termination of parental rights. *Id.* We recognize that by statutory language under § 43-292(1), the abandonment must have existed for at least 6 months, whereas under § 42-364(7)(a), there is no minimum statutory period which must be met prior to a finding of abandonment.

[9] Under the juvenile code, to prove abandonment of a child sufficient to terminate parental rights, the evidence must clearly and convincingly show that a parent for at least 6 months has acted toward a child in a manner evidencing a subtle purpose to be rid of all parental obligations and to forgo all parental rights, together with a complete repudiation of parenthood and abandonment of parental rights and responsibilities; mere inadequacy is not the test. *In re Interest of E.G.*, 240 Neb. 373, 482 N.W.2d 17 (1992). We use the cases under the abandonment provision of the juvenile code for assistance in evaluating the present appeal.

In the instant case, Vernon had not seen Elizabeth for slightly over 6 months when Sharon filed the petition to modify on February 14, 1996. The record reflects that Vernon had not paid child support since November 1995; that he had not seen Elizabeth since July 1995; and that during this last visit, his care of Elizabeth was inadequate. Evidence from the hearing of December 3, 1996, also shows that between December 1995 and June 1996, Vernon had left four or five messages on Sharon's answering machine. At least one of those messages was left after Sharon filed her motion to modify. Based on this record, the trial court denied Sharon's petition to modify the decree to terminate Vernon's parental rights based on abandonment.

As is apparent from the trial court's order of December 18, 1996, that although the trial court found the overall circumstances troubling, the trial court found in effect that the circumstances were not necessarily irreversible and that termination of Vernon's parental rights would be premature. Given the evidence, and following our de novo review, we cannot conclude that the trial court erred in denying the motion to modify at this time. Accordingly, we affirm.

AFFIRMED.

SIEVERS, Judge, concurring.

I concur in the result, but not because I do not believe that Vernon has not abandoned his daughter—he has. His failure to provide love, nurturing, monetary support, and the most basic of contact with Elizabeth is clearly abandonment of the child. But termination of his parental rights is permanent, and although Vernon's lack of responsibility generates little compassion for him, we must also consider whether termination of his parental rights is in Elizabeth's best interests. Sharon offers no compelling reason to terminate Vernon's rights, nor does she show benefit to Elizabeth from such a termination. Sharon's fear of Vernon's taking Elizabeth seems unsubstantiated by any of his past actions. In fact, his abandonment of Elizabeth makes it seem unlikely. Absent evidence showing that termination of Vernon's parental rights is in the best interests of Elizabeth, we should not forever remove the opportunity for a lawful father-daughter relationship. Moreover, we should not free Vernon from his obligation to pay support for his child, which a termination would do.

KERRY WHIPPLE AND CAROLEE WHIPPLE, HUSBAND AND WIFE, APPELLEES, V. THE COMMERCIAL BANK OF BLUE HILL, A NEBRASKA CORPORATION, ET AL., APPELLANTS.

572 N.W.2d 797

Filed December 16, 1997. No. A-96-480.

1. **Summary Judgment: Appeal and Error:** 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. 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.
2. **Judgments: Appeal and Error.** On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts.
3. **Mortgages: Foreclosure: Real Estate: Trusts: Deeds.** A trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property.
4. **Statutes: Appeal and Error.** Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Title: Liens: Merger: Conveyances.** Merger occurs under Neb. Rev. Stat. § 76-274 (Reissue 1996) only when a person who has an interest in the fee title and an interest in a lien subsequently conveys the fee title to a third person.
6. **Mortgages: Real Estate: Merger.** Ordinarily, when one having a mortgage on real estate becomes the owner of the fee, the former estate is merged in the latter.
7. **Mortgages: Liens: Deeds.** When a mortgagee takes a deed from the record titleholder in consideration of the forgiveness of the mortgage debt with knowledge of an intervening lien, the mortgage debt is forgiven and the lien securing that debt is canceled as against the intervening lien.
8. **Banks and Banking: Presumptions.** Where a director or officer of a bank has knowledge of material facts respecting a proposed transaction, which his relations to it as representing the bank have given him, it becomes his official duty to communicate that knowledge to the bank, and he will be presumed to have done so and his knowledge will be imputed to the bank; this presumption cannot be rebutted by showing that the knowledge of such facts was not actually transmitted to the bank.
9. **Mortgages.** A mortgage is a mere security and has no efficacy if unaccompanied by a debt or obligation.

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

Steven G. Seglin and D. Bryan Wickens, of Crosby, Guenzel, Davis, Kessner & Kuester, and Ted S. Griess, of Baird &

Griess, for appellants Commercial Bank of Blue Hill and Ash Hollow Developers, Inc.

Robert J. Parker, Jr., of Seiler, Parker & Moncrief, P.C., for appellees.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

The instant case is a foreclosure action brought by Kerry Whipple and Carolee Whipple, husband and wife, against The Commercial Bank of Blue Hill (TCB) and Ash Hollow Developers, Inc. (AHDI), hereinafter referred to collectively as "the defendants." Both TCB and the Whipples had liens on a golf course owned by William and DeEtta Richards. TCB's lien was senior to that of the Whipples' when the Richardses conveyed the golf course to TCB in consideration of TCB's forgiveness of the Richardses' debt. TCB later conveyed the property to AHDI. The Whipples then brought this action to foreclose their mortgage and moved for summary judgment. The trial court concluded that under Neb. Rev. Stat. § 76-274 (Reissue 1996), TCB's lien on the property merged with the fee title when TCB conveyed the property to AHDI, leaving the Whipples' lien as first in priority. It therefore found the Whipples' mortgagee to be a first lien and granted their motion for summary judgment of foreclosure. The defendants now appeal. We conclude that merger did not occur by virtue of § 76-274 but that TCB's forgiveness of the Richardses' debt with knowledge of the Whipples' intervening lien operated to extinguish TCB's deed of trust under the common law. Thus, we affirm.

UNDISPUTED FACTS

The Whipples purchased Ash Hollow, a golf course located in Blue Hill, Nebraska, in 1987. In order to finance their purchase and a subsequent improvement, the Whipples became indebted to TCB in the amount of $97,200. On January 22, 1993, the Whipples sold Ash Hollow to the Richardses; the details of which are contained in the record. In order to finance the purchase and subsequent operation of the golf course, the Richardses borrowed $93,500 (evidenced by promissory notes

of $77,500 and $16,000) from TCB and $18,000 (evidenced by a promissory note for $18,000) from the Whipples. Both loans were secured by deeds of trust. The Whipples' deed of trust was recorded last and was intended to be inferior to that of TCB. Both deeds of trust were notarized on February 6, 1993, by Rolland K. Grandstaff, vice president of TCB.

In 1993, William Richards became mortally ill, and the Richardses faced bankruptcy. On August 6, 1993, the Richardses conveyed Ash Hollow to TCB for the stated consideration of "forgiveness of debt." The standard covenants normally used in deeds to warrant title were obliterated by asterisks being superimposed on them. The details of the transaction will be discussed later when we consider its significance. On the face of both of the Richardses' promissory notes to TCB, "THE COMMERCIAL BANK-BLUE HILL, NEBRASKA," was stamped, followed by "Forgiveness of Debt by /s/ Gerald Koepke 8-6-93."

On March 5, 1994, TCB conveyed Ash Hollow to AHDI, a corporation in which Gerald Koepke, the president and chief executive officer of TCB, was an incorporator and holder of a 25-percent interest. Koepke admitted that AHDI was formed to buy Ash Hollow from TCB. In the corporation warranty deed, TCB covenanted that it was lawfully seized of Ash Hollow and that Ash Hollow was free from encumbrances. TCB also warranted title.

The Whipples then brought this action against the defendants to foreclose on Ash Hollow. The Whipples prayed for an order declaring their lien to be first and paramount, determining the amount of the lien, and foreclosing on the property in the statutory form. The defendants then filed a cross-petition, praying that the court determine that the Whipples' deed of trust was of no value and further praying that the court quiet title to Ash Hollow in AHDI. The Whipples then moved for summary judgment. The district court concluded that pursuant to § 76-274, TCB's lien interest merged with the fee on March 5, 1994, the day that TCB conveyed Ash Hollow to AHDI. Consequently, the court concluded that TCB's lien was released, thus elevating the Whipples' lien to first in priority. The court granted the Whipples' motion for summary judgment and ordered foreclosure by the statutory procedure. The defendants now appeal.

ASSIGNMENTS OF ERROR

The defendants generally contend that the court erred in granting the Whipples' motion for summary judgment. Specifically, the defendants argue that the court erred in concluding that TCB's lien merged with the fee upon TCB's conveyance of the property to AHDI.

STANDARD 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. 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. *Schendt v. Dewey*, 252 Neb. 979, 568 N.W.2d 210 (1997).

[2] On questions of law, a reviewing court has an obligation to reach its own conclusions independent of those reached by the lower courts. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

ANALYSIS

[3] The instant case revolves around the deeds of trust issued by the Richardses to TCB and the Whipples. If an instrument is intended by the parties to be security for a debt, it is in equity, without regard to its form or name, a mortgage. *Koehn v. Koehn*, 164 Neb. 169, 81 N.W.2d 900 (1957). A trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. Neb. Rev. Stat. § 76-1005 (Reissue 1996). See, also, *PSB Credit Servs. v. Rich*, 4 Neb. App. 860, 552 N.W.2d 58 (1996). We shall therefore apply the law applicable to mortgages in considering the issues of this case. We first consider the statute that the trial court found to be controlling.

Merger Under § 76-274.

The trial court concluded that § 76-274 caused a merger of the title with TCB's lien when it conveyed Ash Hollow to AHDI

on March 5, 1994. We do not agree. Section 76-274 provides as follows:

> Whenever an interest in the fee title to any real estate in this state and an interest in a mortgage or other lien affecting the same interest shall become vested in the same person, and such person subsequently conveys such fee title by deed, unless a contrary intent is expressed by the terms of such deed, it shall be conclusively presumed in favor of subsequent purchasers and encumbrancers for value and without notice, that such lien interest merged with the fee and was conveyed by such deed and that such lien was thereby released from the fee interest so conveyed.

[4,5] Statutory language is to be given its plain and ordinary meaning, and an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Metropolitan Utilities Dist. v. Balka*, 252 Neb. 172, 560 N.W.2d 795 (1997). Despite the Whipples' protestations to the contrary, they are not subsequent encumbrancers. The statute is clear—merger occurs under it only when a person who has an interest in the fee title and an interest in a lien subsequently conveys the fee title to a third person. Thus, the action bringing about the merger is the subsequent conveyance, which in this case was TCB's conveyance to AHDI and not, as the Whipples contend, the fact that they recorded their lien after TCB recorded its lien. AHDI is a subsequent purchaser under § 76-274, but it was not without notice of TCB's lien. It is undisputed that at the time TCB conveyed the property to AHDI, Koepke, who was both president of TCB and owner of a 25-percent interest in AHDI, had actual notice of TCB's lien, as well as the Whipples' lien. Therefore, § 76-274 cannot be used for purposes of merger in the instant case.

Merger Under Common Law.

In the instant case, TCB held a first lien on Ash Hollow and later acquired fee title to it. As a result of the transactions involved in this case, both parties have devoted the majority of their briefs to a discussion of the merger doctrine in the context of mortgages. This is not without a basis. It has been a long-standing proposition of mortgage law in Nebraska that ordinar-

ily, when a mortgagee becomes the owner of the fee, the former estate is merged in the latter. *Wietzki v. Wietzki*, 231 Neb. 551, 437 N.W.2d 449 (1989); *Overland-Wolf, Inc. v. Koory*, 183 Neb. 611, 162 N.W.2d 889 (1968); *Edney v. Jensen*, 116 Neb. 242, 216 N.W. 812 (1927). The question presented in this case is what the effect of an intervening lien has on the application of that doctrine.

The merger doctrine, as applied to mortgages, has generally been described as follows:

> Ordinarily, a transfer of the interest of the mortgagor in mortgaged property to the mortgagee operates as a merger of the two estates, which effects a discharge of the mortgage and satisfaction of the debt . . . . This rule, however, is subject to exceptions, and courts of equity will not follow it where justice requires the lien to be preserved in order to protect a right.

55 Am. Jur. 2d *Mortgages* § 1340 at 734 (1996).

General authority recognizes that the question of merger is primarily a question of intention and that merger will not take place where there is an intention to keep the mortgage alive or, in the absence of a showing of an intention to the contrary, where the mortgage is necessary to protect the mortgagee from intervening claims or liens of third persons. *Id.*, §§ 1342 and 1345.

> In this regard, it has been held that an intent to effect a merger is indicated where, after acquiring the equity, the mortgagee conveys the property to an unrelated party, constituting convincing evidence that the mortgagee intended to effect a merger so that the complete fee then could be transferred to the third party.

Id., § 1345 at 737-38. This portion of the merger doctrine appears to be embodied in § 76-274, which we have already dismissed as inapplicable to the instant case.

General authority further recognizes that the conveyance of the mortgaged property to the mortgagee in satisfaction of the mortgage debt does not necessarily operate as a merger when the mortgagee is ignorant of the junior lien. "A different result has, however, been reached where the mortgage was discharged with knowledge of the intervening lien . . . ." 55 Am. Jur. 2d, *supra*, § 1350 at 741.

[6] These general principles of merger comport with Nebraska's view:

> "Ordinarily, when one having a mortgage on real estate becomes the owner of the fee the former estate is merged in the latter.
>
> "But the mortgagee may in such case keep his mortgage alive when it is essential to his security against an intervening title. If there was no expression of his intention in relation to the matter at the time he acquired the equity of redemption, it will be presumed, in the absence of circumstances indicating a contrary purpose, that he intended to do that which would prove most advantageous to himself."
>
> . . . .
>
> "It is presumed, as [a] matter of law, that the party must have intended to keep on foot his mortgage title, when it was essential to his security against an intervening title, or for other purposes of security; and this presumption applies although the parties, through ignorance of such intervening title, or through inadvertence, have actually discharged the mortgage and canceled the notes, and really intended to extinguish them."

Edney v. Jensen, 116 Neb. at 247, 216 N.W. at 814. See, also, *First State Savings Bank v. Martin*, 131 Neb. 403, 268 N.W. 281 (1936).

In contrast to these well-established propositions, the drafters of the Restatement (Third) of Property § 8.5 (1997) have concluded that the merger doctrine is inapplicable to mortgages. At the same time, however, the drafters have recognized that courts continue to apply the doctrine in this context:

> As applied in the mortgage setting, the theory holds that when a mortgagee's interest and a fee title become owned by the same person, the lesser estate, the mortgage, merges into the greater, the fee, and is extinguished unless the holder intends a contrary result. This extension of the merger principle has created one of the most complex, confusing, and frequently litigated areas of mortgage law.

Id., § 8.5, comment *a.* at 608. The case at hand is an example of that complexity.

The drafters of the Restatement present the reader with two illustrations that resolve the issues presented in the instant case

without resorting to the merger doctrine. See *Id.*, § 8.5, comment *b.*, illustrations 1 and 6. The basic facts underlying both illustrations are that the senior of two mortgagees takes a deed to the mortgaged property from the mortgagor in exchange for which the senior mortgagee releases the mortgagor from liability. In the illustration where the senior mortgagee had no knowledge of the second or intervening lien at the time of the release, the senior mortgagee could foreclose on the property. However, as in the illustration noted, where the senior mortgagee did have knowledge of the intervening lien at the time of the release, the senior mortgagee could not foreclose on the property.

Clearly, the decisive factor was the senior mortgagee's knowledge of intervening liens at the time it accepted the deed and released the mortgagor. It was also the decisive factor in *Edney v. Jensen*, 116 Neb. 242, 216 N.W. 812 (1927), and *First State Savings Bank v. Martin, supra*, although it was decided in the context of the merger doctrine. In *Edney*, the senior mortgagee, who had two mortgages on certain property, took a deed to that land from the mortgagor and, in exchange, executed releases of the two mortgages. Unbeknownst to the senior mortgagee, the mortgagor had given a mortgage on the same property to a third party. After discovering the third party's mortgage, the senior mortgagee brought suit to foreclose his two mortgages. The trial court found that the senior mortgagee had no knowledge of the third party's mortgage when he executed the releases, and consequently, it granted the senior mortgagee's petition of foreclosure. In affirming the trial court's judgment, the Nebraska Supreme Court stated that the only factual question of consequence was whether the senior mortgagee had actual knowledge of the third party's mortgage at the time that he consummated the settlement with the mortgagor. The *Edney* court resolved that fact question in favor of the senior mortgagee.

In *First State Savings Bank v. Martin, supra*, the bank took a deed in satisfaction of a mortgage, but the abstractor it hired to check the title failed to discover a judgment that was an intervening lien. After so discovering, the bank filed an action for reinstatement of its lien and then for foreclosure. The judgment holder argued that the bank was negligent in not learning of the judgment lien. The Nebraska Supreme Court rejected that argu-

ment and held that the bank's lack of actual knowledge was sufficient. The court concluded that the bank had discharged its lien under a mistake of fact—that the intention of the bank was not to subject its lien to the lien of the judgment creditor. Thus, the court affirmed the trial court's order reinstating the lien and decreeing foreclosure.

[7] We have found no cases where the senior mortgagee was found to have had actual knowledge of an intervening lien. However, in both *Edney* and *First State Savings Bank*, the Nebraska Supreme Court necessarily implied that the senior mortgagee's knowledge of any intervening liens at the time of the release or forgiveness of debt is the crucial factor. Thus, we conclude that there is a corollary to the general rule that lack of knowledge of an intervening lien prevents merger: When a mortgagee takes a deed from the record titleholder in consideration of the forgiveness of the mortgage debt with knowledge of an intervening lien, the mortgage debt is forgiven and the lien securing that debt is canceled as against the intervening lien.

We now review the evidence to determine if there is a genuine issue of material fact as to TCB's actual knowledge of the Whipples' lien when TCB took the deed in consideration for its forgiveness of their obligation. In her deposition, DeEtta Richards testified that she and her husband met with Koepke, president and chief executive officer of TCB, on the evening of August 6, 1993, and made, executed, and acknowledged the deed to TCB at that time for forgiveness of their debt. She testified that "[h]e told us that that gave them the right to take and sell the property and to handle all of the dealings with it; that we were out of it; that it was a forgiveness of debt, we didn't owe anybody on that property." She also testified that when Koepke asked them to sign a warranty deed they questioned how they could do so in view of the "second mortgage." According to DeEtta Richards, her husband asked if they could put in the deed that they still owed the Whipples, and Koepke said that the bank's attorneys would take care of that. When she mentioned that she would go and tell the Whipples of the transaction, Koepke asked her not to and told her that he would contact them. If believed, this evidence would clearly establish that the president and chief executive officer of TCB knew of the

existence of the Whipples' lien when he made the deal on behalf of TCB.

[8] In his deposition, Koepke denied that the Whipples' lien had been discussed at the meeting with the Richardses. Without more, this would create an issue of fact that would prevent summary judgment. However, Koepke did admit that Grandstaff, vice president of the bank and a member of the board of directors, had acknowledged the deed of trust to the Whipples and knew about the Whipples-Richardses' transaction. Additionally, Grandstaff notarized the deed of trust to the Whipples.

> [W]here a director or officer has knowledge of material facts respecting a proposed transaction, which his relations to it as representing the bank have given him, it becomes his official duty to communicate that knowledge to the bank, and he will be presumed to have done so and his knowledge will be imputed to the bank, and this presumption cannot be rebutted by showing that the knowledge of such facts was not actually transmitted to the bank[.]

Professional Recruiters v. Oliver, 235 Neb. 508, 517, 456 N.W.2d 103, 108-09 (1990), citing 10 Am. Jur. 2d *Banks* § 163 (1963). There is no doubt that between Koepke and Grandstaff, they had actual knowledge of the Whipples' intervening lien. Clearly then, TCB had actual knowledge of the Whipples' intervening lien. The evidence conclusively establishes that TCB did not forgive the promissory notes inadvertently.

[9] Consequently, TCB's forgiveness of the Richardses' debt on August 6, 1993, was effective. It has long been the rule in Nebraska that a mortgage is a mere security and has no efficacy if unaccompanied by a debt or obligation. *County of Keith v. Fuller*, 234 Neb. 518, 452 N.W.2d 25 (1990); *Columbus Land, Loan & Bldg. Assn. v. Wolken*, 146 Neb. 684, 21 N.W.2d 418 (1946). As a result, the lien of the deed of trust ceased to exist, and the Whipples' mortgage was elevated to first in priority. There is no genuine issue of fact, and the Whipples are therefore entitled to a determination that their lien is a first lien. Neither party questions any other determination embodied in the court's summary judgment of foreclosure. We therefore affirm.

AFFIRMED.

F & J ENTERPRISES, INC., A NEBRASKA CORPORATION, APPELLEE, V. JAMES W. DEMONTIGNY AND BETTY JANE DEMONTIGNY, APPELLANTS.

573 N.W. 2d 153

Filed December 16, 1997. No. A-96-623.

1. **Adverse Possession: Proof: Time.** One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession under claim of ownership for the full 10-year statutory period.
2. **Adverse Possession: Intent.** Ordinarily, the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession.
3. **Adverse Possession: Notice: Time.** When a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered, and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete.
4. **Adverse Possession: Intent.** It is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character.
5. **Adverse Possession: Proof.** Actual assertion of a claim of ownership is not necessary to prove adverse possession.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded with directions.

Dixon G. Adams, of Adams and Sullivan, for appellants.

James E. Lang, of Laughlin, Peterson & Lang, for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

MUES, Judge.

INTRODUCTION

F & J Enterprises, Inc., brought action against James W. DeMontigny and Betty Jane DeMontigny to quiet title to certain real property located in Sarpy County, Nebraska. The DeMontignys filed a cross-petition, alleging that they were the owners of the property in dispute by virtue of having adversely possessed the property for a period of more than 10 years. The trial court found that the DeMontignys failed to prove that they had adversely possessed the property under a claim of ownership and quieted title in F & J Enterprises. The DeMontignys now appeal that judgment. For the reasons set forth below, we reverse, and remand with directions.

BACKGROUND

In 1963, the DeMontignys bought 2 acres of land from Max Pixel. At the time of the purchase, Pixel also owned the property to the south and the west of the DeMontignys (hereinafter Pixel property). Pixel's house was located to the south of the DeMontignys' property. The property now in dispute, 1 acre of land, is on the southern border of the DeMontignys' property and is situated between the DeMontignys' property and the land Pixel owned. A visual representation will help explain further facts:

X - the DeMontignys' House

A B

N

C D

X - Pixel's House

The area within points A, B, C, and D is the acre which is the subject of this quiet title action. Points A and B are on the southern border of the DeMontignys' property. At the time the DeMontignys purchased their 2 acres, the disputed acre was fenced on three sides. There was no fence between points A and B. The DeMontignys fenced that area and put gates in. The DeMontignys then grazed horses on the disputed acre. James DeMontigny testified that he did not obtain Pixel's permission to erect the fence or graze his horses and that he did not pay Pixel rent on the property.

During the time Pixel lived on the property, he did not use the disputed acre and never objected to the fact that the DeMontignys were grazing their horses on it. Pixel lived on his property until around 1969, when he rented the farmhouse to Vern Echternach. Echternach testified that someone else rented the farm ground.

Echternach lived in Pixel's farmhouse for approximately 16 or 17 years. During this time, Echternach kept a horse on the property, but he did not graze it on the disputed acre. Echternach testified that for as long as he has known the DeMontignys, they are the only ones who have occupied the disputed acre.

When Echternach moved out of the farmhouse, Fred Citta moved in and rented both the house and some of the land. Prior

to renting the house, Citta had rented and farmed different parcels of land in the area for approximately 15 years. Citta testified that he kept some sheep on the property, but he did not use the disputed acre, and that, at one point in time, he fixed one of the fences to keep his sheep out of that area. Citta never observed anyone besides the DeMontignys use the disputed acre. Citta testified that the Pixel property had several owners during the time he was renting.

In 1990, Frank Krejci, a real estate developer, purchased the Pixel property. Krejci subsequently transferred the property to his corporation, the plaintiff, F & J Enterprises, and planned to develop the property into an industrial park. In the spring of 1995, Krejci commenced grading the Pixel property and requested that the DeMontignys remove themselves from the disputed acre. Krejci testified that at this point, James DeMontigny informed him that Pixel had given the property to the DeMontignys. James DeMontigny testified that he could not recall telling Krejci this.

When the DeMontignys refused to vacate the disputed acre, F & J Enterprises filed the present lawsuit to quiet title to the property. The DeMontignys filed a cross-petition, alleging that they were the owners of the property by reason of adverse possession. A bench trial was held April 25, 1996. The trial court determined that the DeMontignys had been given permission to graze their horses on the property. The court further found that the DeMontignys failed to prove they held the land under a claim of ownership. The court accordingly held that the DeMontignys had failed to prove adverse possession and entered judgment in favor of F & J Enterprises. The DeMontignys now appeal that decision.

ASSIGNMENT OF ERROR

The DeMontignys' six assigned errors can be restated as alleging that the trial court erred in quieting title in F & J Enterprises.

STANDARD OF REVIEW

A quiet title action sounds in equity. *Gustin v. Scheele,* 250 Neb. 269, 549 N.W.2d 135 (1996); *Poppleton v. Village Realty Co.*, 248 Neb. 353, 535 N.W.2d 400 (1995).

In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, 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. *Siffring Farms, Inc. v. Juranek*, 252 Neb. 150, 561 N.W.2d 203 (1997); *Gustin v. Scheele, supra.*

DISCUSSION

In finding that the DeMontignys had failed to prove the necessary elements of adverse possession, the trial court stated:

> It appears that the [DeMontignys] owned a tract of land to the north of the questioned property, purchased in about 1963. The [DeMontignys] were given permission by the owner of the property in question to graze their horses on the property shortly thereafter their purchase and continued to use the property up to the time of the trial.
>
> There is no question that title to the property is in [F & J Enterprises]. In order for the [DeMontignys] to obtain title by adverse possession, they must show by the preponderance of the evidence that they were in actual, continuous exclusive, notorious and adverse possession under a claim of ownership for a full 10 year statutory period. Thornburg v. Haecke[r,] 243 Neb. 693, 502 N[.]W[.]2d 434 (1993).
>
> The [DeMontignys] used the land in question for numerous years, well over the 10 year period. They repaired and replaced fences on the property to keep the horses in. No one bothered them in the use of this property. They did not pay the taxes on the property. The [DeMontignys] fulfilled all the requisites except the evidence does not show adverse use under a claim of ownership. See Bergl[u]nd v. Sisler, 210 Neb. 258[,] 313 N[.]W[.]2d 679 (1981).

If It Looks Like a Duck and Walks Like a Duck . . .

[1-3] One who claims title by adverse possession must prove by a preponderance of the evidence that he or she has been in actual, continuous, exclusive, notorious, and adverse possession

under claim of ownership for the full 10-year statutory period. *Thornburg v. Haecker*, 243 Neb. 693, 502 N.W.2d 434 (1993).

> " 'Claim of right or of ownership mean hostile and these terms describe the same element of adverse possession. Ordinarily the intent with which the occupier possesses the land can best be determined by his acts and the nature of his possession. The statute of limitations will not run in favor of an occupant of real estate, unless the occupancy and possession are adverse to the true owner and with the intent and purpose of the occupant to assert his ownership of the property.' "

Id. at 699, 502 N.W.2d at 439.

> [A]dverse possession is founded upon the intent with which the occupant held possession and can best be determined by his acts. . . . " 'It is the nature of the hostile possession that constitutes the warning, not the intent of the claimant when he takes possession. When, therefore, a claimant occupies the land of another by actual, open, exclusive, and continuous possession, the owner is placed on notice that his ownership is endangered and unless he takes proper action within 10 years to protect himself, he is barred from action thereafter and the title of the claimant is complete.' "

Nebraska State Bank v. Gaddis, 208 Neb. 136, 140-41, 302 N.W.2d 686, 689 (1981).

> "It can readily be seen that the intent with which the claimant first took possession of the disputed tract is not ordinarily of too much significance. The title of the true owner is lost by his inaction. It would seem, therefore, that when the possession of the land of another, no matter what the intention may have been in making the first entry, amounts to that which the law deems as adverse to the true owner and such possession continues for the statutory period of limitation of 10 years, the adverse holding ripens into ownership in the absence of explanatory circumstances affirmatively showing the contrary such as occupancy under a lease, an easement, or a permissive use. . . ."

Svoboda v. Johnson, 204 Neb. 57, 65, 281 N.W.2d 892, 898 (1979) (quoting *Purdum v. Sherman*, 163 Neb. 889, 81 N.W.2d

331 (1957)). See, also, *Dugan v. Jensen*, 244 Neb. 937, 942, 510 N.W.2d 313, 317 (1994) (observing "[g]enerally, if the occupier's physical actions on the land constitute visible and conspicuous evidence of the possession and use of the land, such acts will be sufficient to establish that the possession was actual and notorious"); *Barnes v. Milligan*, 196 Neb. 50, 241 N.W.2d 508 (1976).

Nebraska State Bank v. Gaddis, supra, was a boundary dispute case in which the defendant and her former husband took possession of land under the mistaken belief that the land was a part of their property. The trial court found that the defendant's former husband testified that he never intended to occupy more land than was purchased; that no open claim was made to the disputed tract; and that the record was devoid of any evidence tending to prove that the defendant possessed the disputed tract adversely, exclusively, notoriously, or actually. Accordingly, the trial court quieted title in the plaintiff. In reversing the decision of the trial court, the Nebraska Supreme Court observed:

> The record in the case now before us establishes that the defendant and her husband appropriated and used the disputed strip as their own, to the exclusion of all others. Their acts establish their intent and a claim of ownership which was adverse to the plaintiff. Adverse possession does not depend upon the remote motivations or purposes of the occupant nor upon whether his motivation is guilty or innocent. The evidence is uncontradicted that no one ever interfered with defendant's open, exclusive, and continuous possession and use of the disputed strip from 1955 until the plaintiff's contractor attempted to enter on the property in 1978.

208 Neb. at 141, 302 N.W.2d at 689.

Similarly, in the present case, the DeMontignys have been in actual, open, exclusive, and continuous possession of the disputed property for more than 30 years. The DeMontignys kept their horses on the land, repaired the fences, and mowed the grass. The DeMontignys never obtained permission to use the disputed acre, nor did they ever pay anyone rent. From 1963 until 1995, when Krejci asked the DeMontignys to remove themselves from the disputed acre, no one interfered with the

DeMontignys' use of the property. Accordingly, in the "absence of any explanatory circumstances," the DeMontignys' adverse holding has ripened into ownership. The presumption of adverse use and claim of right prevails unless it is overcome by a preponderance of the evidence. See, e.g., *Svoboda v. Johnson*, *supra*.

Actions Speak Louder Than Words.

F & J Enterprises does not take issue with this; however, F & J Enterprises argues, and the trial court found, that the DeMontignys did not occupy the land under a claim of ownership. In support of its position, F & J Enterprises relies extensively on the following testimony of James DeMontigny elicited on cross-examination:

> Q. . . . Isn't it true, sir, that you have never made a claim of ownership to this property to anyone?
>
> A. No.
>
> . . . .
>
> Q. You have never informed anyone or told anyone that this one acre in question is your property?
>
> A. No.
>
> . . . .
>
> Q. Never made a claim of ownership to this property, correct?
>
> A. No.
>
> Q. Okay. When was the first time that you have claimed any interest in this property?
>
> A. Well, after they started developing it, you know, and I was losing ground there pretty fast, and I had — I was informed that I could put a claim on the property, and so I did.
>
> Q. Okay. Who informed you you could put a claim on the property?
>
> A. Well, there was — I talked to people in the courthouse and I talked to different attorneys and they said the same thing.
>
> . . . .
>
> Q. Okay. Prior to . . . 1995, isn't it true that you never claimed any interest in this property, —

A. No.

Q. — correct?

You never claimed any interest in the property, is that correct?

A. I just used it. I never claimed it, no.

Q. Never claimed ownership, correct?

A. Pardon?

Q. You never claimed ownership to this property, correct?

A. No.

Q. You were just using the property?

A. That's right.

Relying on *Hallowell v. Borchers,* 150 Neb. 322, 34 N.W.2d 404 (1948), the DeMontignys contend that "[w]ith reference to the testimony of the [DeMontignys] that they never made a claim of ownership to the one acre tract, the cases in Nebraska make it clear that not much importance has been placed upon such testimony in adverse possession cases." Brief for appellant at 15.

In *Hallowell,* the plaintiffs had purchased certain real property and mistakenly believed that some adjoining land, the disputed property, was within their property line. The plaintiffs plowed and cultivated this land, and the persons cultivating the adjoining land stopped planting and plowing at the claimed boundary lines. The plaintiffs subsequently erected a chicken house and a fence which enclosed a portion of the disputed land. The plaintiffs also planted trees along the claimed boundary line. Several witnesses testified that when friends visited, the plaintiffs showed them the boundaries of their land, inclusive of the disputed property. Some 15 years later, a survey was done and the plaintiffs learned that the true boundary lines did not include the disputed property. Both of the plaintiffs testified that prior to the survey, they believed that the disputed property was part of their purchased property.

After discovering that the plaintiffs had been using their land, the defendants informed the plaintiffs that the defendants were going to fence the property and suggested that if the plaintiffs had any trees to save, they needed to transplant them. The defendants further informed the plaintiffs that their chicken-

yard fence was on the defendants' property. The plaintiffs moved the fence.

The plaintiffs subsequently consulted with counsel and put the fence back in its original position. Counsel for the plaintiffs wrote the defendants a letter informing them that they had trespassed on the plaintiffs' land and caused damage thereon and requesting that they refrain from doing so in the future.

[4] The defendants ignored this letter and cut down some of the plaintiffs' trees in preparation for the construction of their fence. The plaintiffs then brought suit to quiet title. The trial court quieted title in favor of the plaintiffs, and the defendants appealed. In affirming the decision of the trial court, the Supreme Court stated:

> With reference to the testimony of the defendants to the effect that the plaintiffs made no claim to any other land than to the true boundary line, and other evidence of similar import heretofore appearing in the opinion, we might well add that it is clear that *not too much importance should be attached to what an occupant may claim on the witness stand* on this point, particularly when it is apparent that his testimony is altogether inconsistent with his acts and conduct during the period of his possession. Any honest witness, unless coached by counsel, would be likely to answer a question as to whether he claimed more than to the true boundary in the negative, and would not be likely to think of qualifying it by stating that the true boundary of which he speaks is the boundary as appears to him to be the true one. Hence, while we do not want to go so far as to hold that such testimony should not be taken into consideration in determining the true facts of the case, it is clear that *to have a case depend entirely upon what might become a mere verbal quibble is dangerous and subversive of rights.*

(Emphasis supplied.) 150 Neb. at 333, 34 N.W.2d at 410.

> "In other words, it is the visible and adverse possession, with an intention to possess land occupied under a belief that it is the possessor's own, that constitutes its adverse character, and not the remote view or belief of the possessor. Or, as said in 1 R. C. L. 733, 'the mere fact of posses-

> sion is allowed to override the intention; and it is held that a possession beyond the true boundary lines, irrespective of the intention with which it was taken, becomes adverse.'"

150 Neb. at 334, 34 N.W.2d at 411.

Similarly, in the present case, we do not believe that "too much importance" can be attributed to James DeMontigny's testimony that he "made" no claims of ownership to this land during the timeframe in which he possessed it. We reach this conclusion for several reasons. First, it is not altogether clear from that testimony just exactly how James DeMontigny interpreted the "making" of a claim or the "claiming" of ownership as those terms were used in the initial questioning. However, his later answers provide some insight. When asked to define the first time that he had "claimed" any interest in the property, James DeMontigny responded: "Well, after they started developing it, you know, and I was losing ground there pretty fast, and I had — I was informed that I could put a claim on the property, and so I did." When he was again asked to confirm that he "never claimed any interest in the property," he responded, "I just used it. I never claimed it, no." We believe these answers are strongly suggestive that, in James DeMontigny's mind, the *making* of a claim of ownership or the *claiming* of ownership involved some form of legal event such as the filing of a document, the placing of a monument, or the like. We believe this is precisely the type of "verbal quibble" that *Hallowell v. Borchers*, 150 Neb. 322, 34 N.W.2d 404 (1948), cautions not be entirely depended upon in resolving the "true facts of the case." In reality, the issue is not whether the DeMontignys *made* a claim, but whether they occupied the land with the intention of claiming ownership of it.

[5] Second, we decline to place overriding import on James DeMontigny's words because it is apparent that his testimony is altogether inconsistent with his acts and conduct during the period of his possession. The DeMontignys' actions were consistent with those of owners. They maintained the fences, mowed the property, grazed their horses, and did not pay rent on the property or obtain anyone's permission to use the property. According to Krejci, when he challenged the DeMontignys'

ownership of the property, James DeMontigny informed Krejci that Pixel had given the property to the DeMontignys and that the DeMontignys owned the property. Prior to this time, there is no evidence that anyone ever challenged the DeMontignys' ownership of the property so as to prompt any overt "claim" of ownership to the property. The one and only time his ownership was challenged, James DeMontigny asserted his ownership positively and resolutely. Actual assertion of a claim of ownership is not necessary to prove adverse possession. See, e.g., *Nebraska State Bank v. Gaddis*, 208 Neb. 136, 302 N.W.2d 686 (1981).

F & J Enterprises urges us to conclude that the DeMontignys' acts show they did not occupy the land with the intent to claim ownership because, on several occasions, surveyors were on the land and the DeMontignys did not object to their presence or question or approach them in any fashion and because, when the Metropolitan Utilities District (MUD) installed a new waterline, the DeMontignys did not inform MUD employees that the DeMontignys owned the property. We do not find either event to be particularly persuasive on the issue. Although James DeMontigny admitted that he saw the surveyors on the land, there is no evidence that he felt ownership of it was threatened by their presence. While some may react to the presence of strangers on their property by threats, claims of trespass, and other verbal or physical protestation, we are not prepared to say that civility in the face of such intrusion is necessarily inconsistent with a claim of ownership. To the contrary, it may well be viewed as a sign of assured confidence that such claim of ownership is so open and obvious that verbalizing it would be redundant. The DeMontignys' response to the MUD employees' presence is a good example. At that time, the present lawsuit had already been filed and the DeMontignys were clearly claiming ownership, yet they did not protest MUD's presence.

CONCLUSION

The DeMontignys proved that they were in actual, open, exclusive, and notorious possession for more than 30 years. The burden then fell on F & J Enterprises to prove by a preponderance of the evidence that the DeMontignys' use was not

adverse. F & J Enterprises failed to meet this burden. Accordingly, the trial court should have quieted title in the DeMontignys. The judgment of the trial court is reversed, and this cause is remanded with directions that the trial court enter judgment in favor of the DeMontignys on their cross-petition.

REVERSED AND REMANDED WITH DIRECTIONS.

JOHN CAVE, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES, APPELLEE.

572 N.W.2d 420

Filed December 16, 1997. No. A-96-768.

1. **Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court in an appeal from a prison disciplinary case may be reversed, vacated, or modified on appeal for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court, where competent evidence supports those findings.
3. **Prisoners: Intent: Circumstantial Evidence: Proof.** In issues involved in prison disciplinary cases, the existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Paul D. Boross and, on brief, John Cave for appellant.

Don Stenberg, Attorney General, and Marie C. Pawol for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

MILLER-LERMAN, Chief Judge.

John Cave appeals the order of the district court for Lancaster County affirming the Nebraska Department of Correctional Services (DCS) Appeals Board's affirmance of a prison disciplinary committee finding that Cave had violated prison rules prohibiting the possession of a weapon or an article to be used as a weapon. Cave claims that there was insufficient evidence that the article found in his possession, an

X-ACTO blade, was to be used as a weapon. For the reasons recited below, we affirm.

BACKGROUND

On October 20, 1995, a DCS employee conducted a search of Cave's prison cell at the Nebraska State Penitentiary and discovered the blade taped to the inside of the battery compartment of a radio/cassette player. Cave admitted that the radio was his and that he had hidden the blade.

Following a hearing in front of the prison disciplinary committee, Cave was found guilty of violating DCS rules, which list as an offense "[p]ossession or manufacture of any weapon or article to be used as a weapon." See 68 Neb. Admin. Code, ch. 5, § 5(I)[D]. Cave stated that he had placed the blade inside the radio because he planned to use it in repairing the radio, which had earlier been stolen from him. Cave admitted that he should not have had the blade in his cell because it was unauthorized but argued that he had no intention of using the blade as a weapon. The disciplinary committee imposed a penalty of 15 days' loss of good time and 30 days' disciplinary segregation.

Cave appealed the decision of the disciplinary committee to the appeals board. On December 7, 1995, a hearing was held and the appeals board affirmed the decision of the disciplinary committee, finding that some competent, material, and substantial evidence existed to support the disciplinary committee's finding of guilt. The appeals board stated, in part, that the disciplinary committee "chose to consider this blade as an item which could be used as a weapon, [and] the Appeals Board certainly finds that to be a reasonable interpretation."

On January 4, 1996, Cave appealed to the district court for Lancaster County. After a de novo review pursuant to Neb. Rev. Stat. § 84-917 (Reissue 1994), the district court affirmed without comment the appeals board's decision. Cave appeals to this court.

ASSIGNMENT OF ERROR

Cave's sole assignment of error is that the district court erred in affirming the decision of the appeals board because there was insufficient evidence to sustain a finding that Cave had violated chapter 5, § 5(I)[D], of the DCS rules.

STANDARD OF REVIEW

[1,2] A judgment rendered or final order made by the district court in an appeal from a prison disciplinary case may be reversed, vacated, or modified on appeal for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Reissue 1994); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court, where competent evidence supports those findings. *Lynch, supra.*

ANALYSIS

Cave's argument rests on the interpretation of chapter 5, § 5(I)[D]. Cave claims that the appeals board erred in concluding that he violated chapter 5, § 5(I)[D], because, according to the appeals board, the disciplinary committee had found that the blade " '**could be** used as a weapon,' " whereas the prison rule forbids items " '**to be** used as a weapon.' " Brief for appellant at 13.

A review of the record shows that the disciplinary committee action sheet states that the "committee finds [Cave] guilty of possession of weapon." As noted above, the appeals board upheld the disciplinary committee's finding, stating that "[t]he Committee chose to consider this blade as an item which could be used as a weapon, [and] the Appeals Board certainly finds that to be a reasonable interpretation."

The record reflects that Cave acknowledged that the blade was in his possession and that he kept the blade concealed because he knew such possession was against the rules. Notwithstanding this court's standard of review for errors appearing on the record, Cave, in effect, asks this court to substitute a finding of fact that in this case the blade was not a weapon. Given our standard of review and the undisputed factual record, we decline to do so.

[3] In the context of a criminal conviction for carrying a concealed weapon, the Nebraska Supreme Court has held that the existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence. *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). We logically

extend to issues involved in prison disciplinary cases the principle found in the criminal cases that the existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence.

In this case, Cave's own testimony establishes his knowledge that possession of the blade was forbidden and that he knew his possession of it could be viewed as not innocent. The fact finder is not required to accept Cave's explanation that he did not intend to use the blade as a weapon or his explanation as to why it was in his possession. See *State v. Kanger*, 215 Neb. 128, 337 N.W.2d 422 (1983) (holding that in context of prison environment, to conclude that possession of homemade knife in defendant's sock did not constitute carrying concealed weapon would ignore reality). See, also, *State v. Conklin*, 249 Neb. 727, 545 N.W.2d 101 (1996) (holding that there was sufficient evidence to convict defendant of carrying concealed weapon notwithstanding defendant's claim that he had just left work and that knife found in his pocket was used to open packages of meat at his place of employment).

For obvious reasons, Cave was not authorized to possess the blade in his cell. A sharp instrument such as the blade could easily be used to injure other prisoners or DCS employees. The disciplinary committee clearly inferred from Cave's actions in concealing the blade that he knew it was an article to be used as a weapon and, therefore, a violation of chapter 5, § 5(I)[D]. Although the appeals board characterized the disciplinary committee's finding as that Cave possessed "an item which could be used as a weapon" instead of using the language of chapter 5, § 5(I)[D], which forbids possession of "any weapon or article to be used as a weapon," it is nevertheless clear that the appeals board affirmed the disciplinary committee's conclusion that Cave possessed an article to be used as a weapon. The district court's subsequent evident rejection of Cave's argument and affirmance of the appeals board's decision was not error.

Finding no errors on the record, we affirm the decision of the district court.

AFFIRMED.

KEITH D. REDFIELD, APPELLEE, V.
DEBORAH S. REDFIELD, APPELLANT.
572 N.W.2d 422

Filed December 16, 1997. No. A-96-1248.

1. **Equity: Appeal and Error.** In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of that of the trial court.
2. **Child Support.** Child support payments become vested in the payee as they accrue, and thus, courts are without authority to reduce the amounts of such accrued payments.
3. **Judgments: Proof.** A district court may, on motion and satisfactory proof that a judgment has been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.

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

Douglas A. Davidson, of Brooks & Green, P.C., for appellant.

Arlan G. Wine for appellee.

SIEVERS, MUES, and INBODY, Judges.

INBODY, Judge.

INTRODUCTION

Deborah S. Redfield, now known as Deborah R. Witt, appeals an order of the Hitchcock County District Court awarding Keith D. Redfield a $6,960 credit on his child support obligation. For the reasons set forth herein, we affirm the court's decision.

STATEMENT OF FACTS

On March 19, 1984, a decree was entered dissolving the marriage of Deborah and Keith. Keith was granted custody of the parties' three minor children: Mitchell, born July 10, 1978; Timothy, born August 2, 1980; and Chancellor, born October 12, 1981. On December 31, 1987, an order was entered modifying the dissolution decree by granting physical custody of the minor children to Deborah with legal custody of the children retained by the court. Keith was ordered to pay $240 monthly in child support ($80 per child per month).

On November 28, 1995, Keith filed a motion to modify the court's order with respect to child support and custody. An amended motion was filed on August 7, 1996, in which Keith sought custody of the minor children and a child support award from Deborah. Additionally, Keith requested that retroactive amendments be made to the custodial and support orders due to changes which had occurred since the 1987 court order. On October 9, 1996, Deborah filed an application for modification of support and visitation and a motion for an order to show cause why Keith should not be held in contempt for failure to pay child support.

A hearing on the application for modification and the motion for an order to show cause why Keith should not be held in contempt was held on November 5, 1996. At the hearing, evidence was adduced that, in December 1992, Chancellor and Timothy left Deborah's custody and control and went to live with Keith. During this time, Chancellor was not living with Keith every day, and Keith testified that Chancellor went "back home" periodically and sometimes stayed with Collie McVickers or Sarah Witt, who, it appears, are relatives of Deborah's residing in Palisade, Nebraska. However, Keith testified that he provided the boys' financial support during the time that they lived with him. Deborah testified that she provided clothing and medical coverage for the boys during the time that they resided with Keith.

In July 1995, Timothy moved to Colorado to live with Keith's sister and remained there until May 1996. During this time, Keith testified that he provided the full amount of his court-ordered support directly to his sister. Chancellor remained with Keith from December 1992 through August 2, 1996. Mitchell remained in Deborah's custody and control except for the period from the end of August 1994 through the first part of July 1995, when he resided with Keith.

On November 18, 1996, the court entered an order finding that the minor children, at one time or another, resided with Keith and that Deborah paid no support for the minor children during that time. Further, the court found that, because Keith had provided support by way of food and shelter, it would be grossly inequitable to allow Deborah to receive support while

the children were in Keith's custody. The court then awarded Keith a $6,960 child support credit for the period of time that the minor children were residing with him. Further, the court found that there was still a large child support arrearage due and owing by Keith to Deborah and that Keith's failure to pay the same was willful and contemptuous. Deborah then filed a timely appeal to this court.

ASSIGNMENT OF ERROR

Deborah's assignments of error can be consolidated into the following issue: The trial court erred in granting Keith a $6,960 credit toward his child support arrearage.

STANDARD OF REVIEW

[1] In equity actions, an appellate court reviews the factual findings de novo on the record and reaches a conclusion independent of that of the trial court. *Gutierrez v. Gutierrez*, 5 Neb. App. 205, 557 N.W.2d 44 (1996).

DISCUSSION

The sole issue on appeal is whether the trial court erroneously granted Keith a $6,960 credit toward his child support arrearage.

[2] Child support payments become vested in the payee as they accrue, and thus, courts are without authority to reduce the amounts of such accrued payments. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991); *Rood v. Rood*, 4 Neb. App. 455, 545 N.W.2d 138 (1996); *Robbins v. Robbins*, 3 Neb. App. 953, 536 N.W.2d 77 (1995); *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993) (court applied rule to unreimbursed medical expenses).

> [3] Neb. Rev. Stat. § 25-2210 (Reissue 1995) provides in relevant part: "Whenever any judgment is paid and discharged, the clerk shall enter such fact upon the judgment record in a column provided for that purpose." Referring thereto, the Nebraska Supreme Court has long stated: " 'The district court may, on motion and satisfactory proof that a judgment had been fully paid or satisfied by the act of the parties thereto, order it discharged and canceled of record.' " [Citations omitted.]

> Referring to the "inherent power of a court to determine the status of its judgments," the court in *Cotton*, 222 Neb. at 306-07, 383 N.W.2d at 740, granted the respondent credits against a judgment for alimony and child support as a result of payments he made directly to the petitioner, rather than, as required by the decree, through the clerk of the court. Similarly, in *Berg, supra,* the Supreme Court affirmed a decision granting a father credit against child support arrearages where the evidence established that two of the children for whom the father was ordered to pay support lived with him for a definite period of time, during which he directly provided for their full support. In both *Cotton, supra*, and *Berg, supra*, the Supreme Court rejected the argument that by granting a credit, it was modifying a previous order of the court.

Gutierrez, 5 Neb. App. at 215-16, 557 N.W.2d at 51. Thus, Keith's application for modification of support was in the nature of a request for a credit to his child support arrearage, and this is how the case was tried at the district court level.

We have conducted a de novo review of the evidence adduced and find that there is sufficient evidence to support the trial judge's decision to award Keith a $6,960 child support credit. Consequently, the order of the trial court is affirmed.

AFFIRMED.

JANET L. BECKER, APPELLANT,
V. BRUCE E. BECKER, APPELLEE.
573 N.W.2d 485

Filed December 16, 1997. No. A-97-279.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Modification of Decree: Child Support: Proof.** A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered.

3. **Modification of Decree: Child Support.** Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent.
4. **Child Support: Rules of the Supreme Court.** Paragraph D of the Nebraska Child Support Guidelines defines total monthly income as the income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages.
5. **Modification of Decree: Child Support.** The general rule in Nebraska is to allow modification of a child support order to operate prospectively from the time of the modification order.
6. **Courts: Modification of Decree: Child Support.** A court is without authority to issue an order modifying child support retroactive to a date prior to the date of the filing of the application.
7. ____: ____: ____. Although a court may not forgive or modify past-due child support and cannot order modification retroactive before the filing of the application to modify, the court may modify child support coming due in the future.
8. **Child Support.** The paramount concern and question in determining child support is the best interests of the children.
9. ____. Earning capacity is a critical measure of the obligation to pay child support.
10. **Modification of Decree: Child Support: Rules of the Supreme Court.** All orders for child support, including modifications, *must* include from the Nebraska Child Support Guidelines a basic income and support calculation worksheet 1, and if used, worksheet 2 or 3.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Reversed.

Claude E. Berreckman, Jr., and Kelly L. Sudbeck, of Berreckman & Berreckman, P.C., for appellant.

E. Bruce Smith for appellee.

SIEVERS, MUES, and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

This case presents the issue of whether a workers' compensation settlement award should be considered for purposes of calculating child support.

BACKGROUND

Bruce E. Becker was married to Janet L. Becker on November 12, 1976, in Dawson County, Nebraska. During their

marriage, the couple had two children: Jamie Lynn, born February 27, 1978, and Mark Edward, born May 20, 1981. In September 1993, Bruce ruptured a lower spinal disk in the course and scope of his employment when he fell while moving a large board. Bruce filed a workers' compensation claim for injuries received as a result of this accident. On December 3, 1993, in accordance with the wishes of the parties, a decree of dissolution of marriage was entered in the district court for Dawson County, Nebraska. The decree gave custody of the couple's minor children to Janet, subject to Bruce's right of reasonable visitation. Neither party was required to pay alimony, but Bruce stipulated to child support payments of

> "$50.00 payable December 1, 1993, to increase to $275.00 per month commencing January 1, 1994, payable in the same amount on the first day of each month thereafter. Support payable from and after January 1, 1994 is based upon net monthly income of Petitioner [Janet] of approximately $1,063.00, and upon Respondent's [Bruce] net monthly income of approximately $800.00."

On February 3, 1995, the district court for Dawson County determined that Bruce's obligation for child support should be increased to $378 per month for two children and $242 for one child. In September 1995, Bruce suffered a recurrence of his back injury. As a result, on October 13, he filed a motion for a temporary modification of decree due to physical hardship, which stated:

> A Material Change has taken place in the Health of the Respondent, Bruce Becker. A reacurrance [sic] of a medical condition (ruptured lower spinal disk) from a previous injury in September of 1993, has caused Respondent to be unable to work. Thus having no income to pay Court Ordered Support for the Respondents 2 minor children.
>
> Respondent has been unable to work since September 15th, 1995 and has been under the care of an Orthopedic Specialist since September 19th 1995. . . . Respondent has been advised by his Doctor to not return to his type of employment (carpentry) until approximately December, 5th, 1995. . . .
>
> . . . .

> WHEREFOR RESPONDENT PRAYS TO THE COURT THAT:
>
> That the Respondent, Bruce Becker, be Temporarily . . . relieved of the Financial Burden of, Child Support, Medical Insurance Premiums of minor children, Payments of 1/2 of uncovered Medical Expenses. Until such time Respondent is Medically capable of returning to fulltime Gainfull [sic] employment.

In a journal entry filed November 6, 1995, the district court reduced Bruce's child support payment to $50 per month per child for a total of $100 per month retroactive to September 15, 1995.

Bruce was released by his doctor to return to regular work as of January 25, 1996, subject to a lifting restriction of 50 pounds using proper body mechanics. On February 28, Janet filed an application for modification of decree, seeking to reinstate Bruce's prior child support obligation. In a journal entry filed March 21, the district court held that "child support payable by Respondent be reinstated effective March 1, 1996, in the same amount as was previously in effect, that being $378.00 per month for the two minor children of the parties. . . ." The temporary child support reduction in the amount of $278 per month from September 15, 1995, to March 1, 1996, a period of 5½ months, totaled $1,529.

In response to a second application by Janet to modify the divorce decree, the district court ruled on April 29, 1996: "The Court is further advised that, based on net monthly incomes of $1,283.00 for the Petitioner and $1,789.00 for the Respondent, the child support obligation of the Respondent shall be increased to $600.00 per month for the two minor children of the parties, effective April 1, 1996 . . . ." In response to a third application by Janet to modify the decree, the district court held, by journal entry filed November 20, 1996, that Bruce pay $416 per month for the two minor children, based on a net monthly income of $1,280 for Janet and $1,218 for Bruce.

On November 13, 1996, Bruce received a lump-sum settlement of $35,000 from his workers' compensation claim. Exhibit B, attached to Bruce's application for approval of final lump-sum settlement, indicates that the settlement consisted of

$5,943.57 for temporary total disability for the period from September 5, 1995, through February 9, 1996; $10,436.27 for permanent partial disability based on a 10-percent disability and the resulting reduction in Bruce's earning capacity; and $18,620.16 of "additional consideration."

Janet filed a fourth application for modification of decree on December 13, 1996. The fourth application is the subject of this appeal. This request for modification alleged, in pertinent part:

> The Respondent has recently received the proceeds of a $35,000.00 Workers' Compensation Lump Sum Settlement. . . .
>
> . . . The proceeds of the lump sum settlement . . . constitute income under Section D of the Nebraska Child Support Guidelines and the amount received constitutes a material change in circumstances justifying modification of the Decree to increase the child support obligation of Respondent.

Janet requested a prospective increase in child support and reimbursement for the reduction in child support received by Bruce for the months he did not work.

Bruce alleged in an affidavit offered at the hearing on the application for modification that after attorney fees, costs, and "basic furniture" was purchased, he had $13,000 remaining from the $35,000 settlement and continued to "have bothersome back problems, and anticipates that further surgery will be required." In a journal entry filed February 6, 1997, the district court denied Janet's application to further increase child support based on the lump-sum settlement. Janet moved for a new trial, and after this motion was denied, she appealed.

ASSIGNMENTS OF ERROR

Janet argues that the trial court erred (1) in finding that the workers' compensation lump-sum settlement did not constitute a material change in circumstances pursuant to the Nebraska Child Support Guidelines, (2) in finding that the settlement did not constitute income pursuant to the Nebraska Child Support Guidelines, and (3) in denying her application for modification.

STANDARD OF REVIEW

[1] Modification of the amount of child support payments is entrusted to the discretion of the trial court, and although, on

appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

ANALYSIS

Lump-Sum Settlement as Income for Child Support Purposes.

[2,3] A party seeking to modify a child support order must show a material change in circumstances which has occurred subsequent to the entry of the original decree or a previous modification and was not contemplated when the decree was entered. *Knaub v. Knaub*, 245 Neb. 172, 512 N.W.2d 124 (1994). Among the factors to be considered in determining whether a material change of circumstances has occurred are changes in the financial position of the parent obligated to pay support, the needs of the children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction in income, and whether the change is temporary or permanent. *Sabatka v. Sabatka, supra.*

[4] Janet asserts on appeal that the workers' compensation lump-sum settlement award received by Bruce should be considered income for the purpose of calculating child support. Paragraph D of the Nebraska Child Support Guidelines defines total monthly income as the "income of both parties derived from all sources, except all means-tested public assistance benefits and payments received for children of prior marriages." It further states: "If applicable, earning capacity may be considered in lieu of a parent's actual, present income and may include factors such as work history, education, occupational skills, and job opportunities. Earning capacity is not limited to wage-earning capacity, but includes moneys available from all sources." The guidelines, then, define "income" broadly, and with certain exceptions, income includes "income . . . derived from *all* sources." (Emphasis supplied.)

Guided by the above definition of income, this court, in *Mehne v. Hess*, 4 Neb. App. 935, 553 N.W.2d 482 (1996), included Federal Employers' Liability Act (FELA) settlement proceeds in a parent's income for calculation of child support. In *Mehne*, David Mehne received a $375,000 FELA settlement for injuries he received to his back while working for the

Burlington Northern Railroad. Prior to the settlement, Mehne had admitted that he was the father of Deana Hess' twin boys, Ethan and Evan. In a settlement agreement of the paternity matter, Hess was awarded custody of the minor children and Mehne was required to pay $500 in child support, with this amount subject to review and retroactive adjustment upon settlement of Mehne's pending lawsuit against Burlington Northern.

After Mehne filed a showing acknowledging that he had received a settlement from Burlington Northern, a hearing was held to determine child support. The trial court reduced Mehne's child support and failed to treat any of the settlement as income. On appeal, we modified that decision, holding that because the settlement, "in large measure, was intended to compensate Mehne for the significant lost wages and future wage loss," it was income under the Nebraska Child Support Guidelines. *Id.* at 944, 553 N.W.2d at 487. As support for this holding, we agreed with the rationale of the Colorado Court of Appeals in *In re Marriage of Fain*, 794 P.2d 1086 (Colo. App. 1990), where the father argued that his personal injury settlement award constituted property rather than income for child support purposes. The Colorado court noted that the issue in child support cases is whether settlement proceeds are a financial resource that may be considered in setting child support. The Colorado Court of Appeals determined that payments received pursuant to a structured settlement of a personal injury claim constitute gross income when determining the parent's child support obligation. In *Mehne*, we also noted the Supreme Court of Iowa's decision, *In re Marriage of Swan*, 526 N.W.2d 320 (Iowa 1995), where the father's workers' compensation lump-sum settlement was treated as income for child support purposes, because it was intended to replace income he could have earned absent his injury.

Based on the broad definition of "income" in the guidelines, the *Mehne* decision, and the cited decisions of other states, we conclude that the district court abused its discretion by failing to consider any of Bruce's settlement proceeds as income under the guidelines. Having so found, we must make a de novo determination of what portion of Bruce's workers' compensation settlement should be considered and how it should be factored into

the child support calculations. This determination, of necessity, depends upon the facts of each case, including what was intended to be compensated for by the settlement. See *Mehne, supra.*

How to Consider Proceeds.

[5,6] We move now to the question of how to factor the settlement proceeds into the determination of Bruce's child support obligation. Janet first contends that she is owed retroactive child support in the amount of $1,529, because of the reduction of Bruce's previous obligation of $378 per month for two children to $100 per month for two children due to temporary hardship when he was temporarily totally disabled by his injury and unable to work. The general rule in Nebraska is to allow modification of a child support order to operate prospectively from the time of the modification order. *Dean v. Dean*, 4 Neb. App. 914, 552 N.W.2d 310 (1996). But, in certain circumstances, a modification can be made retroactive to when the application to modify was filed. *Id.* In *Dean*, we held that a court is without authority to issue an order modifying child support retroactive to a date prior to the date of the filing of the application. See *Hoover v. Hoover*, 2 Neb. App. 239, 508 N.W.2d 316 (1993). Janet filed her application to modify on December 13, 1996, and asks that she be awarded child support for a period commencing on October 15, 1995, and ending March 1, 1996. Under *Dean*, we cannot impose a child support obligation retroactive to a date prior to the filing of the application to modify. To do so would, in effect, be a judgment against Bruce, payable immediately for $1,529.

[7] We digress briefly, because we note that the district court's order of November 6, 1995, which reduced Bruce's child support obligation from $378 to $100 was made retroactive to September 15, 1995, despite Bruce's application being filed October 13, 1995. Thus, the district court in effect "forgave" $278 of child support which had accrued and vested prior to Bruce's filing his application to modify. This cannot be done. See *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991) (holding that courts are generally without authority to reduce accrued payments). However, it is important to note here, and

for our final resolution of this issue, that although a court may not forgive or modify past-due child support and cannot order modification retroactive before the filing of the application to modify, the court may modify child support coming due in the future. *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991). Although not explicitly stated in *Berg*, we believe that a future modification must take into account the equities of the situation. Here, that would include consideration of the forgiveness of child support which had already accrued.

[8] The paramount concern and question in determining child support is the best interests of the children. *Mehne v. Hess*, 4 Neb. App. 935, 553 N.W.2d 482 (1996). Obviously, Bruce's children were affected by their father's injury, because their level of support was reduced while he was totally disabled. Bruce's application to modify requested only a *temporary* reduction in his support obligation. Via the settlement, Bruce has now been compensated, at least in large part, for the work he missed while temporarily totally disabled. These facts, coupled with the court's forgiveness of $278 of accrued child support, cause us to conclude that under *Berg* an equitable adjustment prospectively to account for the loss of $1,529 in child support should have been made by the district court. There are 42 months left for Bruce to pay child support from the time of Janet's application on December 13, 1996, until the youngest child reaches age 19. Thus, we find that his monthly child support obligation should be increased by $36.40 ($1,529 ÷ 42 months). However, we must deal with the settlement proceeds in order to determine the sum to which the $36.40 each month will be added.

In an affidavit by Bruce which Janet offered to prove that Bruce received a lump-sum workers' compensation settlement, Bruce stated:

> Of the total settlement award of $35,000.00, the following expenses have been made:
>
> | | |
> |---|---|
> | $35,000.00 | Award |
> | - 8,000.00 | Attorneys' fees |
> | - 622.25 | Misc. Costs |
> | $26,377.75 | Balance to Affiant |

> . . . From the above settlement, debts accumulated during Affiant's disability were paid, basic furniture was purchased, and the sum of $13,000.00 remains in savings, against expenses anticipated in the future. Affiant continues to have bothersome back problems, and anticipates that further surgery will be required. The last surgery experienced by Affiant cost over $16,000.00, and the amount of attained [sic] savings is considered to be inadequate for such surgical expense, if and whenever required.

Included on exhibit B, attached to Bruce's application for approval of final lump-sum settlement made to the Workers' Compensation Court, is a breakdown of the benefits payable to Bruce via the lump-sum settlement. This exhibit sets forth:

To plaintiff for temporary total disability from 9/5/95 to 2/9/96, inclusive, 22 3/7 weeks at a rate of $265.00 per week	$ 5,943.57
To plaintiff for a 10 percent partial disability of the body as a whole (10% x $634.14 x 66 2/3) = $42.28 per week	
a) Accrued from 7/15/96 to 10/31/96, 15 4/7 weeks	$ 616.08
b) Commuted for the balance of (300 - 22 3/7 - 15 4/7) 262 weeks, the present value of which is 232. 2655	$ 9,820.19
Additional Consideration	$18,620.16

[9] In *Mehne*, this court determined an equitable sum to factor into our de novo review of Mehne's child support obligation. There, we found that $209,400 out of a gross settlement of $375,000 was an equitable sum. We observed that the settlement was in large measure designed to compensate Mehne for future wage loss. The figure of $209,400 allowed deduction for attorney fees and expenses and repaying loans incurred while his case was pending, but we did not wholeheartedly embrace the fact that Mehne had spent the settlement down to only $69,000. Mehne had bought a house and a vehicle, and paid

other debts; and we observed that doing so should reduce his monthly outlay of cash for living expenses, freeing up money for child support. Here, the settlement is considerably smaller and only $13,000 cash was left at the time of the hearing. But Bruce's children should have the benefit of what he earns in wages, plus some recognition that he has achieved a settlement which compensates him, to the extent allowed by the Nebraska Workers' Compensation Act, for a loss of earning capacity. The fact Bruce may have already spent part of the money is not an overriding consideration in this calculus of support. Earning capacity is a critical measure of the obligation to pay child support. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). Here, part of Bruce's earning capacity has been replaced by a lump-sum settlement, and we find that the district court abused its discretion in essentially ignoring that reality of this situation. But *Mehne* makes it clear that the determination of what to include from work-injury settlements and how to calculate its inclusion in the child support calculus is a case-by-case matter.

In our de novo review, we conclude that settlement proceeds of $22,820.19 ($13,000 of remaining cash plus the $9,820.19 of the settlement attributed to permanent disability) should be considered in setting child support from December 13, 1996 (the date when Janet filed her most recent application), until the youngest child reaches age 19.

[10] As of the hearing on the application to modify at issue held January 17, 1997, Bruce's monthly net income from wages was $1,218 and Janet's was $1,280. Prior to the application to modify of December 13, 1996, Bruce's child support obligation was $416 per month for two children and $289 per month for one child. The district court had not revealed its method of setting this amount, nor did it explain its rationale for not using the settlement proceeds when ruling on Janet's fourth application to increase child support above $416 per month. It has been previously suggested that when using the Nebraska Child Support Guidelines, it would be extremely helpful to the reviewing court if the trial judge somehow would incorporate into the record his or her worksheet which was employed in arriving at a child support amount. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104

(1994). Paragraph C of the Nebraska Child Support Guidelines now requires that "[a]ll orders for child support, including modifications, *must* include a basic income and support calculation worksheet 1, and if used, worksheet 2 or 3."

Returning to the calculation, we see that as a result of the settlement, Bruce was awarded $42.28 per week for a 10-percent partial disability of the body as a whole. Thus, because of his settlement, Bruce has additional monthly income of $183 ($42.28 × 52 weeks ÷ 12 months). We therefore consider Bruce's earnings to be increased by $183 per month. We also consider the $13,000 Bruce has in savings, to the extent that said sum should generate income by interest. We use the interest on judgments at the time of trial of 6.61 percent, see Neb. Rev. Stat. § 45-103 (1993). Therefore, Bruce has additional monthly income of $71.61 ($13,000 × 6.61 percent ÷ 12). Therefore, according to the above calculations, Bruce has a present monthly income of $1,472.61 ($1,218 + $183 + $71.61). Using the Nebraska Child Support Guidelines, we find that Bruce and Janet have a combined monthly income of $2,752.61 ($1,472.61 + $1,280), of which 54 percent is attributable to Bruce. The guidelines provide for a child support amount at that income level of $935.80 for two children and $651.55 for one child or $505.33 in support payable by Bruce for two children and $351.83 for one child. Adding in the additional $36.40 per month to make up for the temporary reduction of his child support to each figure, as we earlier discussed, we hold that Bruce should pay $541.73 per month for child support for two children and $388.23 for one child as a result of the lump-sum settlement award, effective January 1, 1997, the first month after Janet filed her application to modify.

CONCLUSION

The district court abused its discretion by refusing to consider Bruce's lump-sum settlement from his work injury as part of the income calculation for child support purposes. Moreover, equity requires that the reduction in child support which Janet endured while Bruce was unable to work now be addressed. Thus, we reverse the district court's decision denying Janet an increase in child support and increase Bruce's obligation effec-

tive January 1, 1997, from $416 per month to $541.73 per month for two children and from $289 to $388.23 per month for one child.

REVERSED.

DORIS L. CRIPPEN, APPELLEE, V. MAX I. WALKER AND ITT HARTFORD, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLEES, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLANT.

572 N.W.2d 97

Filed December 16, 1997. No. A-97-401.

1. **Workers' Compensation: Appeal and Error.** With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination.
2. **Workers' Compensation: Second Injury Fund.** Neb. Rev. Stat. § 48-128 (Reissue 1993) requires, as a condition to entitlement to compensation from the Second Injury Fund, that the employee be entitled to receive compensation on the basis of the combined disabilities. The combined disabilities are those from the preexisting condition and the subsequent compensable injury.
3. **Workers' Compensation: Second Injury Fund: Liability.** If an employee is found not to be entitled to benefits for combined disabilities and the employer is thus liable only for the disability resulting from the subsequent last injury, there is nothing to shift to the Second Injury Fund and Neb. Rev. Stat. § 48-128 (Reissue 1993) has no application.
4. **Workers' Compensation: Second Injury Fund: Liability: Waiver.** If any employee concedes or waives his or her right to compensation on the basis of a combined disability, the Second Injury Fund cannot be held liable.
5. **Workers' Compensation: Second Injury Fund: Liability.** Separate and distinct injuries can be combined for purposes of liability of the Second Injury Fund.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Don Stenberg, Attorney General, and Martin W. Swanson for appellant.

David L. Welch and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellees Max I. Walker and ITT Hartford.

Dirk V. Block, P.C., of Marks, Clare & Richards, for appellee Crippen.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

HANNON, Judge.

The State of Nebraska, Second Injury Fund, appeals an award of the Workers' Compensation Court, finding that Doris L. Crippen's workplace injuries had combined with her preexisting disability to render her permanently and totally disabled and finding that the Second Injury Fund was liable under Neb. Rev. Stat. § 48-128 (Reissue 1993) for its apportioned share of Crippen's disability. The Second Injury Fund contends that it should have been dismissed as a party under *Eichorn v. Eichorn Trucking*, 3 Neb. App. 795, 532 N.W.2d 345 (1995), because Crippen's injuries were separate and distinct and not capable of being combined. We disagree with the Second Injury Fund's interpretation of *Eichorn* and conclude that although Crippen's injuries were separate and distinct, the trial judge correctly combined them and held the Second Injury Fund liable for its apportioned share. Thus, we affirm.

PROCEDURAL BACKGROUND

The facts are undisputed. On or about December 10, 1992, Crippen suffered an accident arising out of and during the course of her employment with Max I. Walker (Walker), a dry cleaner, where she worked as a towel folder. Crippen's injuries consisted of bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Crippen subsequently brought an action against Walker for workers' compensation benefits. In an order filed September 14, 1994, the trial judge awarded her temporary total benefits and ordered that if the parties could not agree on the extent of her impairment at the time that her total disability ceased, an additional hearing could be held.

On December 6, 1995, Crippen filed a "further petition," seeking permanent total disability benefits. In its answer, Walker affirmatively alleged that Crippen had reached maximum medical improvement and was entitled to permanent partial disability benefits based on a 10-percent rating for each upper extremity. At some point, ITT Hartford, Walker's insurer, was made a party to the action. Crippen then impleaded the Second Injury Fund based on her complete bilateral hearing

loss, a condition which predated her employment with Walker and which Walker knew of when it hired Crippen. Thereafter, Crippen filed a "third party petition," again praying for permanent total disability benefits.

A hearing was had on the matter on August 26, 1996. The trial judge found that from and after November 21, 1995, Crippen had been permanently and totally disabled on the basis of the combined disabilities of loss of hearing and her December 10, 1992, injuries to her arms. The trial judge found that because the requirements of § 48-128 had been satisfied, Walker was liable only for the 10-percent permanent partial disability to each arm resulting from the December 10, 1992, accident and that the Second Injury Fund was liable for the remainder of Crippen's disability. The trial judge ordered the Second Injury Fund to pay $140 per week in permanent and total disability benefits. The Second Injury Fund appealed, and the review panel affirmed. The Second Injury Fund now appeals to this court.

ASSIGNMENTS OF ERROR

The Second Injury Fund contends that the court erred in concluding that all the requirements of § 48-128 had been met and in not following *Eichorn*, which it argues is precedential and controlling.

STANDARD OF REVIEW

[1] With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Acosta v. Seedorf Masonry, Inc.*, 253 Neb. 196, 569 N.W.2d 248 (1997).

ANALYSIS

The Second Injury Fund's liability is set out in § 48-128, which provides in relevant part:

> (1) If an employee who has a preexisting permanent partial disability whether from compensable injury or otherwise, which is or is likely to be a hindrance or obstacle to his or her obtaining employment or obtaining reemployment if the employee should become unemployed and which was known to the employer prior to the occurrence

> of a subsequent compensable injury, receives a subsequent compensable injury resulting in additional permanent partial or in permanent total disability so that the degree or percentage of disability caused by the combined disabilities is substantially greater than that which would have resulted from the last injury, considered alone and of itself, and if the employee is entitled to receive compensation on the basis of the combined disabilities, the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability. For the additional disability, the employee shall be compensated out of a special trust fund created for that purpose which shall be known as the Second Injury Fund which is hereby created. . . .
>
> (2) In order to qualify under this section, the employer must establish by written records that the employer had knowledge of the preexisting permanent partial disability at the time that the employee was hired or at the time the employee was retained in employment after the employer acquired such knowledge.
>
> (3) . . . No condition shall be considered a preexisting permanent partial disability under this section unless it would support a rating of twenty-five percent loss of earning power or more or support a rating which would result in compensation payable for a period of ninety weeks or more for disability for permanent injury as computed under subdivision (3) of section 48-121.

[2] Section 48-128 requires, as a condition to entitlement to compensation from the Second Injury Fund, that the employee be "entitled to receive compensation on the basis of the combined disabilities." See *Eichorn v. Eichorn Trucking*, 3 Neb. App. 795, 532 N.W.2d 345 (1995). The "combined disabilities" are those from the preexisting condition and the subsequent compensable injury. *Id.*

> Absent the provisions of § 48-128, an employer is liable for all compensation benefits to which an employee is entitled. Therefore, the statute is for the benefit of the employer, as the employee has no interest in *who* pays the

> money, so long as he or she receives it. [Citation omitted.] Because the statute benefits the employer, it is the employer's burden to prove apportionment between the portion of the injury for which the fund is liable and the portion for which the employer is liable, and generally the fund's involvement comes by virtue of the employer joining the fund in a manner akin to making it a third-party defendant.

Id. at 805, 532 N.W.2d at 352.

[3] Section 48-128 allows the employer of an injured employee to shift some of the liability for benefits for an injured employee to the Second Injury Fund. However, before the burden can shift, the employee must first be found to be entitled to receive compensation benefits as a result of the combined disabilities. If the employee is found not to be entitled to benefits for the combined disabilities and the employer is thus liable only for the disability resulting from the subsequent last injury, there is nothing to shift to the fund and § 48-128 has no application. *Eichorn, supra.*

The Second Injury Fund argues that *Eichorn* stands for the proposition that separate and distinct injuries cannot combine under § 48-128, and, as a result, it contends that it cannot be held liable for any of Crippen's disability. Succinctly put, we disagree.

[4] In *Eichorn*, the employee did not challenge the trial court's finding that she was not entitled to receive compensation on the basis of combined disability. Instead, on appeal, the employee attempted to hold the Second Injury Fund directly liable for the benefits for which her employer was not liable. This court concluded that because the employee conceded or waived any right she might have had to compensation on the basis of a combined disability, there was no possibility that the Second Injury Fund could bear a portion of the burden of liability for a combined disability. Therefore, there was no liability for the employer to shift to the Second Injury Fund, and § 48-128 was inapplicable.

[5] *Eichorn* does not stand for the proposition that separate and distinct injuries cannot be combined, but, rather, that there can be no award from the Second Injury Fund if there is no

determination that the employee is entitled to receive compensation on the basis of combined disabilities. In many cases, such as those cited below, the interpretation relied upon by the Second Injury Fund would render the statutory provision creating the Second Injury Fund useless. Section 48-128 speaks of combined disabilities, and it places no limit on the type of disabilities which may be combined. Moreover, the Nebraska Supreme Court has repeatedly held that such injuries can be combined and has apportioned liability between the employer and the Second Injury Fund for separate and distinct injuries. See, e.g., *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981) (permanent partial disability to right thumb combined with prior loss of left arm); *Camp v. Blount Bros. Corp.*, 195 Neb. 459, 238 N.W.2d 634 (1976) (injury to left foot combined with prior injury to right foot); *Runyan v. State*, 179 Neb. 371, 138 N.W.2d 484 (1965) (injuries to fingers on both hands combined with prior injury to right foot). See, also, *Lozier Corp. v. State*, 1 Neb. App. 567, 501 N.W.2d 313 (1993) (injury to left arm combined with previous injury to right arm). We conclude that the Second Injury Fund's argument lacks merit. Therefore, the judgment of the Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
WILLIAM C. BLACKMAN, APPELLANT.
572 N.W.2d 101

Filed December 23, 1997. No. A-97-105.

1. **Drunk Driving: Evidence: Time.** In a driving under the influence case there must be sufficient direct or circumstantial evidence that a driver's intoxication and operation of his or her vehicle occurred simultaneously.

Appeal from the District Court for Keith County, JOHN P. MURPHY, Judge, on appeal thereto from the County Court for Keith County, KRISTINE R. CECAVA, Judge. Judgment of District Court vacated, and cause remanded with directions.

J. Blake Edwards and Robert S. Harvoy, of McGinley, Lane, O'Donnell, Reynolds & Edwards, P.C., for appellant.

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

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Appellant, William C. Blackman, was charged with the offense of driving under the influence (DUI). Trial was had before the county court without a jury. Blackman was found guilty. Blackman appeals, contending that the Intoxilyzer test result should not have been admitted into evidence because the test was not administered within a reasonable period of time and that the evidence was insufficient to convict him. We reverse the decision of the district court, which affirmed the county court's decision, and we remand the matter to the district court with directions to vacate the decision of the county court and to remand the case to the county court for dismissal for the reasons stated below.

II. FACTUAL BACKGROUND

Two witnesses testified for the State, Officer Dion John Neumiller and Officer David Kling. Officer Neumiller testified first. He is a deputy sheriff employed by Keith County since March 1994. On May 31, 1996, he was working the evening shift, which runs from 5 p.m. until 2 or 3 a.m. Officer Neumiller testified that he was assigned a call by the emergency operations center regarding a report of a motorcycle in a ditch on a county road. This assignment was received at 10:03 p.m. Officer Neumiller traveled to the location that had been given him by the dispatcher and arrived in approximately 15 to 20 minutes. When he first arrived, he observed a motorcycle in a ditch that ran parallel to the road. He also observed Blackman next to the motorcycle and determined that Blackman was not physically injured. Officer Neumiller testified that Blackman told him that "he had been westbound when he met two vehicles. After the second vehicle passed him, he lost control of the motorcycle and went into the north ditch . . . ."

Officer Neumiller testified that he had contact with Blackman by the roadside for approximately 30 to 60 minutes. He testified that he smelled a strong odor of alcoholic beverage coming from Blackman's person. Upon asking Blackman if he had had anything to drink, Blackman stated, "No." Blackman explained that he had not had anything to drink that evening. Officer Neumiller then told Blackman that he could smell an alcoholic beverage emanating from Blackman's person. Blackman then explained that he had had something to drink the evening before, but that he had not had anything to drink that evening prior to Officer Neumiller's contact with him. Officer Neumiller assisted Blackman in removing his motorcycle from the ditch but did not allow Blackman to operate the motorcycle.

Officer Neumiller proceeded to conduct field sobriety tests. Blackman attempted to complete the alphabet test and then stated to Officer Neumiller that he knew his attempt at reciting the alphabet was wrong and that "he did not know his alphabet." Officer Neumiller also testified that he administered a horizontal gaze nystagmus test as well as a preliminary breath test, the results of which were not testified to, however. Officer Neumiller testified that due to Blackman's inability to successfully complete any other field sobriety tests and the strong odor of alcoholic beverage coming from his person, coupled with the facts that his eyes were bloodshot and that his speech was slurred, Officer Neumiller concluded that Blackman was under the influence of alcohol. He testified that he placed Blackman under arrest for suspicion of DUI.

Officer Neumiller testified that he had been involved in approximately 25 to 30 DUI investigations. He further testified that he had training and education in the detection and apprehension of persons suspected of being under the influence of alcohol. This included training supplied by the Nebraska Law Enforcement Training Center as well as an additional course given by the Nebraska Highway Safety Council specifically designed to teach recognition of alcohol-impaired drivers.

Regarding the timeframe during which these matters transpired, Officer Neumiller testified that after receiving the message from the dispatcher at 10:03 p.m. he immediately responded to this request to investigate the motorcycle incident.

Officer Neumiller was unable to testify whether or not the engine of the motorcycle was warm to the touch when he assisted Blackman in extricating it from the ditch. Officer Neumiller also could not recall whether or not the keys were in the ignition of the motorcycle.

Officer Kling then testified. He is employed by the Ogallala Police Department and administered the breath test to Blackman at 11:28 p.m. The results of that test showed the alcohol content of Blackman's breath to be in excess of the statutorily provided limit. Blackman does not take issue with Officer Kling's administration of the test, but argues the test result should not be admitted into evidence because it was not given in a timely fashion.

After all the evidence was submitted, the court found Blackman guilty of the crime of DUI and subsequently sentenced him. Blackman appealed to the district court, which affirmed the county court's decision. The matter was then timely appealed to this court.

III. ASSIGNMENTS OF ERROR

Blackman assigns four errors. These are easily distilled into two: first, that the Intoxilyzer test was not timely administered and that, therefore, its results should not have been admitted into evidence; and second, that his conviction was contrary to the evidence.

IV. STANDARD OF REVIEW

The standard of review will be set forth in the appropriate section of the analysis.

V. ANALYSIS

1. Breath Test Given Within Reasonable Time

The nub of Blackman's first assigned error is that the State failed to show when Blackman was ever operating or in actual physical control of the motorcycle and that, therefore, the State was unable to prove that the Intoxilyzer test was administered within a reasonably short time from when he stopped operating or physically controlling the motorcycle, as required by statute.

A valid breath test given within a reasonable time after the accused was *stopped* is probative of a violation of the DUI

statute. See, Neb. Rev. Stat. § 60-6,196 (Reissue 1993); *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). "In some cases, the delay may be so substantial as to render the test results non-probative of the accused's impairment or breath alcohol level while driving." *State v. Kubik*, 235 Neb. at 634, 456 N.W.2d at 501.

The Nebraska Supreme Court in *Kubik* reviewed authority from various jurisdictions regarding the relationship between the admissibility of breath alcohol test results and delays between driving and testing. The court in *Kubik* concluded that evidence of delay between the time a defendant is *stopped* and the time he is given a breath test is properly viewed as going to the weight of the test results, but also concluded that the delay sometimes may be such that the delay bears on the admissibility of the test results.

The difficult question presented by the case before us is what happens when the State presents absolutely no evidence of when a defendant stopped driving. Unlike the cases discussed by the Supreme Court in *Kubik*, the record presented here gives us no idea as to how much time passed from the time Blackman last drove his motorcycle on the roadway, and, therefore, we cannot determine how much time elapsed from the last act of driving by Blackman until the test was administered.

The crux of a DUI case is that the defendant is intoxicated at the time of driving. The vast number of DUI cases appealed to this court and to the Supreme Court involve situations where the arresting officer observes a defendant drive his or her vehicle on a public road and the defendant is *stopped* by the officer. When a breath test is administered subsequent to that stop, the test results serve as a basis to determine if the person was intoxicated when his or her driving was observed by the officer.

The critical issue before us is whether there is sufficient direct or circumstantial evidence from which a fact finder could infer that Blackman's intoxication and his operation or control of his motorcycle on a public road occurred simultaneously, not that Blackman was intoxicated when Officer Neumiller arrived.

Our duty in reviewing a case such as this is to scrutinize the totality of the evidence in the light most favorable to the State. *State v. Johnson*, 250 Neb. 933, 554 N.W.2d 126 (1996); *State*

v. Ryan, 249 Neb. 218, 543 N.W.2d 128 (1996); *State v. Kao*, 3 Neb. App. 727, 531 N.W.2d 555 (1995); *State v. Rodgers*, 2 Neb. App. 360, 509 N.W.2d 668 (1993).

It is also axiomatic that the State must prove every element of a criminal offense beyond a reasonable doubt. See *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996). Therefore, it was incumbent upon the State to prove that Blackman operated his vehicle at a time when he was intoxicated. See § 60-6,196.

The State introduced direct evidence of Blackman's intoxication. Officer Neumiller testified to his opinion that Blackman was intoxicated, together with the basis for this opinion, and the State elicited evidence showing that a breath test resulted in a .134 reading. Clearly, viewing this evidence in the light most favorable to the State, it was sufficient to prove that at the time Officer Neumiller found Blackman by the side of the road, Blackman was intoxicated.

However, there is no evidence whatsoever, direct or circumstantial, as to the time at which the accident occurred or as to how long Blackman had been in the ditch before Officer Neumiller found him. There was no evidence as to when alcoholic beverages had been drunk by Blackman prior to his driving mishap which resulted in his presence in the ditch or as to the time of the mishap. Additionally, there is no evidence showing the time the dispatcher received the call from the passerby or when the passerby saw Blackman. The record is devoid of any evidence that Blackman was even observed driving the motorcycle.

The undisputed evidence produced by the State was that Blackman was lying by his motorcycle and that he was under the influence of alcohol at the time Officer Neumiller arrived at the scene.

Entirely lacking in the presentation of the State was any evidence, direct or circumstantial, of the time when Blackman had the accident. For example, testimony indicating the motorcycle engine was warm or hot or about other circumstances could be probative regarding this issue. Therefore, we conclude that the State has not proved that the breath test was administered within a reasonable time after Blackman last drove his motorcycle on a public road or highway. The test results should have been excluded from evidence and not considered by the fact finder.

2. SUFFICIENCY OF EVIDENCE

Blackman assigns as error that his conviction was contrary to the facts presented to the county court. Blackman notes in his argument that when reviewing a conviction in a bench trial of a criminal case, an appellate court will sustain the conviction if the evidence, viewed and construed in a light most favorable to the State, is sufficient to support the conviction. See *State v. Johnson, supra.*

While the State introduced uncontested evidence that Blackman was under the influence at the time Officer Neumiller found him lying beside his motorcycle, it offered no direct evidence that Blackman was under such influence at the time of the accident, which time, as we have already seen, was unknown.

Other states have encountered this situation. See, *State v. Clark*, 130 Vt. 500, 296 A.2d 475 (1972) (defendant could not be convicted where there was no direct evidence that defendant was under influence at time of accident, despite uncontested testimony that defendant was intoxicated when police found defendant at accident scene); *Brown v. State*, 584 P.2d 231 (Okla. Crim. App. 1978) (that defendant was intoxicated when assisted at scene of accident was insufficient to sustain conviction in absence of evidence as to when accident occurred); *Coleman v. State*, 704 S.W.2d 511 (Tex. App. 1986) (because no evidence showed defendant was intoxicated at time he was driving prior to accident, conviction could not rest on evidence that defendant was intoxicated at scene when officers arrived).

Intoxication may be evidenced circumstantially by "*prior or subsequent condition* of intoxication within such a time that the condition may be supposed to be continuous." 2 John H. Wigmore, Evidence in Trials at Common Law § 235 at 33 (James H. Chadbourn rev. 1979). But it is obvious that in order to have the inference of being under the influence applied retroactively in the present case, the burden was upon the State to prove that Blackman's last act of driving occurred within a time period such that the intoxicated condition, in which he was found at the scene, had been continuous since his last act of driving. This burden of proof was not met by the State.

[1] Additionally, the fact that Officer Neumiller offered opinion testimony that Blackman was intoxicated when found by the

roadside does not provide any more sufficient basis upon which to rest the conviction than the breath test does. It would be incongruous at best to say in a case such as that before us that the breath test is inadmissible to prove intoxication at some unknown prior time when Blackman was driving his motorcycle, yet that Officer Neumiller's testimony is admissible. Again, the issue in this DUI case is whether there is sufficient evidence from which a fact finder could infer that Blackman's intoxication and his operation or control of his motorcycle occurred simultaneously, not that Blackman was intoxicated when Officer Neumiller found him. In order to have the inference of being under the influence applied retroactively, the State must show that Blackman's driving occurred within a time period such that the intoxicated condition, in which he was found at the scene, had been continuous since the time of Blackman's driving. In this case, such inference can be no better made from Officer Neumiller's opinion than from the already excluded breath test. Concluding that there was insufficient evidence to support this conviction and sentence, we reverse the decision of the district court, which affirmed the county court's decision, and we remand the matter to the district court with directions to vacate the decision of the county court and to remand the case to the county court for dismissal.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

HANNON, Judge, dissenting.

I must respectfully dissent. In my opinion, no one who has gone into a ditch while riding a motorcycle after losing control of it, as Blackman admits he did, lies down beside the vehicle and proceeds to get drunk while remaining in that ditch. Furthermore, it is impossible for such a person to do so without the presence of a container from which to get the alcohol. With these and similar thoughts in mind, I am confident that Blackman was at least as drunk when he drove into the ditch as he was when Officer Neumiller observed his condition. I think the circumstances are more than adequate to support a verdict of guilt.

DIANE M. PROCHASKA, NOW KNOWN AS DIANE M. KLEIN, APPELLANT, V. GERALD JOSEPH PROCHASKA, APPELLEE.

573 N.W.2d 777

Filed January 6, 1998. No. A-96-614.

1. **Modification of Decree: Child Support: Appeal and Error.** Modification of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion.
2. **Taxation: Appeal and Error.** An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion.
3. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
4. **Child Support: Rules of the Supreme Court.** Child support payments should be set according to the guidelines established by the Nebraska Supreme Court, which guidelines compute the presumptive share of each parent's child support obligation. However, the trial court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate.
5. ____: ____. The deduction in worksheet 5 of the Nebraska Child Support Guidelines designated "[d]eduction computed for child or children of one of the parties but not previously ordered" is placed so that it will have the same effect as the deduction contained on worksheet 1 designated "[c]hild support previously ordered for other children."
6. ____: ____. When calculating child support under the child support guidelines for a first family, the support for each family should be determined after a deduction for the support for the other family.
7. **Taxation: Child Support: Alimony.** A tax dependency exemption is nearly identical in nature to an award of child support or alimony.
8. **Taxation.** The dependency exemption for income tax returns is an economic benefit.
9. **Taxation: Courts: Child Custody.** A trial court may exercise its equitable powers to allocate dependency exemptions between custodial and noncustodial parents.

Appeal from the District Court for Butler County: ALAN G. GLESS, Judge. Affirmed in part as modified, and in part reversed.

John H. Sohl for appellant.

James M. Egr, of Egr and Birkel, P.C., for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

IRWIN, Judge.

I. INTRODUCTION

Diane M. Prochaska, now known as Diane M. Klein, appeals from a district court order modifying the divorce decree of her and her former husband, Gerald Joseph Prochaska. On appeal, Diane alleges that the district court erred when it awarded both dependency exemptions for their two children to Gerald and when it considered the support Gerald provided for the child of his current marriage in determining the amount of child support for Diane and Gerald's children. We conclude that the district court abused its discretion in the amount of child support awarded and in awarding both dependency exemptions to Gerald. Accordingly, we affirm in part as modified, and in part, we reverse.

II. PROCEDURAL BACKGROUND

On May 5, 1987, the marriage of Diane and Gerald was dissolved by the district court for Butler County. Gerald received custody of the parties' two children: Jill Lynne, born January 31, 1981, and Brian Joseph, born August 25, 1983. The decree was modified on April 28, 1993, to provide that Diane have custody of Jill and Gerald maintain custody of Brian. Neither party was required to pay child support under the modified decree. Each party was allowed to claim the child in his or her custody as an exemption for income tax purposes.

On September 11, 1995, Diane filed an application for modification requesting that she be granted custody of Brian and that Gerald be ordered to provide child support. A hearing was held on Diane's application on February 2, 1996. The parties stipulated regarding all issues except health insurance for Jill and Brian and child support. In particular, we note that the parties stipulated to the existence of a material change of circumstances and to Diane's being given custody of Brian.

In an order filed May 8, 1996, the district court ordered Gerald to pay child support in the amount of $377 per month for two children and $262 per month for one child. The court also awarded both dependency exemptions to Gerald so long as he remained current on all child support payments. In addition, Gerald was ordered to provide health insurance for Jill and

Brian. Each party was ordered to pay one-half of all medical expenses not covered by insurance. From this order, Diane timely appealed.

III. FACTUAL BACKGROUND

Since the parties' divorce, Gerald has remarried. He and his wife have a son, Eric. Gerald is a farmer, and his average gross monthly income is $1,673. At the time of the hearing, Diane was employed with FirsTier Insurance. After February 16, 1996, she was to be employed with Agency One Insurance. Her gross monthly income is $1,473. Neither party disputes the above income figures.

Regarding Jill and Brian's health insurance, the record shows that after the parties' divorce and Gerald's subsequent remarriage, Jill and Brian were covered by Diane's insurance policy which she obtained through her employer, and also by an insurance policy obtained by Gerald's present wife through her employment. At some point in 1995, Brian was no longer covered by Diane's health insurance policy. The evidence showed that Jill and Brian could be covered by an insurance policy of Gerald's present wife's through her employment at no cost to Gerald.

IV. ASSIGNMENTS OF ERROR

For her assignments of error, Diane claims that the district court erred in computing the amount of child support and in granting Gerald both dependency exemptions for income tax purposes.

V. STANDARD OF REVIEW

[1] Modification of child support payments is an issue entrusted to the discretion of the trial court, and although, on appeal, the issue is reviewed de novo on the record, the decision of the trial court will be affirmed absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Lebrato v. Lebrato*, 3 Neb. App. 505, 529 N.W.2d 90 (1995).

[2] An award of a dependency exemption is reviewed de novo to determine whether the trial court abused its discretion. See *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991).

[3] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997); *Jirkovsky v. Jirkovsky*, 247 Neb. 141, 525 N.W.2d 615 (1995).

VI. ANALYSIS

1. Child Support

We first address whether the district court abused its discretion in determining Gerald's child support obligation to be $377 per month for two children and $262 per month for one child. Diane argues that the district court erroneously considered Gerald's child from his subsequent marriage when determining child support in this case.

At the outset, we commend the district court for including the worksheets it used to arrive at its award of child support. Based upon our review of the district court's order and attached worksheets, it appears that in determining the amount of Gerald's child support obligation for Jill and Brian, the court considered Gerald's obligation to his and his present wife's son, Eric. In order to arrive at an amount to deduct from Gerald's monthly income to represent his obligation to Eric, the district court completed a child support worksheet for Gerald and his present wife. Through these calculations, the district court determined that Gerald would be responsible under the Nebraska Child Support Guidelines for support for Eric in the amount of $341. The district court then deducted the entire $341 from Gerald's monthly income when determining Gerald's child support obligation to Jill and Brian, his children with Diane.

[4] Child support payments should be set according to the guidelines established by the Nebraska Supreme Court, which guidelines compute the presumptive share of each parent's child support obligation. *Phelps v. Phelps*, 239 Neb. 618, 477 N.W.2d 552 (1991). However, the trial court may deviate from the guidelines whenever the application of the guidelines in an indi-

vidual case would be unjust or inappropriate. *Id.*; *Peterson v. Peterson*, 239 Neb. 113, 474 N.W.2d 862 (1991); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991).

The Nebraska Supreme Court has dealt with the issue of a parent's obligation to multiple families in three cases. Generally, in these cases, the Supreme Court did not find an abuse of discretion so long as the trial court considered whether the facts of the particular case warranted a deviation from strict application of the guidelines. In *Czaplewski v. Czaplewski*, 240 Neb. 629, 483 N.W.2d 751 (1992), the court affirmed a trial court's allowance for the father's present family when determining child support for the previous family. The court held:

> [A] trial judge does not satisfy his duty to equitably determine child support by blindly following suggested guidelines. The Nebraska Child Support Guidelines are, by their very nature, simply guidelines. . . .
>
> Line 2(f) of the guideline's worksheet 1, the basic net income and support calculation, provides as a deduction that amount in "[c]hild support previously ordered for children not of this marriage." In keeping with the spirit of the guidelines, the trial court was correct in factoring into the child support calculations the father's offspring of his subsequent marriage.

Id. at 631, 483 N.W.2d at 752.

In *Lodden v. Lodden*, 243 Neb. 14, 497 N.W.2d 59 (1993), the Supreme Court found no abuse of discretion in the trial court's failure to consider a father's obligation to support his present family and in the increase of the father's support obligation to his previous family. The court stated that the guidelines "do not provide for an automatic deduction for the support of children of subsequent marriages." *Id.* at 19-20, 497 N.W.2d at 62.

In *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994), the Supreme Court reversed the trial court's determination of child support because the court was unable to ascertain if the trial court had considered whether a deviation from the guidelines due to the father's obligation to his present family was appropriate under the facts of the case. The court stated:

> If the support ordered by the court in this case gives no consideration at all to the present children, we find that the trial court abused its discretion in not first determining that, under the particular facts of this case, the strict application of the guidelines would be unjust or inappropriate, as set out in the Nebraska Child Support Guidelines, paragraph C(5).

244 Neb. at 886, 510 N.W.2d at 57-58.

[5] Paragraph C of the child support guidelines provides in relevant part: "All orders for child support obligations shall be established in accordance with the provisions of the guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the guidelines should be applied." Paragraph C lists five circumstances in which deviation is permissible. Only the fifth circumstance could relate to the issue presented in the case before us. That circumstance provides that a deviation is permissible "whenever the application of the guidelines in an individual case would be unjust or inappropriate." Worksheet 5, referred to in paragraph C, is entitled "Deviations to Child Support Guidelines" and contains a deduction from the net income computed on worksheet 1. This deduction in worksheet 5 is designated "[d]eduction computed for child or children of one of the parties but not previously ordered." We observe that this deduction is placed so that it will have the same effect as the deduction contained on worksheet 1 designated "[c]hild support previously ordered for other children."

In this case, Gerald has an obligation to support both families. We conclude that in this case, the trial court did not abuse its discretion in making an allowance for the second family. The district court appropriately employed the use of worksheet 5.

[6] However, we conclude that the district court abused its discretion in determining the amount of the allowance for the second family and, hence, the appropriate amount of child support in this case. The district court used the $341 figure, which it arrived at by calculating child support under the guidelines for Eric, as a deduction to Gerald's monthly income when determining Gerald's support obligation to Jill and Brian. By using the $341 figure, the district court provided a benefit to the sec-

ond family—Eric—to the detriment of the first family—Jill and Brian. The support for each family should be determined after a deduction for the support for the other family. When arriving at the $341 figure which represents Gerald's support obligation to Eric, the district court did so without considering Gerald's support obligation to Jill and Brian.

When computing Gerald's support obligation to Jill and Brian, we considered Gerald's obligation to Eric. In determining Gerald's obligation to Eric, we considered his support obligation to Jill and Brian. Based upon the results of this interdependent arithmetic, we determine that Gerald should pay Diane child support of $407 per month for both Jill and Brian and $282 per month for one child. We modify the district court's order accordingly.

2. Dependency Exemptions

Next, we address whether the district court abused its discretion in awarding Gerald both dependency exemptions for income tax purposes so long as he remains current on his child support obligation. Diane argues that there is no equitable reason why Gerald should receive both dependency exemptions.

[7-9] A tax dependency exemption is nearly identical in nature to an award of child support or alimony. *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991). The dependency exemption for income tax returns is an economic benefit. *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990). A trial court may exercise its equitable powers to allocate dependency exemptions between custodial and noncustodial parents. *Id.*

We first point out that neither party requested a modification of the allocation of the dependency exemptions in his or her pleadings or in the evidence offered at the modification hearing. Prior to the entry of the modification order before us, each party had one dependency exemption.

Based on the calculations of both the district court and this court, Gerald is paying child support in an amount less than 50 percent of the total monthly support, as determined by application of the child support guidelines. As a result, Diane is responsible under the guidelines for more than 50 percent of Jill and Brian's support. We recognize that, as the custodial parent,

Diane may very well have additional expenses for the family above the amount for which the guidelines determine she is responsible. There is no evidence that Gerald has any other out-of-pocket expenses regarding Jill and Brian besides incidentals. Gerald argues that he provides their health insurance and that this should be considered when determining the allocation of the dependency exemptions. However, the record shows that the employer of Gerald's present wife provides Jill and Brian's insurance at no cost to Gerald and his present wife.

As each party remains responsible for approximately one-half of Jill and Brian's support under the guidelines, there is no basis to justify modifying the allocation of the dependency exemptions and awarding both to Gerald. We conclude that the district court abused its discretion in awarding Gerald both dependency exemptions. We reverse the district court's order accordingly.

VII. CONCLUSION

Based on our de novo review of the record, we conclude that the district court abused its discretion in the amount of child support awarded. We modify the amount of support awarded by increasing the support to $407 per month for two children and $283 per month for one child. We also conclude that the district court abused its discretion in awarding both dependency exemptions to Gerald. We reverse the district court's award of both dependency exemptions to Gerald. As a result, each party is entitled to one dependency exemption just as prior to the entry of the modification order.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED.

JOHN BURKE, APPELLANT AND CROSS-APPELLEE, V. KENNETH HARMAN, APPELLEE AND CROSS-APPELLANT.

574 N.W.2d 156

Filed January 6, 1998. No. A-96-846.

1. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered

instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction.

2. **Rules of Evidence: Trial: Witnesses.** Unavailability is defined in part by Neb. Rev. Stat. § 27-804(1)(e) (Reissue 1995) as including situations when the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.
3. **Rules of the Supreme Court: Pretrial Procedure: Witnesses: Depositions.** Under Neb. Ct. R. of Discovery 32(a)(3)(B) (rev. 1996), unavailability is defined as the witness is at a greater distance than 100 miles from the place of trial or hearing, or out of the state, or beyond the subpoena power of the court, unless it appears that the absence of the witness was procured by the party offering the deposition.
4. **Witnesses: Testimony.** A witness' failure to answer questions on cross-examination may require striking all or part of his testimony, depending upon how closely connected to the issues in the case the questions are or whether the questions relate to collateral matters concerning credibility.
5. ____: ____. A distinction must be drawn between cases in which unanswered questions merely preclude inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the unanswered questions prevent inquiry into matters about which the witness testified on direct examination.
6. **Witnesses: Testimony: Contempt.** A witness' reason for refusing to answer is crucial in determining whether to hold the witness in contempt, but it plays no role in considering whether the cross-examination was frustrated.
7. **Witnesses.** The right to present witnesses is obviously not unlimited, but the rule distinguishing between collateral and direct issues properly limits it.
8. **Witnesses: Testimony: Appeal and Error.** When the object of cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted; the scope of such latitude is ordinarily subject to the discretion of the trial judge, and unless abused, such exercise is not reversible error.
9. **Evidence: Witnesses: Impeachment.** Evidence which does not tend to impeach a witness on a material point and which is not substantive proof of a fact relevant to an issue is properly excluded as collateral evidence.
10. **Witnesses: Testimony.** The test of whether a fact inquired of in cross-examination is collateral is whether the cross-examining party would be entitled to prove it as part of his case.
11. **Witnesses: Impeachment.** A witness may not be impeached by producing extrinsic evidence of collateral facts to contradict the witness' assertions.
12. **Negligence: Fraud: Liability.** Liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information.
13. **Fraud: Liability.** One who, in the course of his business, profession, or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
14. **Negligence: Fraud: Damages: Value of Goods.** According to the Restatement (Second) of Torts § 552 B(1) (1977), the damages recoverable for a negligent mis-

representation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including the difference between the value of what he has received in the transaction and its purchase price or other value given for it and pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

15. **Contracts: Negligence: Fraud: Damages.** In an action for negligent misrepresentation, damages are excluded for the benefit of the plaintiff's contract with the defendant.
16. **Negligence: Fraud: Damages: Value of Goods.** The out-of-pocket rule looks to the loss which a plaintiff has suffered in a transaction and gives him the difference between the value of what he has parted with and the value of what he has received.
17. ____: ____: ____: ____. The loss for the out-of-pocket rule is usually measured as the difference between what the plaintiff parted with and what the plaintiff received.
18. **Pretrial Procedure: Rules of the Supreme Court.** Sanctions under Neb. Ct. R. of Discovery 37 (rev. 1996) exist to punish a litigant or counsel who might be inclined or tend to frustrate the discovery process, and under the rule, the appropriate sanction is to be determined from the factual context of the particular case and is left to the discretion of the trial court.
19. **Pretrial Procedure.** The purpose of the discovery process is to enable preparation for trial without the element of an opponent's tactical surprise, a circumstance leading to results based on counsel's legal maneuvering more than on the merits.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded for a new trial.

Charles H. Wagner and Maureen Freeman-Caddy, of Edstrom, Bromm, Lindahl, Wagner & Miller, for appellant.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

MILLER-LERMAN, Chief Judge, and SIEVERS and MUES, Judges.

SIEVERS, Judge.

A Navajo chief's blanket, first phase, Ute style, is a rare and beautiful object because of its historical and ethnographic significance, as well as its art; all of which add to the blanket's great value. Such blankets were handwoven by Navajo women before 1850. The plaintiff, John Burke, acquired such a blanket by purchase for $115 from an antique mall in Lincoln. He sold the blanket to the defendant, Kenneth Harman, for $1,000. Harman sold the blanket to an individual in New York for

$290,000. Burke has sued Harman for $289,000, claiming that Harman falsely or negligently misrepresented the blanket as a substantially less valuable Mexican weaving.

FACTUAL BACKGROUND

John Burke resides in Ithaca, Nebraska, and his work is primarily wood carvings of Native Americans, mountainmen, early American historical figures, Civil War figures, and the like. In order to lend authenticity to his work, Burke engages in some collecting of historical artifacts involving his subject matter, which he studies and then typically sells or trades when he is finished with them. Burke teaches his wood-carving art throughout the United States and has published several how-to books on the subject.

Kenneth Harman holds a bachelor of arts degree in education and has taught first grade at Arnold Elementary School in Lincoln for over 23 years. Harman says that he has been a collector since he was 10 years old. Initially, he collected toys, and he eventually completed a collection of high quality Lehmann toys made in Germany, which is now on display in Nuremberg, Germany. In the late 1980's, Harman began collecting Indian baskets. He has also collected advertising signs and comic strip toys. Prior to the transaction at issue here, Harman had owned a total of 12 weavings, which he believed to be Native American. All of those weavings were rugs rather than blankets, and the most expensive was purchased from Daphne Deeds for $4,250. Harman tried to sell that rug in New Mexico without success and ultimately traded it for an Indian basket from the Morning Star Gallery. Three of the other weavings which he acquired turned out to be Mexican rather than Indian, which he returned to the sellers. Mexican weavers have done, and continue to do, imitations of the Navajo weavings, and these imitations are much less valuable than the Navajo weavings. One of the first guideposts in determining the value of a Southwestern weaving is to determine whether the weaving is Indian or a Mexican "knock-off." Harman estimated that of the eight weavings he owned at the time of the transaction in question with Burke, he had paid $1,200 to $1,400 for all of them.

Harman has a reference library of some consequence in his home dealing with collecting and collectibles. His library

included at least two reference books which displayed pictures of Navajo chief's blankets, first phase, Ute style. The books are entitled "Weaving of the Southwest," by Marian Rodee, and "The Navajo Weaving Tradition 1650 to the Present," by Alice Kaufman and Christopher Selser. He also had copies of American Indian Art magazine, which reported on the sale of several chief's blankets. Prior to the transaction at issue, Harman had sent one of the other weavings he had acquired to Sara Alexanian of Albuquerque, New Mexico, who works with her husband in the cleaning, buying, and selling of rugs and blankets, including Navajo textiles, but she returned the weaving to Harman because it was Mexican and therefore not worth her time or his money. Alexanian explained that the Navajo blankets were much more finely woven than rugs and were used as trade items with other tribes and as wearing apparel.

The story of the particular Navajo chief's blanket involved in this case began before 1850, when it was handwoven in the Ute style by a Navajo woman. The Ute Indians, with whom the Navajos traded, preferred the ivory, chocolate brown (natural colors from the wool), and indigo (naturally dyed) stripe pattern seen on this blanket—hence the name "Ute style." The name indicates a particular and recognizable style of chief's blanket. According to Alexanian, the term "first phase" means that it was woven before there were white settlers in the Southwest.

The history of the blanket involved in this case, at least for us, begins on July 1, 1993, when Burke attended the opening of St. George's Antique Mall in Lincoln. Burke was the second customer in line to enter the business. There, he purchased the blanket for $115. It had a price tag of $115 on it from its owner, Tedd Whipple of Grand Island, who had placed it at the mall for sale. On the tag, Whipple described it as a "1930's Southwest wool handwoven throw." Burke testified that the blanket was placed on the floor in front of the fireplace at his home. On August 1, a houseguest, William Hackett, inquired about the rug. Burke indicated that he did not know anything of its background or origin. Burke and Hackett discussed the matter and concluded that some effort should be made to determine its age and origin, and in that regard, Harman's name occurred to Burke. Burke and Harman had known each other since early

1993, when Harman had called Burke about some items Burke had displayed for sale at the Antique Market in Lincoln. As a result, the two men met, and Harman purchased items from Burke.

Burke, Hackett, and the blanket proceeded to Harman's residence on August 1, 1993, after Burke had called Harman about looking at the blanket. There is a sharp conflict about the time of day on August 1 when the meeting took place. Burke recounts that it was at 8 o'clock in the evening and that he left about 8:30. Burke supports his timeframe with his phone records, which show a call to Harman at 7:30 p.m. for 4 minutes at a cost of 24 cents. Under Burke's testimony, this is the pre-meeting phone call to Harman approximately 30 minutes before arrival at Harman's house. Harman concedes that Burke called before bringing the blanket to his house but asserts that Burke arrived around 1 p.m.

The meeting time is important because of other inferences which might flow therefrom. For example, the record establishes a long distance phone call from Harman's residence to Whipple on the night of August 1 at 8:28 p.m., which, according to Burke and Hackett, would have been within minutes of their departure. Whipple testified that in this conversation with Harman there was no suggestion that the weaving was of Mexican origin or that Harman did not know what kind of weaving it was. According to Whipple, he remembered Harman using the words " 'early Navajo rug' " in that conversation. Harman's timeframe is important to his defense, because he relates that after buying the weaving he attempted to identify the weaving, which included calling St. George's that day to find out who had placed it there, waiting for a return call with that information, looking at his reference books, and only calling Whipple after getting his name from St. George's. But Harman's evidence is that St. George's closes at 8 p.m. and that he could not have gotten that information if the meeting occurred when Burke said it did. In short, Burke says his timeframe shows that Harman did not have to research anything about the weaving, because Harman knew from the outset that the weaving was an extremely valuable Native American blanket. On the other hand, Harman says his timeframe and what he

did shows that he did not know what the weaving was and that he undertook a number of steps to find out.

After 1,100 pages of testimony, several videotaped depositions, and three boxes of exhibits, the essence of the case still comes down to the conflicting versions of the conversation at Harman's home on August 1, 1993, regardless of the time of day that it occurred. When the meeting took place, what Harman did or did not do thereafter, and the inferences to be drawn therefrom arguably support each party's version of the conversation, depending upon what is concluded about the underlying facts. At the simplest level, Burke's lawsuit asks the questions: "What did Harman know, and when did he know it?"

Burke's version of the meeting is that after Harman rolled out the blanket for examination, Harman told Burke that it was Mexican and that in Sante Fe it was worth $1,500 to $2,000. Harman offered Burke $500 plus two Indian Skookum dolls for the weaving. When Burke refused that offer, Harman offered $1,000 cash, which Burke accepted. Burke had also brought an Indian basket along, which Burke sold to Harman for $250. Harman admits in his testimony that he was asked by Burke, "What do you think it is?" But he relates that he told Burke that it could be Mexican or Indian and that he gave no opinion as to its value except in reference to its condition in relation to the rug he had acquired from Deeds, Harman saying that Burke's weaving was in poorer condition. Harman testified that he liked the weaving and that he asked what Burke wanted for it, to which Burke responded with, " 'What will you give me?' " Harman responded by offering Burke $500 in cash plus the two Indian Skookum dolls which he had lying on the table, preparing to pack them to take to Santa Fe. Harman related that Burke did not think the dolls were worth the $500 asserted by Harman. Harman testified that he then said, " 'I'll give you a thousand dollars for your blanket.' " According to Harman, Burke's response was, " 'Hell, yes. I'll sell it for $1,000.' " Harman paid Burke $1,250 in cash for the blanket and the basket, and Burke and Hackett left.

The blanket was identified as a Navajo chief's blanket, first phase, Ute style. Howard Grimmer, the former owner of Morning Star Gallery in Santa Fe, which handles valuable

Indian artifacts, put the matter in perspective when he testified that even if a person had $500,000 in a checking account and wanted to buy a first phase blanket on a particular day, he did not think that anyone could do it, because the blankets are very rare, and there are only a "handful of them in public hands and those only move occasionally." Harman sold the blanket a year after he got it from Burke to an individual in New York for $290,000. The parties have stipulated that on August 1, 1993, the blanket Burke sold to Harman had a "fair market value of $290,000." Additional facts from the record will be provided as necessary in our discussion of the issues raised by the appeal.

PROCEDURAL BACKGROUND

The case was apparently tried on the fourth amended petition (petition), as that is the only petition in our transcript. That petition alleges that Harman represented to Burke that he had knowledge and expertise in reference to Native American artifacts, including weavings, and that Harman represented to Burke after examination of the weaving that it was not of Native American origin but was a Mexican blanket with a value in the area of $1,500 to $2,000. The petition alleges that those representations were false, as the blanket was of Native American origin with a value in excess of $250,000, which facts "were suppressed or concealed by [Harman] with the intention that [Burke] be [misled] as to the true condition of the property; that [Burke] was reasonably so [misled] and suffered damages as a result . . . ."

The petition further alleges that when Harman made the affirmative representations to Burke, Harman "either knew the statements and representations were false, or said statements were made recklessly by [Harman] without knowledge of their truth, but represented to [Burke] as positive assertions." Alternatively, Burke pleads that the proposed transaction was one where Harman had a pecuniary interest and supplied false information to Burke which Burke justifiably relied upon and that Harman "failed to exercise reasonable care or competence in obtaining or communicating the information" about the origin of the blanket and its value. Burke further alleges that the representations

of Harman were made with the intent that Burke rely upon them and as an inducement for Burke to sell the blanket to Harman and that, as a result, Burke has been damaged in the sum of $289,000.

Harman's answer to the petition preserved his demurrer that a cause of action based upon neither fraudulent misrepresentation nor negligent misrepresentation was stated and, additionally, that Burke had not "pled the proper measure of damages." As affirmative defenses, Harman alleged that Burke was contributorily negligent in failing to use ordinary care to independently research the origin and value of the blanket and that such contributory negligence was the cause of any damage. As a second affirmative defense, Harman alleges that it is the trade and custom of buyers and sellers of antiques to make their own independent determinations of value and not to rely upon the valuation of a buyer. The third affirmative defense alleges that prior to August 1, 1993, Burke had contacted Harman approximately a dozen times about buying or trading for antique items owned by Burke and that a course of dealing had been established where each person independently arrived at prices and values for the goods they were buying, selling, or trading.

Trial before a jury in the district court for Lancaster County began on May 13, 1996, and the jury returned its verdict in favor of Harman on May 21. The trial court submitted the case to the jury only on the claim of fraudulent misrepresentation, outlining that the plaintiff must prove by a greater weight of the evidence that (1) Harman made the claimed representation; (2) the representation was false; (3) the representation was made fraudulently; (4) when the representation was made, the intent was that Burke would rely upon it; (5) Burke did rely upon the representation; (6) Burke's reliance was reasonable; and (7) the representation was the proximate cause of some damage to Burke and the nature and extent of the damage.

In the instructions on effect of findings, the court instructed the jury that if Burke had met his burden of proof, the verdict must be for him in the amount of $289,000. No affirmative defenses were submitted to the jury. After Burke's motion for new trial was denied, a timely appeal was filed to this court.

ASSIGNMENTS OF ERROR

Burke assigns that the trial court erred (1) in granting Harman's motion for a partial directed verdict as to Burke's claim based on negligent misrepresentation; (2) in refusing to allow the use of the deposition of Ralph Soloman Silverheels; and (3) in denying Burke's proposed jury instructions (a) on presentation of videotape testimony, (b) that contributory negligence is not a defense to fraudulent misrepresentation, (c) on negligent misrepresentation, and (d) on reliance. As his fourth assignment of error, Burke claims that the lower court erred in instructing the jury by giving inconsistent instructions and failed to properly instruct on the issues of justifiable reliance and whether contributory negligence is a defense to fraudulent misrepresentation.

STANDARD OF REVIEW

[1] To establish reversible error from a court's failure to give a requested instruction, an appellant has the burden of showing that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the tendered instruction. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997); *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997).

On questions of law, an appellate court has an obligation to reach independent conclusions irrespective of the decision made by the court below. *State v. McBride*, 252 Neb. 866, 567 N.W.2d 136 (1997).

A party against whom a motion for directed verdict or a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence. *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 438 N.W.2d 485 (1989).

ANALYSIS

Silverheels' Deposition.

On February 20, 1996, the deposition of Ralph Soloman Silverheels was taken in Albany, Oregon, at the instance of

Burke. Burke's counsel and a court reporter were present in Albany with Silverheels, and Harman's counsel participated by telephone from Lincoln. Silverheels described himself as a "[N]ative American fine art dealer" and said that he had an antique store in Omaha at the time the transaction concerning the weaving took place. The general substance of Silverheels' testimony was that he had become acquainted with both Burke and Harman through antique trading. In the past, before the transaction which is the subject of this litigation took place, Harman had contacted Silverheels to inquire whether he had good weavings and baskets, in particular whether he had any first phase, second phase, or third phase weavings, or any older Hopi weavings.

Silverheels also testified that Harman had been in his store looking at weavings and, in particular, had examined a third phase weaving in the summer of 1993. Silverheels testified that he first heard about Harman's acquisition of the first phase weaving when an acquaintance told him that Harman had obtained a "very, very nice Navajo weaving" and was looking to sell it for $350,000 to $450,000. Silverheels and Harman talked by phone, and they discussed how Harman had obtained this weaving, as well as a price for the weaving. In particular, Silverheels testified:

> He [Harman] had told me that he had bought a first phase chief's blanket and that he had come onto it with great luck, that — excuse my language, a dumb fat fucker that had bought it at an antique — like a fle[a] market or an antique store, that he told him it was Mexican, and that he gave him a thousand bucks for it, told him it was worth two thousand.

Silverheels indicated to Harman that he would like to see it. According to Silverheels, Harman left a photograph of the weaving in Silverheels' store when Silverheels was absent from the store. Silverheels testified that his nephew received the photo and wrote " 'Photograph of first phase Ute Navajo blanket' " with Harman's phone number on the back of the photograph. By the time Silverheels contacted Harman about the weaving after seeing the photograph, Harman had already sold it.

Under cross-examination at his deposition, Silverheels refused to answer approximately 20 questions posed by Harman's counsel. Summarized and reorganized, the specific questions he refused to answer were: (1) his father's last name, (2) his mother's last name, (3) the name on his birth certificate, (4) the city in California where he went to high school, (5) the year he graduated from college, (6) the college he graduated from, (7) specifics of his military career, (8) whether he still owned his former house in Omaha, (9) whether he was wounded in the line of duty as a police officer, (10) his current residential address, (11) the address of his nephew who worked in his Omaha store, (12) whether he told anyone in Omaha he was the grandson of Tonto from "The Lone Ranger," (13) whether he told people in Omaha that he was a lawyer in California, (14) whether he had represented himself as the chief of an Indian tribe, (15) specifics about Putgrand Auction and Silverheels' lawsuit against Heartland Estates and Bill Kauffman, (16) when his name legally became Ralph Soloman Silverheels, (17) whether he has been known by any name other than Silverheels, (18) the significance of June 6, 1980, (19) the name of his shop in Arizona, and (20) the tribe of which he is a member.

Several times after refusing to answer a specific question, Silverheels offered to explain to a judge why he would not answer, adamantly insisting that the judge would rule in his favor, and asserted, "The United States government . . . allow[ed] [him] the privilege [not to answer] by [C]ongress." He also stated that he would be more than willing to come to Lincoln to testify. At the close of the deposition, Harman's counsel stated that he was planning to make either a motion to compel Silverheels to answer the questions he refused to answer or a motion to strike his entire deposition testimony. The record before us reveals that Harman's counsel opted for the latter option, because in a motion in limine filed before trial, Harman asked the court to exclude

> all testimony of Ralph Soloman Silverheels contained in his deposition of February 20, 1996 for the reason that:
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> a. The witness indicated in his deposition that he is willing to appear and he is therefore not "unavailable" under Neb. Rev. Stat. § 27-804(2)(a);

b. The defendant was deprived of his right to effectively cross-examine the witness at his deposition by the witness's refusal to answer appropriate questions; and

c. The probative value of the testimony is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury in violation of Neb. Rev. Stat. § 27-403.

In a journal entry, the trial judge ruled that Silverheels' deposition would be excluded at trial because the questions he refused to answer did not "relate to mere collateral or cumulative matters," but, instead, were "highly relevant" credibility issues and that Silverheels' refusal to answer unfairly deprived Harman of his right to cross-examination. Because the motion in limine concerning Silverheels' testimony was sustained, there was no mention of Silverheels in the trial record other than when Burke unsuccessfully offered the deposition at trial. During cross-examination of Harman, the following exchange took place between Burke's counsel and Harman:

Q. Okay. Mr. Harman, did you ever tell an antique dealer in Omaha that you purchased a chiefs blanket from a big dumb fat so and so?

A. No, I certainly did not.

. . . .

Q. Are you aware of anyone, other than . . . Burke, who contends that you made such a statement to a dealer in Omaha?

A. No.

Harman also testified on both direct and cross-examination regarding the people he contacted after he obtained the blanket from Burke, and Silverheels was not one of the people Harman admitted contacting.

Burke argues that the trial judge erred in refusing to admit any of the deposition of Silverheels merely because the witness failed to answer collateral background questions.

Neb. Rev. Stat. § 27-804 (Reissue 1995) states in relevant part:

(2) Subject to the provisions of section 27-403, the following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

> (a) Testimony given as a witness . . . in a deposition taken in compliance with law in the course of the same or a different proceeding, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered.

[2,3] Unavailability is defined in part by § 27-804(1)(e) as including situations when the declarant "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." Additionally, Neb. Ct. R. of Discovery 32(a)(3)(B) (rev. 1996) contains a more precise definition of unavailability: "[T]he witness is at a greater distance than one hundred miles from the place of trial or hearing, or out of the state, or beyond the subpoena power of the court, unless it appears that the absence of the witness was procured by the party offering the deposition." Neb. Rev. Stat. § 25-1227 (Reissue 1995) provides that a witness in a civil trial cannot be compelled to attend a trial outside of the state where he or she is served with a subpoena or at a location more than 100 miles from his or her residence.

Silverheels lived in Oregon, well outside of the reach of a subpoena from the Nebraska trial court. Although Harman's motion asserted Silverheels was "available" as a ground for excluding this deposition, the trial court did not rely on that ground in excluding the deposition. Harman's brief in this court does not assert that Silverheels was "available." Harman did assert at oral argument that Silverheels was "available," because Silverheels said he would return to Lincoln to testify. But we are cited to no authority that such a statement at deposition makes the witness "available," nor have we found any authority on our own for this proposition. Rather, § 25-1227 and rule 32(a)(3)(B) make distance and whether the witness can be reached by the court's subpoena power the conclusive test of "availability," unless the proponent of the testimony "arranges" the witness' unavailability—and there is no claim or evidence of such here.

It has been held that rule 32, in most cases, will not create different conditions for admissibility than does § 27-804. *Maresh v. State*, 241 Neb 496, 489 N.W.2d 298 (1992).

Moreover, an occurrence witness, as Silverheels would be, is not required to travel more than 100 miles to attend trial pursuant to subpoena. See *id.* Thus, we are satisfied that Silverheels, who lived in Oregon, was unavailable to testify as contemplated by § 27-804(2)(a) and rule 32(a)(3)(B).

The deposition was taken via stipulation, and no claim is raised under § 27-804 that it was not in accordance with Nebraska law, or Oregon law for that matter. That the parties and their motives were the same in both the deposition and trial cannot be disputed. Thus, the only question remaining on whether the deposition was admissible under § 27-804(2)(a) is whether Harman had the *opportunity* to develop Silverheels' testimony through cross-examination when Silverheels refused to answer the questions we have outlined earlier. The district court's ruling was that Harman's counsel did not.

Because we find it clear that Silverheels' deposition was admissible under § 27-804(2)(a) and rule 32 *unless* the opportunity to cross-examine was unduly denied, an analysis of cases dealing with the effect of a witness' refusal to answer questions during cross-examination must be undertaken to determine whether the deposition was admissible in whole or in part despite the fact that Silverheels did not answer all questions put to him on cross-examination.

In a somewhat similar case involving the use of deposition testimony at trial, *U.S. v. Salim*, 855 F.2d 944 (2d Cir. 1988), a government witness refused to answer certain questions on cross-examination in her deposition, and her lawyer answered other cross-examination questions for her. The witness was deposed in France, where she was being held in custody by French police for drug smuggling. The deposition was taken pursuant to French law. The prosecution successfully introduced the deposition under Fed. R. Evid. 804(b)(1), which is essentially the same as our § 27-804(2)(a). On appeal, the defendant argued that the witness' refusal to answer certain questions denied him the opportunity for cross-examination in violation of the Confrontation Clause. The court of appeals held that "[a]lthough [the witness] failed to answer some questions, and although her lawyer responded to a few others on [her] behalf, those flaws did not render the testimony inherently unre-

liable. Rather, they affected the weight to be accorded to the witness' answers, which was a question for the trier of fact." 855 F.2d at 955.

Additionally, the U.S. Court of Appeals for the Eighth Circuit has held that under the federal equivalent to § 27-804(2)(a), opportunity and motive to cross-examine the witness are the important factors, not the actual extent of cross-examination. See *DeLuryea v. Winthrop Laboratories, Etc.*, 697 F.2d 222 (8th Cir. 1983).

[4] The seminal case on the issue of the effect of a witness' refusal to answer questions during cross-examination is *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied* 375 U.S. 822, 84 S. Ct. 60, 11 L. Ed. 2d 55. In *Cardillo*, a government witness invoked his privilege against self-incrimination on cross-examination. He had testified on direct examination that he had given the defendant money to buy stolen furs, but on cross-examination, he refused to answer questions about the source of that money. The court set forth three categories to consider in determining whether a witness' failure to answer questions on cross-examination requires striking all or part of his testimony. The court described these categories as follows:

> The first would be one in which the answer would have been so closely related to the commission of the crime that the entire testimony of the witness should be stricken. The second would be a situation in which the subject matter of the testimony was connected solely with one phase of the case in which event a partial striking might suffice. The third would involve collateral matters or cumulative testimony concerning credibility which would not require a direction to strike and which could be handled (in a jury case) by the judge's charge if questions as to the weight to be ascribed to such testimony arose.

Id. at 613. In *Cardillo*, the court struck the entire testimony of this witness because the questions the witness refused to answer fell into the first category of testimony.

[5] A different government witness in *Cardillo* had testified about the specifics of the crimes attributable to the defendant and then also refused to answer certain questions on cross-examination. However, the questions this witness refused to

answer were about the current charges pending against this witness and his past criminal record. The court first noted that

> reversal need not result from every limitation of permissible cross-examination and a witness' testimony may, in some cases, be used against a defendant, even though the witness invokes his privilege against self-incrimination during cross-examination. In determining whether the testimony of a witness who invokes the privilege . . . may be used against the defendant, a distinction must be drawn between cases in which the assertion of the privilege merely precludes inquiry into collateral matters which bear only on the credibility of the witness and those cases in which the assertion of the privilege prevents inquiry into matters about which the witness testified on direct examination. Where the privilege has been invoked as to purely collateral matters, there is little danger of prejudice to the defendant and, therefore, the witness's testimony may be used against him.

Id. at 611. The court then held that the district court did not err in refusing to strike the testimony of this witness, because the questions he refused to answer "related solely to his credibility as a witness and had no relation to the subject matter of his direct examination." *Id.*

The *Cardillo* analysis and rules have been applied in civil trials as well. In *Board of Trustees v. Hartman,* 246 Cal. App. 2d 756, 55 Cal. Rptr. 144 (1966), a witness, by deposition, refused to answer certain questions on cross-examination. The defendant was a professor who was challenging his firing for violating the education code's provisions for moral fitness because he had helped a former student obtain a divorce in Mexico and then married the student in Mexico the same day. He had also previously been involved with a woman named Frances, with whom he had lived while married to another woman. At trial, the plaintiff sought to introduce the deposition testimony of Frances, who was outside the state at the time of trial. The defendant objected because Frances had refused to answer certain questions on cross-examination about whether she had blackmailed the defendant. After quoting from *Cardillo*, the court held that because the testimony was cumulative and only

related to the credibility of the witness, it was not error to refuse to strike the testimony.

Another civil case, *Air Et Chaleur, S.A. v. Janeway*, 757 F.2d 489 (2d Cir. 1985), involved stockholders suing for breach of a contract to purchase their stock. On appeal after a plaintiffs' verdict, the defendant argued that the district court erred in allowing one of the plaintiffs to invoke his Fifth Amendment privilege in response to questions asked on cross-examination concerning his alleged nonpayment of Belgium income taxes. After noting that "[o]nly if the alleged error was prejudicial may we find it an adequate basis for reversal," the court held:

> Issues concerning a party's credibility are generally collateral. *United States v. Cardillo*, 316 F.2d 606, 611 (2d Cir. 1963). While it is true that a plaintiff may not attempt to deny defendants all opportunities to obtain potentially damaging information, assertion of the privilege against self-incrimination in response to questions on collateral issues is not improper. [Citations omitted.] Where evidence sought on cross-examination relates only to credibility, a party may invoke the privilege against self-incrimination. . . .
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> . . . Therefore, we hold that the district court did not abuse its discretion in allowing [the witness] to invoke his Fifth Amendment privilege.

Id. at 496. But see *Magyar v. United Fire Ins. Co.*, 811 F.2d 1330 (9th Cir. 1987) (district court did not abuse its discretion in striking plaintiff's testimony as sanction for giving nonresponsive and evasive answers), *cert. denied* 484 U.S. 851, 108 S. Ct. 151, 98 L. Ed. 2d 107. The Nebraska Supreme Court has followed the *Cardillo* rule in *State v. Bittner*, 188 Neb. 298, 196 N.W.2d 186 (1972), where the defendant claimed his right to confrontation was denied when the trial court apparently upheld a self-incrimination claim when questions were asked about whether a witness had engaged in prostitution. The *Bittner* court held: "The restricted questioning dealt only with a collateral matter bearing solely on the credibility of the witness, not upon facts brought out on direct examination, and not on facts pertaining to the guilt or innocence of the defendant." *Id.* at 301-02, 196 N.W.2d at 189.

Additionally, "[t]he test [e]nunciated in *Cardillo* has been followed by nearly all federal circuits and the courts of most states." *Tyler v. State*, 105 Md. App. 495, 589, 660 A.2d 986, 1032 (1995) (Davis, J., dissenting) (rejecting court's holding that prior testimony of codefendant was admissible at defendant's trial where codefendant was unavailable for cross-examination), *rev'd on other grounds* 342 Md. 766, 679 A.2d 1127 (1996).

Although the cases involving this issue frequently arise from the assertion of the Fifth Amendment privilege against self-incrimination, it does not appear that assertion of the privilege is a prerequisite to the admission of the deposition testimony when there are unanswered cross-examination questions. See *U.S. v. Negrete-Gonzales*, 966 F.2d 1277 (9th Cir. 1992). Nonetheless, we observe that Silverheels stated: "I refuse to answer any personal questions on the grounds of the Fifth Amendment that it might endanger my family or my property. You better speak to a judge; you are going too far."

We digress to note that Silverheels' statement above is not entirely accurate, because he did not refuse to answer all personal questions. Examination of the deposition reveals that Silverheels answered a good number of personal questions. For example, he provided the name of his corporations in both Nebraska and Oregon, the location of his business and its phone number in Oregon, the name of the person from whom he first heard about Harman's having acquired the rug, the reason why he and his family moved to Oregon, the fact that he had been in the military, his major in college as Indian art and law enforcement, his father's first name and his mother's first name, and the fact that he was formerly a police officer. But, as we have earlier stated, there were questions that Silverheels would not answer in the deposition.

In *Negrete-Gonzales*, the defendants were on trial for conspiring to sell cocaine. The U.S. Court of Appeals for the Ninth Circuit said that if the jury believed the defendants' witness Medina, "it would have had to acquit Negrete and Mendoza on all three counts." *Id.* at 1279. When the government asked her to identify her source of cocaine on cross-examination, Medina refused, stating it would jeopardize the lives of her children.

She would say only that neither Negrete nor Mendoza provided her with the drugs. Based on the refusal to name her source, the court granted the government's motion to strike her entire testimony. The Ninth Circuit, citing its previous decision in *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983), stated that striking a witness' entire testimony is an extreme remedy, not to be lightly imposed. The Ninth Circuit in *Negrete-Gonzales* found that the identity of the unknown supplier was "only peripherally related to [Medina's] direct testimony." 966 F.2d at 1280. The court continued: "The identity of her source was collateral to the issues at trial and to her testimony on direct examination. Any possible relevance to the issues at trial dissipated when she made clear that her supplier was someone other than Mendoza or Negrete." *Id.*

[6,7] The Ninth Circuit also addressed the role that the witness' reason for refusal to answer plays in the analysis as to whether the testimony should be stricken. The court said:

> Medina, unlike the witness in *Lord*, asserted fear of reprisal rather than her Fifth Amendment privilege as justification for her refusal to answer. Despite this difference, however, we find the *Lord* analysis applicable here. The key question is whether the defendant's right to present witnesses can be protected without frustrating the government's interest in effective cross-examination. A witness's reason for refusing to answer is crucial in determining whether to hold the witness in contempt, but it plays no role in considering whether the cross-examination was frustrated. The right to present witnesses is obviously not unlimited, but the rule distinguishing between collateral and direct issues properly limits it. *Cf. Panza*, 612 F.2d at 436-39 (suggesting without deciding that a nonprivileged refusal to answer does not justify striking a witness's entire testimony if the questioning pertained only to collateral matters).

Id.

Medina's testimony in *Negrete-Gonzales* was not cumulative of other witnesses, and the court described her as a key witness and stated that no other witness could duplicate her testimony. Although the court recognized that the jury could have disbe-

lieved Medina, the error in striking her testimony was not harmless, as the jury was not given the opportunity to consider her testimony.

In the instant case, the trial judge's ruling excluding Silverheels' deposition cited two fundamental reasons: (1) The credibility of the deponent was highly relevant and the unanswered inquiries did not relate to merely collateral matters, and (2) the defense counsel was "deprived of a fair opportunity on cross-examination to test the truth of the deponent's direct examination." In judging the correctness of that ruling, we necessarily consider the subject of confrontation of witnesses on cross-examination. In that regard, the Supreme Court's opinion in *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996), is helpful. The court relied on a series of cases to reach its holding that an accused's constitutional right of confrontation is violated when either

> (1) he or she is absolutely prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, or (2) a reasonable jury would have received a significantly different impression of the witness' credibility had counsel been permitted to pursue his or her proposed line of cross-examination.

Id. at 248, 556 N.W.2d at 38. This holding is of great significance in our analysis of the trial court's conclusion that Harman's counsel was denied a fair opportunity to test the truth of Silverheels' direct testimony.

The court in *Privat* cited *State v. Hartmann*, 239 Neb. 300, 476 N.W.2d 209 (1991), as an example of the denial of the opportunity to cross-examine when the trial court wrongfully refused to allow inquiry into a witness' pending civil lawsuit against the defendant. In *Hartmann*, the pending lawsuit obviously related to the interest and bias of the witness against the defendant, thereby bringing the matter squarely within the *Privat* holding. However, in *State v. Roenfeldt*, 241 Neb. 30, 486 N.W.2d 197 (1992), the Supreme Court upheld the trial court's rejection of a discovery plan to depose a sexual assault victim's grade school principal about an incident involving a missing watch and the assault victim's "untruthfulness" about the

whereabouts of this watch. *Id.* at 38, 486 N.W.2d at 203. The *Roenfeldt* court reasoned that the line of discovery was "clearly collateral" to the criminal behavior at hand and did nothing to exculpate the defendant. *Id.*

[8] The law is well established that when the object of cross-examination is to collaterally ascertain the accuracy or credibility of a witness, some latitude should be permitted; the scope of such latitude is ordinarily subject to the discretion of the trial judge, and unless abused, such exercise is not reversible error. *State v. Lewis*, 241 Neb. 334, 488 N.W.2d 518 (1992). See, also, *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990). But the trial court here found that the matters which Silverheels refused to respond to were not collateral.

[9,10] Therefore, it is necessary to put in place a working definition of the concept of "collateral" evidence on cross-examination. In *State v. Williams*, 219 Neb. 587, 365 N.W.2d 414 (1985), the court said that evidence which does not tend to impeach a witness on a material point and which is not substantive proof of a fact relevant to an issue is properly excluded. The *Williams* court also said that the test of whether a fact inquired of in cross-examination in criminal proceedings is collateral is whether the cross-examining party would be entitled to prove it as part of his case and cited *State v. Zobel*, 192 Neb. 480, 222 N.W.2d 570 (1974). In *Williams*, the charge was breaking and entering, and the State had successfully foreclosed, by a motion in limine, inquiry by the defense into Davis' (the burglary victim's) prior conviction for prostitution. Apparently, Davis had not been truthful about this prior conviction when she testified against Williams at his preliminary hearing. At Williams' trial, defense counsel sought to recall Davis, after the State's case, to secure her admission that she had perjured herself at the preliminary hearing. The trial court refused to allow it, and the Supreme Court affirmed. The court found that reference in any form to Davis' alleged prostitution was "properly excluded . . . as an attempted inquiry into a collateral matter." 219 Neb. at 591, 365 N.W.2d at 417. The court further said that it was not substantive proof of any fact relative to the breaking and entering charge against Williams. The fact that Davis' false denial of prostitution may have occurred under oath

during a preliminary hearing did not alter the court's conclusion that any reference to her alleged prostitution was properly excluded as an attempted inquiry into a collateral matter.

The rule is not limited to cross-examination in criminal cases. In *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990), a dental malpractice case involving alleged improper treatment by use of calcium hydroxide, the counsel for the plaintiff sought to ask an expert witness for the defendant dentist if the witness had patients sign a release before he performed calcium hydroxide therapy for periodontal disease. The objection to the questions about patients' signing releases was sustained at trial and upheld on appeal by the Supreme Court. The court in *Capps* cited the *Williams* rule that evidence which does not tend to impeach a witness on a material point and which is not substantive proof of any fact relating to an issue is properly excluded. The *Capps* court reasoned: "Whether Dr. Nalbor's office practice included having patients sign a release has no bearing on whether Dr. Manhart breached the standard of care in his treatment of appellant." *Id.* at 21, 458 N.W.2d at 746.

An illustration of the limitations upon inquiry into collateral matters is the prohibition against questioning about the precise crime or its details, even though the fact of a felony conviction is properly used as impeachment under Neb. Rev. Stat. § 27-609 (Reissue 1995). See, *State v. Olsan*, 231 Neb. 214, 436 N.W.2d 128 (1989); *Latham v. State*, 152 Neb. 113, 40 N.W.2d 522 (1949) (restriction on inquiry into details of convictions prior to enactment of Nebraska rules of evidence).

In *Latham*, the court held:

> The defendant on cross-examination was asked about matters collateral and immaterial to the issues in the case, and the State was permitted to introduce evidence to disprove what the defendant had said the facts were. This was improper procedure. The apparent purpose of such questions by the State was to lay a foundation for an impeachment argument to the jury based upon false testimony with respect to immaterial matters to prove the defendant unworthy of belief in other matters testified to by him vital to his liberty. When a witness is cross-examined on a matter collateral to the issue, he cannot as to his

> answer be subsequently contradicted by the party putting the question.

152 Neb. at 116-17, 40 N.W.2d at 524-25.

As we read Silverheels' deposition and Harman's brief arguing that it was properly excluded, it appears that the foregoing quote is an accurate description of what Harman's counsel was seeking to do with the unanswered questions and why the deposition was allegedly properly excluded. Thus, in applying the body of law we have detailed to the case at hand, our first inquiry is whether the questions Silverheels refused to answer were collateral or whether they were related to the subject matter of his direct examination.

Recalling our listing of the questions, questions 1 through 10 are clearly collateral, as they deal with Silverheels' family and his personal background, which is not related or material to the issues in the case or to his direct testimony. Materiality as a component of determining admissible evidence looks to the relation between the propositions for which the evidence is offered and the issues in the case. *State v. Fahlk*, 246 Neb. 834, 524 N.W.2d 39 (1994). This concept of materiality should be used in the analysis of this issue. Where Silverheels went to high school or the last names of his parents are not related to the general subject of whether Harman took advantage of Burke or to the specific question of whether Silverheels had the conversation with Harman that he related on direct examination.

Questions 12 through 14, regarding statements which he allegedly made about who was a relative, being a lawyer in California, and being the chief of an Indian tribe, are also collateral. We cannot even know if Silverheels' credibility is involved, because he did not answer, and thus, there are no prior inconsistent statements. We must be mindful of the difference between simply not answering, as happened here, and providing an answer which is inconsistent with a prior statement. Harman did not move to compel answers from Silverheels. (In this regard, we note Oregon Rules of Civil Procedure, which through rule 46A(1)(a) and 46A(2) provide a procedure to seek an order of an Oregon court compelling a witness to answer, including the awarding of expenses under rule 46A(4) for a successful motion. Rule 46B provides for sanctions for a refusal to

answer, including contempt. Rule 38C provides that the foregoing rules are applicable to foreign depositions, which would include those taken in Oregon upon notice or agreement in a Nebraska lawsuit.)

Question 15, about other pending lawsuits involving Silverheels, is also collateral in nature, absent a showing that Burke or Harman was also involved in such cases. Had that been the case, counsel for Harman could have used leading questions, as was his right, to demonstrate for the trial court, and us, why the question had materiality and went to Silverheels' bias or interest. But that was not done. Questions 16 and 17, about Silverheels' legal name, when he acquired that name, and whether he had used another name, are also collateral—unless counsel sought to explore felony convictions under another name. But no question about prior felonies was asked, irrespective of the name at the time of conviction. Thus, questions 16 and 17 are collateral. The answers to these questions, had they been given, tend to prove nothing about whether Silverheels had the conversations he testified to with Harman.

The answer to question 18, about the significance of June 6, 1980, the date before which Silverheels said he would not provide personal information (even though he did provide some prior information), may well be interesting, but on its face as asked, it does not relate to whether he and Harman discussed a Navajo weaving 13 years later. The name of his shop in Arizona, asked in question 19, may allow the cross-examiner to track down some more information about Silverheels, his reputation, and his knowledge of Indian artifacts. But Silverheels' testimony was not offered as expert testimony on identification or value of weavings. His testimony is merely that of a person who claims to have had a conversation with Harman in which admissions against Harman's interest were allegedly made. However, the fact that Silverheels would hide the name of his business, presumably open to the public, is a fact from which a jury could gain a different view of Silverheels' credibility, and thus, an answer is really not needed to give the jury a negative impression about Silverheels' credibility. The lack of an answer is probably of more benefit than an answer, because to introduce evidence of negative details of Silverheels' Arizona busi-

ness would require Harman to overcome the prohibition against introduction of contradictory evidence on collateral matters. We view Silverheels' reluctance to discuss his ethnicity in question 20, given that he claims to be a dealer in Native American art, to be curious, but the refusal to answer again inures more to Harman's benefit in how a jury would judge Silverheels' credibility than if he had simply said, "I am a member of the Apache Tribe."

[11] When we assess whether the unanswered questions are collateral and the trial court's order excluding all of the testimony, we posit the hypothetical of what would happen if Silverheels had answered, for example, that he was an Apache and then Harman sought to prove at trial by other witnesses that Silverheels was not an Apache (therefore making him generally not credible by inference) because he had been raised on the Crow Indian Reservation in eastern Montana. Is Burke then allowed to counter with testimony from Silverheels' grandmother that she is an Apache and that her grandson is one-eighth Crow and seven-eighths Apache, which makes him an Apache under tribal tradition and law, just as he testified? We believe that the rule against impeachment of a witness by producing extrinsic evidence of collateral facts to contradict the witness' assertions, see *McCune v. Neitzel*, 235 Neb. 754, 457 N.W.2d 803 (1990), prevents this from turning into a series of minitrials about whether Silverheels is an Indian chief or is Tonto's grandson. In the analysis of whether the unanswered questions were collateral and whether exclusion of the entire deposition was appropriate, the trial judge should "self-inquire" as to what he or she would do if all the questions were answered, but Harman wanted to call other witnesses to establish that each answer was a lie. If the testimony of such witnesses would be excluded by the *McCune* rule cited above, then the questions posed at the deposition are necessarily collateral and refusal to answer them does not justify exclusion of Silverheels' entire deposition under *United States v. Cardillo*, 316 F.2d 606 (2d Cir. 1963), *cert. denied* 375 U.S. 822, 84 S. Ct. 60, 11 L. Ed. 2d 55.

We are, of course, willing to readily concede that the unanswered questions are potentially important background questions to which a lawyer engaged in discovery and trial prepara-

tion would like to have answers for followup investigation or additional discovery. However, this is not a discovery issue, but, rather, one of the wholesale exclusion of a witness' testimony. The questions are collateral because they do not relate to the substance of his direct examination. See, also, *Commonwealth v. Dwyer*, 10 Mass. App. 707, 412 N.E.2d 361 (1980) (questions witness refused to answer were attack on his general credibility and as such were collateral). The issue for the trial judge was not whether the unanswered questions were good discovery questions, but, rather, were they of such materiality that the refusal to answer them justified excluding all of the witness' testimony. We hold that Silverheels' refusal to answer the listed questions falls into the third *Cardillo* category, which "would not require a direction to strike and which could be handled . . . by the judge's charge" about the weight to be accorded Silverheels' testimony. See 316 F.2d at 613. See *State v. Grubbs*, 117 Ariz. 116, 570 P.2d 1289 (Ariz. App. 1977), and *People v. Siegel*, 87 N.Y.2d 536, 663 N.E.2d 872, 640 N.Y.S.2d 831 (1995), for examples of such jury instructions. In *Grubbs*, the trial court instructed: " 'In determining the credibility of the testimony of such witnesses, you may consider the failure or refusal of such witness to respond to Cross-Examination.' " 117 Ariz. at 119, 570 P.2d at 1292. The Arizona appellate court approved the instruction, finding that the unanswered question did not deny the appellant's counsel an ample opportunity to test the knowledge of the witness.

We note that Silverheels did not refuse to answer any questions bearing on his relationship with either Burke or Harman, nor did he refuse to answer any questions regarding the series of events surrounding the acquisition and selling of the weaving. Harman was not denied the opportunity to cross-examine Silverheels with regard to any matter of substance from his direct examination.

Every question Harman's counsel asked Silverheels about his conversations with Burke and Harman and about the subject weaving was answered. These are the questions which would properly be characterized under *Cardillo* as "so closely related" to the subject of the case that the entire testimony of Silverheels should have been stricken if he had refused to answer. See 316

F.2d at 613. Instead, the questions Silverheels refused to answer were collateral matters. Thus, under *Cardillo,* all of Silverheels' testimony should not have been excluded, and the district court abused its discretion in excluding all of Silverheels' testimony. See, also, *United States v. Lord*, 711 F.2d 887 (9th Cir. 1983) (questions about witness' supplier of cocaine were collateral matter, and district judge abused discretion in striking all of witness' testimony; however, error was harmless in light of other evidence).

The importance to Burke of Silverheels' testimony is obvious. Silverheels' testimony, if believed by the jury, tends to show that Harman had "suckered" Burke into selling the weaving for $1,000 by telling him that it was Mexican, when Harman knew it was not. The testimony of Silverheels, if believed, is supportive of Burke's testimony. The deposition testimony also tends to show that Harman had made several inquiries about first, second, and third phase weavings before the transaction with Burke took place, which is relevant on Harman's prior knowledge and interest in Navajo weavings. The district court abused its discretion in excluding all of Silverheels' testimony. Silverheels' refusal to answer the collateral questions, even if they related somehow to his credibility, was at most only grounds for an instruction to the jury to consider his refusal to answer when judging his credibility. See, *Grubbs, supra*; *Siegel, supra.*

Harman argues that the witness "had attempted to foreclose any potential impeachment on such things as a dishonorable military discharge, felony convictions, or any other information that might reflect negatively upon his credibility." Brief for appellee at 33. However, Silverheels was not asked on cross-examination whether he had felony convictions or if he had been dishonorably discharged. When the questions are not asked, there cannot be any denial of the right to cross-examination. While the right of cross-examination is fundamental, a ruling on evidence of a collateral matter intended to affect the credibility of a witness falls within the discretion of the trial court. *Capps v. Manhart*, 236 Neb. 16, 458 N.W.2d 742 (1990).

In *L. J. Vontz Constr. Co. v. Alliance Indus.*, 215 Neb. 268, 272, 338 N.W.2d 60, 62 (1983), the Nebraska Supreme Court held:

> A party has the right to cross-examine the witnesses produced by his adversary touching every relation tending to show their interest or bias. A party has the right to cross-examine a witness with regard to an interest which affects credibility. Failure to permit such inquiry constitutes reversible error if prejudice results to the complaining party. *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983).

Neither the record made on the motion in limine nor Harman's brief informs us how the unanswered questions related to Silverheels' credibility, interest, or bias. The questions appear to be, at most, the sort of "fishing" that lawyers do in pretrial depositions.

The district court's conclusion that "defense counsel was deprived of a fair opportunity on cross-examination to test the truth of the deponent's direct examination" has a faulty premise, because none of the questions which Silverheels declined to answer went to Silverheels' direct testimony or his interest or bias in the case—the unanswered questions were all about collateral matters. Under these circumstances, the trial court's remedy of refusing to admit Silverheels' deposition was an abuse of discretion, which operated to Burke's prejudice.

Failure to Submit Negligent Misrepresentation to Jury.

At the close of Burke's case, Harman's counsel made a motion for a directed verdict on the ground that "the type of expectancy or loss [sic] profit damages which plaintiff seeks are not recoverable under Nebraska law under a theory of negligent misrepresentation." Following the motion, there was an extensive on-the-record discussion among counsel and the court about damages recoverable under negligent misrepresentation. Burke argued that under either negligent misrepresentation or fraudulent misrepresentation, the damages were the difference in value between what Harman paid for the blanket and the fair market value of the blanket at the time. The record establishes

that the parties stipulated that $290,000 was the blanket's fair market value at the time of the sale by Burke to Harman.

Harman's position was that the Nebraska Supreme Court had adopted the Restatement (Second) of Torts § 552 (1977) with respect to negligent misrepresentation in *Gibb v. Citicorp Mortgage, Inc.*, 246 Neb. 355, 518 N.W.2d 910 (1994); that in fraudulent misrepresentation cases, one was entitled to profits, i.e., expectancies; that in mere negligent misrepresentation cases, the law limits recovery to "out-of-pocket"; and that the plaintiff is "not going to get you the profits you would have made if you hadn't been injured." After ascertaining from Burke's counsel that there was no claim except de minimis for out-of-pocket expenses, the court granted Harman's motion for a directed verdict on the theory of negligent misrepresentation, and the case was submitted to the jury only on fraudulent misrepresentation.

[12,13] *Gibb* articulates that liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. The *Gibb* opinion quotes the Restatement of Torts, § 552:

> "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information."

246 Neb. at 370, 518 N.W.2d at 921.

We have not found a Nebraska case which discusses the matter of the type of damages recoverable for the tort of negligent misrepresentation. However, the issue of recoverable damages under that theory is covered in the Restatement.

[14,15] The matter of damages takes a bit of a tortured path through the Restatement. Section 552 outlines the basic requirements of the theory of recovery for negligent misrepresentation, and we have no doubt that the portion of § 552 quoted above from *Gibb* encompasses Burke's claim against Harman. Harman clearly had a pecuniary interest in the transaction.

Section 552 B(1) at 140 sets forth the damages for negligent misrepresentation and provides:

> (1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.

Section 552 B(2) at 140 excludes damages for "the benefit of the plaintiff's contract with the defendant." In § 552 B, comment *a.* at 141, we are referred to the Restatement (Second) of Torts § 549(1) (1977), as the comment states:

> The rule stated in this Section applies, as the measure of damages for negligent misrepresentation, the rule of out-of-pocket loss that is stated as to fraudulent misrepresentations in Subsection (1) of § 549. Comments *a* to *f* under § 549 are therefore applicable to this Section so far as they are pertinent.

Section 549 at 108, entitled "Measure of Damages for Fraudulent Misrepresentation," states:

> (1) The recipient of a fraudulent misrepresentation is entitled to recover his damages in an action of deceit against the maker the pecuniary loss to him of which the misrepresentation is a legal cause, including
>
> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
>
> (b) pecuniary loss suffered otherwise as a consequence of the recipient's reliance upon the misrepresentation.

It is, of course, important to remember that although this section defines recoverable damages for fraudulent misrepresentation, § 552 B "borrows" § 549(1) for the measure of damages for negligent misrepresentation.

Section 549(1), comment *a.* at 109, states that the most usual loss "is when the falsity of the representation causes the article bought, sold or exchanged to be regarded as of greater or less

value than that which it would be regarded as having if the truth were known." In the context of negligent misrepresentation, it is not whether the truth is known, but, rather, whether reasonable care or competence was exercised in obtaining or communicating the information which forms the alleged misrepresentation. In this case, under Burke's evidence, the alleged misrepresentation is what Harman said the blanket was and what it was worth.

The fact that Burke is the seller and the alleged recipient of the fraudulent or negligent misrepresentation is not of consequence. See *Heise et ux v. Pilot Rock Lbr. Co.*, 222 Or. 78, 352 P.2d 1072 (1960) (seller's action against buyer for fraudulent misrepresentation and concealment which allegedly induced them to sell timber on land for less than true value). See, also, *Hanners v. Balfour Guthrie, Inc.*, 564 So. 2d 412 (Ala. 1990); *Armel v. Crewick*, 71 N.J. Super. 213, 176 A.2d 532 (1961); and *Allied Sound, Inc. v. Neeley*, 909 S.W.2d 815 (Tenn. App. 1995); (all seller against buyer cases).

[16,17] The commentary to § 552 B of the Restatement adopts the out-of-pocket rule as the appropriate measure of damages for negligent misrepresentation and specifically excludes benefit of bargain damages. *Trytko v. Hubbell, Inc.*, 28 F.3d 715 (7th Cir. 1994). *Trytko* involved a claim based upon the alleged misstatement of the expiration dates of stock options held by an employee, and a jury verdict for negligent misrepresentation was returned. The Seventh Circuit Court of Appeals held that Indiana would recognize the tort of negligent misrepresentation and that the measure of damages was the employee's out-of-pocket losses. The *Trytko* court cites W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 10 (5th ed. 1984), to explain the crucial difference between these different measurements of damages as follows: "The out-of-pocket rule 'looks to the loss which the plaintiff has suffered in the transaction, and gives him the difference between the value of what he has parted with and the value of what he has received.' " 28 F.3d at 722. *W.K.T. Distributing Co. v. Sharp Electronics*, 746 F.2d 1333, 1337 (8th Cir. 1984), explained that "[t]he loss is usually measured as the difference between what the plaintiff parted with and what the plaintiff received." In contrast, the benefit of the bargain rule "gives the plaintiff the benefit of

what he was promised, and allows recovery of the difference between the actual value of what he has received and the value that it would have had if it had been as represented." Keeton et al., *supra*, § 10 at 768.

Admittedly, the difference between "out-of-pocket" and "benefit of the bargain" may seem amorphous. The *Trytko* opinion seeks to articulate the difference by discussing *Gediman v. Anheuser Busch, Inc.*, 299 F.2d 537 (2d Cir. 1962), where the plaintiff, confused over the range of benefits available under his employer's retirement plan, asked the employer which option would provide him with the most favorable treatment, but the employer negligently informed him that a certain benefit package was optimal, when in reality the plaintiff would have been significantly better off under a different package. In *Gediman*, the court found liability for negligent misrepresentation under § 552 of the Restatement and awarded damages equal to the difference between the value of the benefit plaintiff would have selected and the value of the plan he did select. The Ninth Circuit later explained the damage award in *Gediman* in *Cunha v. Ward Foods, Inc.*, 804 F.2d 1418 (9th Cir. 1986), in an opinion which concludes that Hawaii would follow § 552B of the Restatement and award only out-of-pocket damages in negligent misrepresentation cases. The *Cunha* case says that the damage award in *Gediman*

> does not represent benefit-of-the-bargain damages, i.e., the difference between what the plaintiff *expected* he would receive, had the defendant's representations been true, and the amount *actually received* under that option. Instead, he was awarded the difference between the value parted with at the time of the misrepresentation, and the value of what he received in return.

(Emphasis in original.) 804 F.2d at 1426.

Accepting the truth of Burke's evidence, as we must, given that we are addressing the sustaining of a motion for a directed verdict, the quote from *Cunha* above describes exactly the situation presented by Burke's evidence. Burke seeks $289,000, which is the difference between the value parted with at the time of the misrepresentation (it is crucial here to recall the parties' stipulation that on August 1, 1993, the blanket had a "fair

market value of $290,000") and the value of what he received in return, $1,000 in cash. In fact, in this connection, we again observe that on the fraudulent misrepresentation claim, the court instructed the jury that if it found for Burke, it must return a verdict of $289,000. In short, the trial court directed what the amount of a verdict would be—a finding as a matter of law as to Burke's out-of-pocket damages—should liability on fraudulent misrepresentation be found.

The *Trytko* opinion also refers at length to *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 235 N.W.2d 831 (1975), where a defendant insurance agent negligently represented to a wife that her husband (before his death) had earlier purchased a life insurance policy when it was actually an annuity. The court awarded damages in the amount of the death benefit of the nonexistent insurance policy, because according to the court in *Trytko*, the plaintiff "forewent purchasing alternative or additional insurance on the basis of defendant's misrepresentations." *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 723 (7th Cir. 1994). The *Trytko* court then succinctly continued its delineation of "benefit-of-the-bargain" versus "out-of-pocket."

> In one sense, measuring plaintiff's recovery by what she had been assured existed seems to award her the benefit of a hypothetical bargain to buy life insurance. But, in fact, the misrepresentation in *Lewis* did not lead the plaintiff into a bargain which she sought to enforce. Rather, the misrepresentation caused her to forego something valuable, which, happenstantially, was a "bargain". *Its* benefit is not what § 552B(2) bars from recovery. § 552B(2) only directs that a plaintiff is not entitled to recover for expectancy created by the defendant's negligent misrepresentations—i.e., the benefit of a negligently described and induced bargain. But while expectations negligently created are not recoverable, benefits foregone as a result of such expectations are. Illustrations from the Restatement make clear that reliance is recoverable and expectancy is not; but reliance is fully recoverable even when it matches expectancy.

Id.

The court in *Trytko* concluded its discussion by summing up that the limitation on benefit of bargain damages refers to the expectancy damages caused when a misrepresentation underlies a bargain or that, in other words, "benefit-of-the-bargain damages arise only where the misrepresentation created an expectancy. The plaintiff is not entitled to recover the expectancy described or contemplated by the misrepresentation because it was not a real loss suffered." *Id.* at 724.

While applying these concepts to the instant case, and importantly remembering the stipulation that the blanket had a fair market value of $290,000 on August 1, 1993, it is clear to us that the damages sought are not benefit of the bargain, but, rather, are a real loss. Burke walked into Harman's house with a blanket, which, by stipulation, was worth $290,000. He left Harman's house with $1,000 because of a fraudulent or negligent misrepresentation, according to his evidence. Thus, under the parties' stipulation, there is a real loss of $289,000. As stated earlier by the Eighth Circuit in *W.K.T. Distributing Co. v. Sharp Electronics*, 746 F.2d 1333 (8th Cir. 1984), the loss is measured as the difference between what the plaintiff parted with (in this case, a $290,000 Navajo chief's blanket) and what he received ($1,000 cash). Thus, this is not an expectancy claim but a claim for out-of-pocket damage which is recoverable under the Restatement, *supra*, when § 552B (negligent misrepresentation) borrows the measure of damages from § 549(1). Consequently, the district court erred in concluding that Burke's damages were not recoverable under negligent misrepresentation, and thereby, the trial court erred in directing a verdict on that claim and refusing to submit the theory of negligent misrepresentation to the jury. In fact, just as the trial court determined on fraudulent misrepresentation, Burke's damages on negligent misrepresentation, if he prevailed, would be $289,000 as a matter of law, because of the stipulation.

Rebuttal Witness.

As we have previously detailed in this opinion, there was sharp conflict on the time of day that the meeting between Burke and Harman took place. The importance of that fact relates to Burke's circumstantially proving what Harman knew

about the blanket and when he knew it, as well as proving what actions Harman took immediately after acquiring the blanket. Burke sought to introduce the testimony of two witnesses on rebuttal to establish that the meeting could not have occurred at the time Harman and his wife said it did, because Burke was otherwise occupied by his attendance at an anniversary celebration lasting the entire afternoon of August 1, 1993. The court sustained Harman's objection to the rebuttal witness, Judy Pennington, who according to the offer of proof, would testify to Burke's attendance during the entire afternoon of August 1 at an anniversary celebration. The court ruled that this was improper rebuttal. The district court has a degree of latitude with respect to the admission of evidence in rebuttal. See *Westgate Rec. Assn. v. Papio-Missouri River NRD*, 250 Neb. 10, 547 N.W.2d 484 (1996). However, given the reversal, and the remand for new trial in this cause, we need not decide this assignment of error, as it is unlikely to recur at retrial.

Jury Instruction—Deposition.

Burke assigns error concerning the inadvertent playing of a portion of a deposition which had been ruled inadmissible and which prompted a request for a specific admonition in jury instructions. Because a retrial is necessary, and this seems unlikely to recur, we see no need to discuss it further.

Jury Instruction—Forms of False Representation.

At trial, Burke proposed an instruction pursuant to NJI2d Civ. 15.23, "Forms of False Representation," which was refused by the trial court. This instruction indicates that a false or fraudulent misrepresentation may take three forms, including a person's failure to disclose a fact known to him when

> (b) [he] knows that disclosure would correct the other party's mistake as to a basic assumption on which that other party is making the contract and where such nondisclosure amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing; or
>
> . . . .
>
> (d) The other person is entitled to know the fact because of a relation of trust and confidence between them.

We have not quoted the entire proposed instruction but have focused on the portions which are arguably most directly related to the case. The comment to NJI2d Civ. 15.23 states: "Use only those paragraphs that, in light of the pleadings and the evidence, will assist the jury." Burke asserts that the importance of the instruction was that it addresses the fact that "failure to disclose is as significant as an affirmative misstatement." Brief for appellant at 31.

The difficulty with Burke's argument is that the lawsuit, viewing the evidence from Burke's standpoint, is not a failure to disclose case, but, rather, an affirmative misrepresentation case. In other words, Burke's evidence and theory of the lawsuit was that Harman told him that it was a Mexican blanket when Harman knew that it was not, or should have taken more care before making this statement. The instruction quoted above which Burke now argues should have been given is applicable, if at all, in the case of a failure to disclose rather than a case of affirmative misrepresentation.

Burke also argues that his proposed instruction that he was justified in relying upon an assertion of opinion by Harman if Burke stands in a relation of trust and confidence to Harman or Burke reasonably believes that as compared with himself, Harman, whose opinion is asserted, has special judgment, skill, or objectivity with respect to the subject matter. This instruction is derived from the Restatement (Second) of Contracts § 169 (1981). This is, of course, a tort case. In any event, the fundamental concepts upon which Burke seeks instructions are, in reality, contained in jury instruction No. 7, which provides:

> The recipient of a fraudulent misrepresentation solely of the maker's opinion is not justified in relying upon it in a transaction with the maker, unless the fact to which the opinion relates is material, and the maker (a) purports to have special knowledge of the matter that the recipient does not have, or (b) stands in a fiduciary or other similar relation of trust and confidence to the recipient, or (c) has successfully endeavored to secure the confidence of the recipient, or (d) has some other special reason to expect that the recipient will rely on his opinion.

The category delineated in (d) is quite expansive and would include the situation involved here, where Burke contacted Harman to look at a weaving for the express purpose, admitted by Harman's testimony, of determining "what it is." Therefore, Burke's assignments of error concerning these aspects of the instructions are without merit.

Cross-Appeal.

Harman cross-appeals with respect to a discovery matter because the trial court failed to impose attorney fees on Burke's counsel for his alleged "abuse of the discovery process." The cross-appeal arises out of the issuance of a subpoena duces tecum at the instance of Burke's attorney. A paralegal from the office of Burke's attorney directed a letter to a court reporter requesting the reporter to do a deposition duces tecum for the custodian of records of Lincoln Telephone and Telegraph (LTT) for Harman's telephone records, including long distance, from July 1, 1993, through August 1, 1994. The letter advises the court reporter: "You can choose an appropriate date and they can send them to our office by that date in lieu of appearing." The reporter issued the subpoena duces tecum as requested and set a deposition date for 10 a.m. on January 30, 1995, and then included the following advice to LTT: "You may comply with this Subpoena Duces Tecum and waive your personal appearance by providing copies of the above-requested records, together with any billing for the same, on or before January 27, 1995 to Mr. Charles H. Wagner, Attorney at Law, P.O. Box 277, Wahoo, NE 68066." An employee of LTT wrote to Burke's attorney, Wagner, indicating that the records would be forthcoming by January 27. Wagner conceded that he received copies of the records from LTT but that no deposition notice was ever served on Harman's attorney advising that the procurement of these records was occurring.

Nebraska Ct. R. of Discovery 30(b)(1)(A) (rev. 1996) provides that a "party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." By Neb. Ct. R. of Discovery 26(f) (rev. 1996), a copy of the notice must be served on opposing counsel.

Harman argues that providing notice of the deposition allows an individual to move for a protective order or take other action to protect that individual's confidentiality and privacy rights. Harman also argues that Burke's counsel circumvented the requirements of the discovery rules and that we should not tolerate "such a blatant abuse of the discovery process and such a cavalier disregard for the privacy rights of individuals." Brief for appellee at 49.

The response of Burke's attorney is that a paralegal directed the letter to the court reporter, asking the reporter to choose an appropriate date and indicating to LTT that the records could be sent in lieu of an appearance. Neb. Rev. Stat. § 64-108 (Reissue 1996) authorizes a notary to issue the subpoena only after notice of deposition has been deposited with the reporter, but Burke argues that the reporter in this instance issued the subpoena prior to advising counsel of the date selected so that he could then issue notice to Harman's counsel. Moreover, Burke asserts that there is no contention that the records were not discoverable or were subject to any privilege. The trial court granted sanctions by precluding Burke's use of telephone records, except as to those which had otherwise been secured through proper discovery procedures. Burke argues that there was no violation of a court order, no withholding of evidence, and no prejudice to Harman arising from the failure of Burke's counsel to ensure that notice was issued to Harman's counsel before the phone records were secured via discovery deposition.

[18] In *Booth v. Blueberry Hill Restaurants*, 245 Neb. 490, 513 N.W.2d 867 (1994), the court indicated that sanctions under Neb. Ct. R. of Discovery 37 (rev. 1996) exist to punish a litigant or counsel who might be inclined or tend to frustrate the discovery process and that under the rule, the appropriate sanction is to be determined from the factual context of the particular case and is left to the discretion of the trial court, citing *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). The court in *Booth* indicated that the " 'hierarchy of harshness in permissible sanctions under Rule 37' " ranges from reimbursement of expenses incurred as a result of noncompliance to a default judgment. 245 Neb. at 494, 513 N.W.2d at 869.

The district court in this matter ruled that counsel's letter to the court reporter was "quite misleading" and that it was "the duty of counsel to make sure that proper notice is given to the adverse party for any manner of formal discovery, particularly when legal process [subpoena] is involved." The court thus sustained the motion for sanctions to the extent that the phone records acquired pursuant to the subpoena be returned to Harman's counsel and that those records could not be used in this case.

[19] We analyze this matter from the standpoint of whether the court's ruling was an abuse of discretion to the extent that fees should also have been awarded against Burke's counsel. An abuse of discretion is defined as the trial court's ruling being clearly untenable and unfairly depriving the litigant of a substantial right and a just result. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993). The purpose of the discovery process is to enable preparation for trial without the element of an opponent's tactical surprise, a circumstance leading to results based on counsel's legal maneuvering more than on the merits. See *Norquay, supra*. The manner that these telephone records were obtained runs counter to those expressed goals and was improper. We find that the district court's sanction was appropriate, and its refusal to include an award of attorney fees as an additional sanction was not an abuse of discretion. Harman's cross-appeal is denied.

CONCLUSION

We have found that the district court abused its discretion in finding that Silverheels' deposition should not be received in evidence because the court's reasoning that the unanswered questions were not collateral matters was incorrect. Moreover, Harman's counsel was not deprived of the opportunity to cross-examine the witness about material matters. If admitted, Silverheels' testimony provides support for Burke's theory of the case and buttresses his other evidence. Thus, it was not harmless error. Moreover, the district court erred in failing to submit the theory of negligent misrepresentation to the jury on the basis that such theory only provided for out-of-pocket loss and there was no out-of-pocket loss. Out-of-pocket loss was in

effect stipulated to in the amount of $289,000 and, therefore, existed as a matter of law. The district court imposed an incorrect limitation on recovery for a cause of action involving negligent misrepresentation. Thus, on two grounds, reversal, and a remand for a new trial is required. The other assignments of error do not need to be decided because of the remand. There is no merit to the cross-appeal.

REVERSED AND REMANDED FOR A NEW TRIAL.

GLENN SINDELAR, TRUSTEE OF SILVER CREEK FARMS, ET AL., APPELLANTS, V. HANEL OIL, INC., A NEBRASKA CORPORATION, APPELLEE.

573 N.W.2d 782

Filed January 13, 1998. No. A-95-1296.

1. **Summary Judgment.** Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
4. ____: ____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
5. **Summary Judgment: Records: Appeal and Error.** Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before an order on such a motion may be reviewed.
6. **Pretrial Procedure: Records: Waiver.** The official court reporter is charged with the duty of making a verbatim record of an evidentiary proceeding, and the making of this record may not be waived.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded with directions.

Charles L. Caskey for appellants.

L.J. Karel, of Karel & Seckman, for appellee.

MILLER-LERMAN, Chief Judge, and HANNON and IRWIN, Judges.

MILLER-LERMAN, Chief Judge.

Glenn Sindelar, as trustee of Silver Creek Farms; Glenn Sindelar; Melvin Sindelar; and Lois Sindelar (Plaintiffs) appeal from the decision of the district court for Colfax County which granted summary judgment to Hanel Oil, Inc. (Hanel), in Plaintiffs' suit against Hanel for damages resulting from Hanel's allegedly delivering contaminated fuel to Plaintiffs. The trial court found Plaintiffs' action time barred, granted Hanel's motion for summary judgment, and dismissed Plaintiffs' case. Plaintiffs appeal. For the reasons recited below, we reverse, and remand for a new hearing on Hanel's motion for summary judgment, which hearing shall be recorded verbatim by the court reporter.

BACKGROUND

On July 28, 1994, Plaintiffs filed a petition in which they alleged that Hanel had sold them contaminated diesel fuel. Plaintiffs alleged that the contaminated fuel caused filter plugging and pump and injection problems in Plaintiffs' diesel engines, with resulting total damages of $9,235.20 and loss of use totaling $3,200. In addition, Plaintiffs asked for an adjustment or refund for the cost of the fuel of $1,000.

On August 29, 1994, Hanel demurred to Plaintiffs' petition. The court overruled the demurrer. Hanel filed an answer in which it claimed that all or part of Plaintiffs' cause of action was barred by the statute of limitations.

A hearing was held on July 13, 1995, in a "bifurcated trial" on the issue of whether Plaintiffs' action was time barred. The district court's order of August 18 states that, under Neb. Rev. Stat. § 25-224 (Reissue 1995), it found that Plaintiffs' action "is not tolled except for that part of the claim of the plaintiffs in the amount of $413.04 is barred by the said Statute of Limitations." Subsequently, on August 18, Hanel filed a motion for new trial on the issue of the statute of limitations. The motion for new trial was granted on September 18.

On September 15, 1995, Hanel moved for summary judgment. Hanel's motion states that it is based on the pleadings; the answers to interrogatories; the bill of exceptions from the July 13, 1995, hearing; and the bill of exceptions from a 1991 county court trial involving an action on an underlying account brought by Hanel against Melvin Sindelar and Lois Sindelar. On October 16, a hearing was held on Hanel's motion for summary judgment. According to a January 5, 1996, affidavit of the district court reporter, no record was made of the hearing on October 16, 1995, on Hanel's motion for summary judgment.

The district court granted Hanel's motion for summary judgment on November 20, 1995. In its written order entitled "Journal Entry," the court stated that a hearing was held October 16, 1995, and that the parties were represented by counsel. The order further states: "Evidence was offered and received by the Court and following argument of counsel, the said matter was taken under advisement." The court held that the statute of limitations barred Plaintiffs' claim and dismissed their action. Plaintiffs have appealed from the court's grant of summary judgment and dismissal of their action.

ASSIGNMENT OF ERROR

Plaintiffs' three assignments of error combine to assert that the trial court erred in finding as a matter of law that Plaintiffs' claims were time barred.

STANDARD OF REVIEW

[1,2] 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. *Weatherwax v. Equitable Variable Life Ins. Co.*, 5 Neb. App. 926, 567 N.W.2d 609 (1997). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3,4] The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and

must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Id.* After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Id.*

ANALYSIS

Plaintiffs have appealed from the district court order granting summary judgment in favor of Hanel and dismissing Plaintiffs' case. The trial court's written order of November 20, 1995, states that a hearing was held on October 16, 1995, on the motion for summary judgment and that evidence was offered and received. In connection with their appeal, Plaintiffs filed a praecipe for bill of exceptions in the district court. On May 28, 1996, the Clerk of the Supreme Court and the Court of Appeals received and filed two items. The first item, stamped "Exhibit No. 7" from the hearing of October 16, 1995, is a 29-page transcription of the hearing conducted on July 13, 1995, in the district court entitled "Bill of Exceptions Volume I - Proceedings," which transcription contains argument by counsel; 15 pages of direct testimony by Melvin Sindelar; and references to exhibit 1, the "case file," and exhibit 2, answers to interrogatories, neither of which is included in this first item. The second item, stamped "Exhibit No. 8" from the hearing of October 16, 1995, is the bill of exceptions from a 1991 Colfax County Court proceeding, which contains 58 pages and refers to two exhibits that are not included in this second item. There is no bill of exceptions from the hearing of October 16, 1995, on the motion for summary judgment, which is the subject of this appeal. Exhibits 1 through 6, and 9 and above, if any, from the hearing of October 16, 1995, are not in the record on appeal.

Because of the apparent deficiencies of the record on appeal, this court on its own motion issued an order to show cause on May 29, 1996, asking the parties to procure a bill of exceptions of the October 16, 1995, hearing, or otherwise show cause why the case should not be treated as one where no bill of exceptions has been filed. As noted above, the court reporter has filed an affidavit dated January 5, 1996, in district court in which she

states that no record was made of the October 16, 1995, proceeding. Consequently, with the exception of exhibits 7 and 8 referred to above, there is no record of what evidence was offered, received, and considered with regard to the motion for summary judgment heard October 16, the ruling on which is the subject of this appeal. No response was filed to the order to show cause. This appeal was ordered to proceed to oral argument on September 10, 1996.

[5] Affidavits, depositions, and other evidence considered at a hearing on a motion for summary judgment must be preserved in a bill of exceptions filed in the trial court before an order on such a motion may be reviewed. *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993). Without a record, this court is unable to review the propriety of the trial court's ruling sustaining Hanel's motion for summary judgment.

According to the trial court's "Journal Entry" of November 20, 1995, an evidentiary proceeding was held on October 16, 1995, during which evidence was received on Hanel's motion for summary judgment. The existence of "Exhibit No. 7" and "Exhibit No. 8" confirms the occurrence of an evidentiary hearing. However, there is no bill of exceptions or other record of evidence, with the exception of exhibits 7 and 8 from the October 16 hearing. The court reporter's affidavit confirms that no record was made of the hearing of October 16.

Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 1996) provides in part as follows: "The official reporter shall be charged with making a verbatim record of all proceedings in such court in accordance with Rule 5, Neb. Ct. R. of Prac." Neb. Ct. R. of Prac. 5A(1) (rev. 1996) provides: "The official court reporter shall in all instances make a verbatim record of the evidence offered at trial or other evidentiary proceeding, including but not limited to objections to any evidence and rulings thereon; oral motions; and stipulations by the parties. This record may not be waived." See, also, *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995).

[6] Under the rules issued by the Nebraska Supreme Court in accordance with its authority to supervise the courts, the official court reporter is charged with the duty of making a verbatim record of an evidentiary proceeding, and the making of this

record may not be waived. See, Neb. Ct. R. of Official Ct. Rptrs. rule 3; Neb. Ct. R. of Prac. rule 5A(1). In the instant case, the official charged with this responsibility failed to perform the duty imposed by the Supreme Court rules. This failure to make a verbatim record prevents this court from reviewing the trial court's ruling on Hanel's motion for summary judgment, as is sought by Plaintiffs in their appeal.

The parties are entitled to the benefits afforded them by court rules. *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986). See, also, *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990). Plaintiffs are entitled to review of a properly sought appeal before either this court or the Supreme Court. The inability of this court to review this appeal is due to an error by a court official and is not chargeable to the parties. In view of the foregoing, we reverse the trial court's order granting summary judgment in favor of Hanel and dismissing Plaintiffs' petition, and remand with directions that a new hearing on Hanel's motion for summary judgment be conducted, which hearing shall be recorded verbatim by the court reporter.

REVERSED AND REMANDED WITH DIRECTIONS.

KATHY J. BAHRS, APPELLANT AND CROSS-APPELLEE, V. R M B R WHEELS, INC., DOING BUSINESS AS THE SUNSHINE TAVERN, AND DEANNA L. CALLAWAY, AN INDIVIDUAL, APPELLEES AND CROSS-APPELLANTS.

574 N.W. 2d 524

Filed January 13, 1998. No. A-96-922.

1. **Directed Verdict: Appeal and Error.** In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence.
2. **Directed Verdict.** In order to sustain a motion for directed 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 from the evidence.
3. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.

4. **Jury Instructions: Appeal and Error.** Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party.
5. ____: ____. It is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error.
6. **Joint Ventures.** Whether a joint or common enterprise exists is generally a question of fact.
7. ____. The elements essential to a joint enterprise are (1) an agreement, express or implied, among the members of the group; (2) a common purpose to be carried out by the group; (3) a community of pecuniary interest in that purpose among the members; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.
8. ____. The common pecuniary interest requirement for a joint venture entails participants having a financial stake in the endeavor.
9. ____. The common pecuniary interest requirement for a joint venture includes an agreement to share in profits and losses.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded for a new trial.

Steven H. Howard, of Law Offices of Ronald J. Palagi, P.C., for appellant.

Jerald L. Rauterkus, of Erickson & Sederstrom, P.C., for appellees.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Kathy J. Bahrs appeals a jury verdict against her and in favor of the defendants, R M B R Wheels, Inc. (Wheels), doing business as the Sunshine Tavern, and Deanna L. Callaway, an individual. Bahrs requests that the verdict be reversed and the case be remanded for a new trial. She claims that the jury was improperly instructed. The defendants cross-appeal, claiming that their motion for directed verdict should have been granted. For the reasons stated below, we reverse, and remand for a new trial.

II. FACTUAL BACKGROUND

On the evening of August 29, 1992, Bahrs went to the Sunshine Tavern in Fremont at approximately 7 p.m. While there, she drank six or seven beers. She left at approximately 11

p.m., exiting through the north door into the parking lot. One of the women with whom Bahrs was leaving slipped in the parking lot, fell, and got back up. Bahrs then fell. According to Bahrs, "I can remember my leg slipping and I fell and my leg was twisted and it was like a rock or something made me slip and my foot slipped down like into a hole; not like a real deep hole, like a pot hole." She also described the place where she fell as follows: "It was like in a dip and I hit something and I slipped and my ankle twisted." As a result of the fall, Bahrs suffered injuries to her ankle.

On August 29, 1992, Callaway was operating the Sunshine Tavern. Callaway was leasing the premises from Wheels, which had acquired the property from a third party on August 7. Wheels acquired the property subject to an existing lease between Callaway and the third party. Effective September 1, 1992, Wheels acquired the Sunshine Tavern business from Callaway.

Bahrs commenced a premises liability lawsuit on August 15, 1995, alleging that the defendants were negligent in failing to inspect the premises to determine whether the premises were free of holes, failing to maintain the premises in a reasonably safe condition, failing to warn her of hazardous conditions which were known or should have been known to the defendants, and failing to have adequate lighting so patrons could see any holes. In their answers, the defendants generally denied the allegations in the petition and affirmatively alleged that Bahrs was contributorily negligent. A jury trial was held August 8, 9, and 12, 1996. Witnesses at the trial included Richard Ottis, the president of Wheels; Callaway; Arthur Callaway, Callaway's husband; other patrons of the bar on the evening of August 29, 1992; and Charles Bahrs, Bahrs' husband. There was also medical testimony.

In addition to the facts recited previously, the evidence at trial showed the following: The parking lot at issue is a gravel lot. The testimony was conflicting regarding the condition of the lot. According to Bahrs' witnesses, there were very large potholes in the lot. According to Callaway, Arthur Callaway, and Ottis, there were no potholes in the parking lot and the lot had been "drug" 3 days prior to Bahrs' fall. The evidence was

also conflicting regarding the type, placement, and adequacy of the lighting for the parking lot.

Ottis and the Callaways testified that they had never discussed whose responsibility it was to maintain the parking lot. According to Ottis, Wheels was "probably" responsible for the lighting in the parking lot. The lease between Callaway and the third party who owned the property prior to Wheels does not address the parking lot specifically but provides only that the lessee shall maintain the "premises." Callaway testified that she inspected the lot every morning, including the morning of August 29. If she determined that the lot needed to be maintained, she told her husband and he "would see to it." Ottis testified that the Callaways "kept it [the lot] up good." Ottis testified that he was in the parking lot every couple of days in the month of August and checked the lot's condition "a lot."

The defendants moved for a directed verdict following Bahrs' case and at the close of all evidence. The defendants' motions were overruled. The jury returned a verdict for the defendants. This appeal timely followed.

III. ASSIGNMENTS OF ERROR

Bahrs' assignments of error may be summarized as follows: (1) The trial court erred in giving jury instruction No. 4, which instructed the jury that the interests of both defendants were the same and that the jury must find either in favor of or against both defendants, and (2) the trial court erred in rejecting "plaintiff's proposed jury instruction number 3," which was a verdict form providing that the jury could find against one defendant and not find against the other or that it could find against the respective defendants in different degrees and percentages of liability.

For their cross-appeal, the defendants claim that the trial court erred in failing to grant their motion for directed verdict.

IV. ANALYSIS

1. Defendants' Motion for Directed Verdict

Before addressing Bahrs' error that is assigned and argued, we address the defendants' cross-appeal. The defendants assign that the trial court should have granted their motion for directed

verdict because Bahrs failed to prove that the parking lot created an unreasonable risk of harm to her.

[1-3] In reviewing a trial court's ruling on a motion for directed verdict, an appellate court must treat the motion as an admission of the truth of all competent evidence submitted on behalf of the party against whom the motion is directed; such being the case, the party against whom the motion is directed is entitled to have every controverted fact resolved in its favor and to have the benefit of every inference which can reasonably be deduced from the evidence. *Blose v. Mactier*, 252 Neb. 333, 562 N.W.2d 363 (1997). In order to sustain a motion for directed 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 from the evidence. *Id.*; *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Sacco v. Carothers*, 253 Neb. 9, 567 N.W.2d 299 (1997).

This case is a premises liability case, and it is undisputed that Bahrs was a business invitee on the premises. In *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996), the Nebraska Supreme Court abrogated the classifications of invitee and licensee in favor of a standard of reasonable care for all those lawfully on the premises of another. However, the *Heins* rule is prospective in application and, thus, without effect in the instant case. See *Blose, supra.*

Based on the law predating *Heins*, a possessor of land is subject to liability for injury caused to a business invitee by a condition of the land if (1) the possessor defendant either created the condition, knew of the condition, or by the exercise of reasonable care would have discovered the condition; (2) the defendant should have realized the condition involved an unreasonable risk of harm to a business invitee; (3) the defendant should have expected that a business invitee such as the plaintiff either (a) would not discover or realize the danger or (b) would fail to protect himself or herself against the danger; (4) the defendant failed to use reasonable care to protect the plaintiff invitee against the danger; and (5) the condition was a proximate cause of damage to the plaintiff. *Cloonan v. Food-4-Less*,

247 Neb. 677, 529 N.W.2d 759 (1995); *Richardson v. Ames Avenue Corp.*, 247 Neb. 128, 525 N.W.2d 212 (1995). An unreasonable risk of harm has been defined as a risk that a reasonably careful person under all circumstances of the case would not allow to continue. See NJI2d Civ. 3.02.

In the case before us, Bahrs contended that the defendants were negligent in failing to inspect the premises to determine whether the premises were free of holes, failing to maintain the premises in a reasonably safe condition, failing to warn her of hazardous conditions which were known or should have been known to the defendants, and failing to have adequate lighting so patrons could see any holes. There was conflicting evidence regarding the condition of the surface of the gravel lot and the location, type, and adequacy of the lighting for the gravel lot. After giving Bahrs the benefit of all inferences deducible from the evidence, we conclude that the issue of whether an unreasonable risk of harm to her existed was an issue for the jury to determine. Reasonable minds could draw more than one conclusion regarding the existence of an unreasonable risk of harm. Therefore, the defendants' motion for directed verdict was properly overruled, and the case was submitted to the jury.

2. Jury Instruction No. 4

On appeal, Bahrs argues that the submission of instruction No. 4, which required the jury to find either against both defendants or for both defendants, was error. This instruction reads: "There are two Defendants in this lawsuit. Their interests are the same. If you find in favor of one of them, you must find in favor of both of them. If you find against one of them, you must find against both of them."

[4,5] Jury instructions are subject to the harmless error rule, and an erroneous jury instruction requires reversal only if the error adversely affects the substantial rights of the complaining party. *Hoover v. Burlington Northern RR. Co.*, 251 Neb. 689, 559 N.W.2d 729 (1997); *Solar Motors v. First Nat. Bank of Chadron*, 249 Neb. 758, 545 N.W.2d 714 (1996). However, it is the duty of the trial court to instruct on the proper law of the case, and failure to do so constitutes prejudicial error. *Heye Farms, Inc. v. State*, 251 Neb. 639, 558 N.W.2d 306 (1997);

Wilson v. Misko, 244 Neb. 526, 508 N.W.2d 238 (1993). In determining whether such has been done, all the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Heye Farms, Inc., supra*. See, also, *Kent v. Crocker*, 252 Neb. 462, 562 N.W.2d 833 (1997).

In submitting instruction No. 4, it appears from the record that the trial court concluded that the defendants were engaged in a joint enterprise. At the jury instruction conference, the court stated in response to the plaintiff's objection to instruction No. 4: "My whole instructions are set up that way, that they are both equally and severally liable."

Neb. Rev. Stat. § 25-21,185.10 (Reissue 1995) provides the basis for treating defendants engaged in a joint enterprise as one for the purposes of determining liability.

> In an action involving more than one defendant when two or more defendants as part of a common enterprise or plan act in concert and cause harm, the liability of each such defendant for economic and noneconomic damages shall be joint and several.
>
> In any other action involving more than one defendant, the liability of each defendant for economic damages shall be joint and several and the liability of each defendant for noneconomic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of noneconomic damages allocated to that defendant in direct proportion to that defendant's percentage of negligence, and a separate judgment shall be rendered against that defendant for that amount.

[6,7] Whether a joint or common enterprise exists is generally a question of fact. *Evertson v. Cannon*, 226 Neb. 370, 411 N.W.2d 612 (1987). In 1995, the Nebraska Supreme Court adopted the definition of joint enterprise set forth in the Restatement (Second) of Torts § 491, comment *c*. (1965). See *Winslow v. Hammer*, 247 Neb. 418, 527 N.W.2d 631 (1995). As a result, the elements essential to a joint enterprise are (1) an agreement, express or implied, among the members of the

group; (2) a common purpose to be carried out by the group; (3) *a community of pecuniary interest in that purpose among the members*; and (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control. *Winslow, supra*. The *Winslow* court stated that its "holding promotes the more desirable policy of limiting the joint enterprise defense to its business and commercial roots." 247 Neb. at 426, 527 N.W.2d at 636. Although the *Winslow* court indicated that the requirement of a common pecuniary interest was a new element, it appears that there is a similar requirement set forth in previous case law. Prior to *Winslow*, Nebraska jurisprudence provided that the absence of mutual interest in the profits or benefits is conclusive that a joint venture does not exist. See *Global Credit Servs. v. AMISUB*, 244 Neb. 681, 508 N.W.2d 836 (1993).

[8,9] Regarding the common pecuniary interest requirement for a joint venture, the Restatement, *supra*, provides that it entails participants' having a financial stake in the endeavor. Other authorities explain the common pecuniary interest requirement for a joint venture includes an agreement to share in profits and losses. See, 46 Am. Jur. 2d *Joint Ventures* § 17 (1994); 48A C.J.S. *Joint Ventures* § 13 (1981). See, also, *S & W Air Vac v. Dept. of Revenue*, 697 So. 2d 1313 (Fla. App. 1997); *Matter of Marriage of Louis*, 911 S.W.2d 495 (Tex. App. 1995). See, also, *Global Credit Servs., supra*. In the context of the landlord and tenant relationship, even an agreement between landlord and tenant that the landlord will receive as rent a stipulated portion of the income or net profits derived by the lessee through its business conducted on the premises does not create a joint enterprise. See *Clapp v. JMK/Skewer, Inc.*, 137 Ill. App. 3d 469, 484 N.E.2d 918 (1985). See, generally, 46 Am Jur. 2d, *supra*, § 48; 48A C.J.S., *supra*, § 9. In the case before us, there is nothing in the record to even suggest that the defendants had any agreement to share losses and profits even if the other elements of joint enterprise existed, and we note that neither party moved for a directed verdict on this issue. However, assuming, without deciding, that the trial court had the authority to determine sua sponte as a preliminary matter the existence of a joint enterprise between the defendants, it was error for the trial court

to determine that the defendants' relationship was a joint enterprise. There was no evidence to support a finding of joint enterprise, let alone to find as a matter of law the existence of joint enterprise. Based on the evidence presented, the defendants' interests should have been treated as separate and distinct, and the jury should have been instructed accordingly.

3. Bahrs' Proposed Verdict Form

Based upon our resolution of Bahrs' first assigned error, it necessarily follows that the verdict form offered by Bahrs as her proposed instruction No. 3 should have been given. It properly provides that the jury may consider the negligence of each defendant separately. Such a verdict form was warranted by the evidence. It was reversible error for the trial court to fail to give it. See *Gustafson v. Burlington Northern RR. Co.*, 252 Neb. 226, 561 N.W.2d 212 (1997) (holding that to establish reversible error from refusal to give requested jury instructions, appellant must show prejudice from refusal to give instruction, that tendered instruction is correct statement of law, and that tendered instruction is warranted by evidence).

V. CONCLUSION

For the reasons stated above, we conclude that jury instruction No. 4, providing that the defendants' interests were the same and that the jury must render a verdict either for both defendants or against both defendants, adversely affected Bahrs' substantial rights and constituted prejudicial error requiring reversal. Accordingly, we also conclude that the failure to give Bahrs' proposed verdict form was also error. We reverse, and remand for a new trial.

Reversed and remanded for a new trial.

STATE OF NEBRASKA, APPELLEE, v. DOUGLAS E. MILLER, APPELLANT.

574 N.W.2d 519

Filed January 13, 1998. No. A-97-304.

1. **Jurisdiction: Prior Convictions.** In proceedings where a prior conviction is an essential element of an offense, county and district courts lack jurisdiction to consider the merits of alleged invalidity of prior convictions.
2. **Collateral Attack: Prior Convictions.** A collateral attack based on *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), if it may be made at all, must be raised in a separate proceeding commenced expressly for the purpose of setting aside the prior conviction.
3. **Postconviction.** A defendant seeking postconviction relief must (1) file a verified motion in the court which imposed the prior sentence, stating the grounds relied upon and asking for relief; (2) be in custody under sentence; and (3) allege a denial or infringement of the defendant's constitutional rights.
4. **Licenses and Permits.** A defendant who has already completed any applicable jail term, who is not on probation or parole, and whose sole claim of "custody" arises from a temporary suspension of his driver's license, is not "in custody" so as to fall within the ambit of Neb. Rev. Stat. § 29-3001 (Reissue 1995).

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, GALE POKORNY, Judge. Judgment of District Court affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Douglas E. Miller appeals from the district court's affirmance of the county court's denial of his "Petition for Relief in a Separate Proceeding/Petition to Set Aside Conviction," in which Miller sought to have the county court set aside a 1991 conviction for third-offense driving under the influence of alcohol (DUI). In affirming the county court's denial, the district court noted that Miller's petition constituted an attempted col-

lateral attack on a prior conviction which the State sought to use as an element of a subsequent offense, driving under suspension (DUS), and was based on the lack of colloquy mandated by *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969), concerning his right to a jury trial. The district court affirmed the action of the county court, relying on the guidance of the Nebraska Supreme Court in *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997). On appeal, Miller asserts that he was entitled to have the prior conviction set aside as a form of post-conviction relief. For the reasons stated herein, we affirm.

II. BACKGROUND

In April 1991, Miller was cited for third-offense DUI and for DUS. Miller initially pled not guilty to both charges on April 23. On July 17, Miller pled guilty to the underlying DUI charge, and upon motion of the State, the DUS charge was dismissed. A sentence enhancement hearing was held on June 26, 1992, at which time Miller was adjudged guilty of third-offense DUI. Miller was sentenced to 90 days' incarceration, was fined $500 and costs, and had his driver's license suspended for a period of 15 years.

In 1996, Miller was charged by information with DUS, for operating a motor vehicle during the term of his 15-year license suspension from the 1991 DUI conviction. Pursuant to Neb. Rev. Stat. § 60-6,196(6) (Reissue 1993), the State was required to prove, as an element of the DUS case, that Miller's license had been suspended for 15 years pursuant to the statute. In an effort to prevent the State from being able to prove this element, Miller filed a petition on September 11 captioned "Petition for Relief in a Separate Proceeding/Petition to Set Aside Conviction." In the petition, Miller asserted that the State was attempting to prosecute him for DUS based on the 1991 DUI conviction and alleged that the 1991 conviction was invalid because he had not been advised prior to his plea that he was entitled to a trial by jury, a right which was enunciated by the Eighth Circuit Court of Appeals in the case *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990), and the Supreme Court in the case *State v. Wiltshire*, 241 Neb. 817, 491 N.W.2d 324 (1992).

The record of arguments made at the hearing on Miller's petition establishes that he argued essentially that he was entitled to bring a special proceeding to challenge the prior conviction and that the prior conviction should be set aside as being void because he had not been advised of his right to a jury trial prior to entering a guilty plea. After hearing argument and receiving exhibits, the county court noted in a journal entry on October 7, 1996, "Petition denied." Miller appealed the county court's decision to the district court, where he again argued that the conviction could be set aside in the special proceeding which he had brought before the county court. The district court affirmed the county court's ruling on February 18, 1997. The district court found that Miller was attempting to bring a collateral attack against the prior conviction which the State was seeking to use as an element of the subsequent DUS charge "'based on the lack of *Boykin*-type colloquy.'" Miller brings this appeal from the district court's affirmance of the county court's denial.

III. ASSIGNMENT OF ERROR

On appeal, Miller has assigned four errors, which can be distilled for discussion to one basic allegation: The lower courts erred in failing to grant him the relief requested in his petition, namely setting aside the 1991 DUI conviction as constitutionally infirm.

IV. ANALYSIS

1. Separate Proceeding Relief

We initially note that, both by the caption and by the substance of Miller's petition, as well as by a careful reading of the record made in the courts below, it is apparent that this case was presented to the lower courts primarily, if not entirely, as a "separate proceeding" to set aside a prior conviction. In Miller's petition, he asserts that the State is attempting to use the 1991 conviction "as a foundation for a criminal charge of driving under suspension, 15 year suspension," in violation of § 60-6,196. Because he was not advised of his right to a jury trial prior to entering his plea in the 1991 DUI case, Miller asserts, he is in danger of being unlawfully deprived of his liberty if convicted of the DUS charge. In his arguments before the

county court, Miller argued that his petition was "a Motion for Relief in a Separate Proceeding" and argued that *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995), which was a separate proceeding case, supported his position. Miller argued the same basic points in his appeal to the district court.

As noted above, the district court ruled that Miller's petition constituted an improper attempt to bring a collateral attack against a prior conviction which the State is seeking to use as a material element of a subsequent offense, in this case a new DUS charge. The district court cited the Supreme Court's opinion in *State v. Lee*, 251 Neb. 661, 558 N.W.2d 571 (1997), to support its determination that the county court properly denied the petition. In *Lee*, the court held that a defendant's challenge of a prior plea-based conviction on the basis of lack of a *Boykin*-type colloquy, rather than on the basis that the record fails to demonstrate the presence of counsel on the defendant's behalf, constitutes a collateral attack on the prior judgment.

[1,2] The Supreme Court in *Lee* noted that the defendant could have brought a direct appeal to seek review of the prior DUI conviction, but had failed to do so. The court further recognized that a limited right to mount *Boykin*-type challenges to prior offenses was provided in *State v. LeGrand, supra*, but the court held that proceedings such as those in *LeGrand* are not appropriate in the context of a defendant's seeking to challenge a prior conviction on *Boykin*-type grounds, where the State is seeking to use the prior plea-based conviction as a material element of a subsequent offense. See *State v. Lee, supra*. The court noted the strong differences between enhancement and recidivist proceedings, and proceedings where the prior conviction is an essential element. See *id.* The court held that in the latter category of cases, county and district courts lack jurisdiction to consider the merits of alleged invalidity of prior convictions, because the collateral attack is impermissible. See *id.* "A collateral attack based on *Boykin*, if it may be made at all, must be raised in a separate proceeding commenced expressly for the purpose of setting aside the prior conviction." *Id.* at 666, 558 N.W.2d at 575.

In the present case, the State alleges that we are without jurisdiction to hear the merits of Miller's appeal because under

the holding in *State v. Lee, supra*, the lower courts were without jurisdiction to hear the merits of the case. See, *Richdale Dev. Co. v. McNeil Co.*, 244 Neb. 694, 508 N.W.2d 853 (1993); *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993); *State v. Miller*, 240 Neb. 297, 481 N.W.2d 580 (1992) (where trial court lacks power or jurisdiction to adjudicate merits of claim, appellate court also lacks power to determine merits of claim). In his brief, Miller concedes that "the Petition for Relief in a Separate Proceeding is likely precluded" by *State v. Lee, supra*. Brief for appellant at 18. Because of the Supreme Court's holding in *Lee*, we agree. To this extent, the lower courts committed no error in denying Miller's petition for relief.

2. POSTCONVICTION RELIEF

On appeal, Miller asserts that, despite the fact that his petition for separate proceeding relief is precluded by *State v. Lee, supra*, nonetheless he is entitled to relief and is entitled to have the conviction set aside as a form of postconviction relief. Miller appears to be asserting that his petition was really *both* a petition for separate proceeding *and* a petition for postconviction relief. In support of this argument, Miller asserts that he requested the lower court to "set aside" the prior conviction and that the petition should, therefore, be construed also as a petition for postconviction relief.

As noted above, it appears to us that this case was presented to the lower courts primarily, if not entirely, as a separate proceeding, and there is no indication in the record that the parties or the lower courts discussed, argued, or considered the possibility that Miller was seeking postconviction relief in addition to separate proceeding relief. Nonetheless, our reading of the petition itself reveals that, given a liberal reading, it is not beyond possibility that it could be read to state a claim for postconviction relief, even if such claim is asserted inartfully. As such, in the interest of a full discussion, we will consider whether Miller could be entitled to postconviction relief on his claim concerning advisement of his right to a jury trial for the 1991 DUI charge and then, if necessary, the implications of such a right where, as here, it appears that the parties and the courts below did not consider the case in such a light.

(a) Requirements for Postconviction Relief

[3] A defendant's right to postconviction relief arises from Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). Section 29-3001 provides, in pertinent part:

> A prisoner *in custody under sentence* and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner *as to render the judgment void or voidable under the Constitution* of this state or the Constitution of the United States, may file *a verified motion* at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

(Emphasis supplied.) As such, three primary requirements are set forth in § 29-3001. A defendant seeking postconviction relief must (1) file a verified motion in the court which imposed the prior sentence, stating the grounds relied upon and asking for relief; (2) be in custody under sentence; and (3) allege a denial or infringement of the defendant's constitutional rights. See § 29-3001.

In the present case, a liberal reading of Miller's verified petition indicates that he alleges an infringement of his constitutional due process rights and his constitutional right to trial by jury. Additionally, Miller asserts that he "is currently suffering the effects [of the prior conviction] for the reason that he is currently suffering from the order of that case that suspended his driver's license for 15 years." Brief for appellant at 20. We conclude that a liberal reading of this language could be construed to result in Miller's having pled that he is, in fact, still "in custody," despite the fact that his actual confinement in jail ended in the latter months of 1991, over 6 years ago.

(b) In Custody

The primary question to be answered, then, is whether the fact that Miller's driver's license was suspended for 15 years and the fact that he is presently serving that 15-year suspension are sufficient to satisfy the "in custody" requirement of § 29-3001. Miller seizes upon the language of this court in the case *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995), *petition for further review overruled* 248 Neb. xxv, in support of

his argument that suspension of a driver's license is sufficient to satisfy the "in custody" requirement, as well as previous holdings of the Supreme Court to the effect that probation and parole orders constitute "custody" for postconviction proceedings. He urges that this issue was not resolved by the Supreme Court in *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988).

In *State v. Styskal*, 242 Neb. 26, 493 N.W.2d 313 (1992), the Supreme Court noted that probation conditions, like parole conditions, impose substantial restraints upon a defendant's freedoms and constitute custody as that term is used in the Nebraska Postconviction Act. Miller argues on appeal that his driver's license suspension constitutes a similar substantial restraint. Indeed, in *State v. McGurk, supra*, this court conceded that driver's license suspensions are serious in nature. In *McGurk*, the defendant filed a postconviction motion while he was still incarcerated. The defendant was, however, no longer incarcerated by the time the motion was heard, decided, and appealed to this court. See *id.* This court noted that the remainder of the defendant's sentence, the 15-year license suspension, was still in effect and proceeded to rule on the merits of the defendant's postconviction motion. See *id.* Ultimately, the lower court's decision denying postconviction relief was affirmed. See *id.*

Although we recognize that the panel of this court which heard the appeal in *McGurk* considered and, ultimately, ruled on the merits of a postconviction issue where the defendant's only remaining claim to "custody" at the time his appeal was decided was his driver's license suspension, we feel compelled to follow the holding of the Supreme Court in *State v. Blankenfeld, supra.* We find the facts of *Blankenfeld* to be remarkably similar to those of the present case, more so than the facts of *McGurk*. In *Blankenfeld*, the defendant was initially charged with DUI and DUS, then pled guilty to the DUI charge, and the State dismissed the DUS charge. The court permanently revoked the defendant's driver's license for the DUI conviction, as well as sentencing him to 6 months' incarceration. See *State v. Blankenfeld, supra.* The defendant completed his jail term and, nearly 1 year after the completion of the jail term, filed a

motion for postconviction relief seeking to have the DUI conviction set aside. See *id.* After discussing at length the difficulties presented by the defendant's lack of clarity in his motion and his appeal, the Supreme Court held that the defendant had not brought himself within "the ambit of § 29-3001 for two reasons: (1) He was not in custody at the time of the filing of the motion in this case, and (2) defendant's rights were not denied or infringed upon in any manner which would [run afoul of the Nebraska or U.S. Constitution]." *State v. Blankenfeld*, 228 Neb. at 616, 423 N.W.2d at 482-83.

We note that importantly, *McGurk*, unlike the present case or *Blankenfeld*, presented the appellate court with a significant matter of public interest which was in serious legal dispute at the time, that is, whether a defendant had a right to a jury trial in a third-offense DUI case. See *State v. McGurk*, 3 Neb. App. 778, 532 N.W.2d 354 (1995), *petition for further review overruled* 248 Neb. xxv. A significant matter of public interest provides an independent justification for addressing the merits of an otherwise moot question. *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989).

[4] In the present case, Miller is seeking to have a conviction similar to the conviction in *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988), set aside, after pleading guilty to the prior DUI charge and having a then-pending DUS charge dismissed by the State. If the defendant in *Blankenfeld* was not considered to be "in custody" for postconviction purposes when his driver's license was *permanently* revoked, we fail to see how we can conclude that a *15-year* suspension renders Miller "in custody." As such, despite the language in *State v. McGurk, supra*, to the contrary, we conclude that a defendant who has already completed any applicable jail term, who is not on probation or parole, and whose sole claim of "custody" arises from a temporary suspension of his driver's license, is not "in custody" so as to fall within the ambit of § 29-3001. See *State v. Blankenfeld, supra.*

(c) Resolution

Having concluded that Miller is not in custody, we need not further address whether Miller has established a claim for postconviction relief. Similarly, because we have concluded that

Miller is not entitled to seek postconviction relief on this claim, we need not consider the repercussions of his petition's alleging the elements of a postconviction claim but the parties' and lower courts' proceedings being conducted without consideration of such a claim. Because Miller is not in custody, the lower courts would have had no jurisdiction to reach the merits of an allegation for postconviction relief, and we are similarly without jurisdiction to consider the issue further.

V. CONCLUSION

Miller is precluded from collaterally attacking the 1991 DUI conviction on *Boykin*-type grounds in a separate proceeding, and he is not in custody so as to be eligible for postconviction relief. Accordingly, the ruling of the district court affirming the county court's denial of Miller's petition is hereby affirmed.

AFFIRMED.

MICHAEL GIBSON, APPELLEE, V. KURT MANUFACTURING AND SAFECO, ITS WORKERS' COMPENSATION CARRIER, APPELLANTS.

573 N.W.2d 786

Filed January 13, 1998. No. A-97-572.

1. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. ____: ____. In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing.
3. ____: ____. Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous.
4. **Workers' Compensation: Judgments: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
5. **Workers' Compensation.** A determination as to whether there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by an injured worker is a question of fact to be determined by the Workers' Compensation Court.

6. ____. An employee's disability as a basis for compensation 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.
7. ____. When a compensation court awards vocational rehabilitation, it should postpone a determination of loss of earning capacity until after the completion of that rehabilitation.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed.

John R. Hoffert, of Knudsen, Berkheimer, Richardson, Endacott & Routh, for appellants.

Samuel W. Segrist, of Meister & Segrist, for appellee.

HANNON, SIEVERS and INBODY, Judges.

HANNON, Judge.

The issues presented by this workers' compensation case are whether the claimant, Michael Gibson, is entitled to vocational rehabilitation and whether a Workers' Compensation Court can postpone a determination of a claimant's loss of earning capacity until the claimant completes vocational rehabilitation. We find in the affirmative on both issues and, therefore, affirm in part and reverse in part the judgment of the review panel.

FACTUAL BACKGROUND

Gibson began working for Kurt Manufacturing, a metal fabrication company, in late June or early July 1991 after he graduated from high school. For the most part, Gibson worked as a screw-machine operator, which required him to keep the machine supplied with steel, to check the quality of the product, and to move trays of parts (screws). The position entailed a significant amount of lifting, carrying, and pushing, sometimes with the help of a sledge hammer, large and heavy pieces of steel which ranged from approximately 400 pounds down to 25 pounds. The larger machines, such as the "4-inch" machine, used the heaviest pieces, while the "9/16ths" machine used the lightest pieces of steel. Gibson testified that he usually ran two machines at once. His hourly wage in February 1993 was $7.35.

At a little before midnight on February 25, 1993, Gibson was pulling on a handle on the collet lever of an "inch and 5/8ths"

screw machine when he felt a pain in his midback between his shoulder blades. Gibson described the pain as similar to being stuck by an ice pick. Gibson informed his supervisor of his injury and went home. When Gibson left work, he was experiencing back spasms and muscle tightness around his ribs. By 5 or 6 a.m., the pain was so great that Gibson went to the emergency room. Gibson later visited his family practitioner, Dr. Milton (Pete) Johnson. Johnson's notes from March 10 reveal that a bone scan showed a slight area of increased activity in the T-8 location of Gibson's spine and that Johnson suspected Gibson had sustained either a very small compression fracture or a bony type of injury at that location.

After going through physical therapy, Gibson returned to work on April 26, 1993. Gibson's muscle spasms had relaxed, but he still experienced pain in his spine. Gibson worked on the 9/16ths machine, which he described as the "real small screw machine." Operation of that machine required him to use 25 pound pieces of steel, which were substantially lighter pieces of steel than he had been using prior to the accident. Gibson also had other employees carry his parts trays, which weighed between 45 and 50 pounds, for him. Gibson continued working on the smaller screw machines that summer. According to Gibson, despite the fact that he returned to work, he continued to have pain in the center of his back.

On August 2, 1993, while at home, Gibson experienced a reoccurrence of the pain in his back. Due to his midback pains, Gibson did not go back to work. Instead, Gibson returned to Johnson, who referred him to Dr. Donn Turner, a neurosurgeon in Fort Collins, Colorado. In addition to his midback pain, Gibson reported having spasms down toward his lower back, pain in his neck, numbness in his legs, and shooting pains down his legs. According to Gibson, his right leg was numb and real heavy, and his left foot was also numb. Turner diagnosed Gibson as having sustained "a prominent disc fragment at T7-8, midline and to the right of midline, in association with narrowing of this interspace."

In September or October 1993, Gibson developed what he described as cramps in his calves. In November, Gibson underwent a functional capacity assessment, which is generally summarized by the following:

> Please note that during the Assessment Mr. Gibson was consistently limited during lifting activities by reports and behaviors of mid-back pain. He also demonstrated increased difficulty with functional activities requiring flexed postures. Body mechanics with lifting were at times poor with the client attempting to control the weight while holding it away from his center of gravity. Heart rate response tended to be elevated and reports of pain ended [sic] to increase throughout the assessment indicating general deconditioning. He also had decreasing resistance values throughout the test . . . . Mr. Gibson also had frequent reports of pain and stiffness in the right calf with functional activities. His reports did not appear to be consistent with radicular symptoms and he reported that he intends to see his family physician before starting the Work Hardening program.

Additionally, the report revealed that Gibson could only "occasionally," defined as 1 to 33 percent of an 8-hour workday, lift the following weights: from 30 to 63 inches in height and return, 23.6 pounds; from 30 to 18 inches in height and return, 36.8 pounds; and from 18 inches to floor and return, 32.4 pounds. The report further revealed that he could only occasionally carry 22 pounds with each arm and that he could only occasionally push and pull 44.1 pounds. We note, with regard to these categories, that Gibson complained of midback pain but not leg pain.

Gibson participated in a "work hardening" program in late November through December 1993, although his attendance was sporadic. Gibson was still having back pain, but he also began noticing more problems with his legs, including numbness, heavy feelings, and cramps. Gibson left the work hardening program toward the end of December when he developed blood clots in his legs, a condition for which he was hospitalized on December 30. Gibson was diagnosed as having deep venous thrombosis. According to Gibson, when he left the work hardening program, he did not think that his back had "improved at all."

Gibson did not return to work at Kurt Manufacturing again until April 18, 1994. When he did return, he performed light-

duty jobs such as sorting parts and working with the smaller screw machines. However, he was still having pain in his middle and lower back. Gibson worked until July 26, when he was taken off work for his vein problems. In September, Johnson advised Gibson not to return to work because of his recurrent deep venous thrombosis. According to Gibson, Johnson eventually came to the conclusion that Gibson could return to work if he alternated standing and sitting and was allowed to put his leg up.

Gibson returned to Kurt Manufacturing on May 15, 1995, and worked as a tool grinder, a tool builder, and an office clerk (the latter at a wage of $7.48 per hour), all physically less demanding jobs. Gibson never returned to the screw machine operator job because of his vein problems. Gibson was laid off on March 15, 1996, because of what he described as having "too many claims on the insurance." During that time, Gibson's back was "still real painful up between the shoulders." In May, Gibson was hired by a credit bureau to do telephone and computer work at a wage of $5 per hour. Gibson worked there until his termination on September 2 or 3. Gibson testified that his back bothered him when he worked at the credit bureau.

In a July 29, 1996, impairment rating, Dr. Michael Curiel stated:

> IMPRESSION: This patient has had a thoracic spine injury with evidence of thoracic disc herniation that has not required any surgery but has documented pain and rigidity with muscle spasm . . . . [T]he patient has a 6% Whole Person impairment. . . . Although the deep vein thrombosis certainly limits his work, there is no way to clearly associate this with his initial injury . . . . Therefore I cannot include that as part of the Impairment Rating.

Additionally, Dr. Glen Forney, in an August 19, 1996, letter, stated that Gibson had permanent physical impairment from his "post phlebitic syndrome" but did not give a degree of impairment.

At the time of trial in September 1996, Gibson was still experiencing pain in his midback "on my spine," as well as some occasional muscle spasms. Gibson admitted that the only medical treatment that he had received for his back problem was

medication, two rounds of physical therapy, and the work hardening program and that since December 1993, all the treatment he had received was for his deep venous thrombosis. Gibson testified that if his thrombosis did disappear, he could return to work at the 9/16ths machine if he had help lifting the parts trays. Gibson testified that after his back injury, he had his friends help lift things for him.

PROCEDURAL BACKGROUND

On April 1, 1996, Gibson filed his petition for workers' compensation benefits against Kurt Manufacturing and Safeco, its workers' compensation carrier, specifically asking for vocational rehabilitation. The trial judge found that the thoracic disk herniation arose out of and in the course of Gibson's employment with Kurt Manufacturing and that his deep venous thrombosis was not related to his injury of February 26, 1993. The judge also acknowledged Curiel's opinion that Gibson had sustained a 6-percent functional disability to the body as a whole as a result of the thoracic disk herniation. The trial judge awarded temporary total disability benefits and ordered Gibson to contact the rehabilitation specialist of the court for "an evaluation and recommended rehabilitation services." According to the court:

> The issues in this case are what is plaintiff's loss of earnings power and is plaintiff entitled to rehabilitation services of the court. After plaintiff's injury, plaintiff returned to work on a lighter machine. Plaintiff was unable to do the work and suffered a reoccurrence which required plaintiff to discontinue work and seek further medical treatment. It was during the course of that medical treatment that deep vain [sic] thrombosis was discovered. It was also during this time that plaintiff underwent a functional capacity assessment which showed significant limitations. Even though a work hardening program may have increased plaintiff's ability to work, he would still have a substantial loss of earnings capacity if he had completed the work hardening program. I find that it is not appropriate at this time to determine plaintiff's loss of earnings capacity. Before determining any loss of earnings capac-

> ity, it is necessary that plaintiff seek the rehabilitation services of the court. It is expected that those rehabilitation services will consist of retraining this young man with his significant back injury. After retraining which most likely will be an educational plan, the parties can either agree as to the plaintiff's loss of earning power. If the parties cannot agree, either party may apply to the court for further hearing.

The defendants then appealed to the review panel, arguing that the trial judge erred in awarding vocational rehabilitation benefits. According to the order, Gibson cross-appealed, arguing that the trial judge erred in not determining loss of earning capacity. The review panel found that the trial judge was clearly wrong in not assessing a loss in earning capacity as Gibson had reached maximum medical improvement and had received an impairment rating with restrictions at the time of trial. The review panel thus remanded the matter to the trial court for a determination of permanent loss of earning capacity. The panel also remanded the case for "clarification and findings as to whether the severe vein thrombosis suffered by the plaintiff after the accident and which was found by Dr. Curiel . . . to be not work related has any effect on the issue of vocational rehabilitation." Last, the review panel affirmed the trial judge's denial of Gibson's claim for payment of Curiel's bill in the amount of $350.

ASSIGNMENTS OF ERROR

The defendants contend that (1) the trial judge erred in awarding vocational rehabilitation benefits to Gibson and (2) the review panel erred when it ordered the trial judge to determine Gibson's loss of earning capacity prior to his completion of vocational rehabilitation.

STANDARD OF REVIEW

[1,2] Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1993), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the

order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Winn v. Geo. A. Hormel & Co.*, 252 Neb. 29, 560 N.W.2d 143 (1997). In determining whether to affirm, modify, reverse, or set aside a judgment of the Workers' Compensation Court review panel, a higher appellate court reviews the findings of the single judge who conducted the original hearing. *Id.*

[3] Findings of fact made by the Workers' Compensation Court after review have the same force and effect as a jury verdict and will not be set aside unless clearly erroneous. *Id.*

[4] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Id.*

ANALYSIS

This case presents two issues: (1) whether Gibson is entitled to vocational rehabilitation and (2) whether a determination on loss of earning capacity can be postponed until after the claimant completes vocational rehabilitation.

Is Gibson Entitled to Vocational Rehabilitation?

First, we note that Neb. Rev. Stat. § 48-162.01 (Reissue 1993), which went into effect approximately 10 months after Gibson's work-related accident, was amended to operate from and after January 1, 1994, so as to provide, among other things, a means of determining a vocational rehabilitation plan and a means of determining loss of earning power. *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995). In *Stansbury*, the Nebraska Supreme Court held that the amendments to § 48-162.01, and in particular subsection (3), were procedural in nature and thus binding upon a tribunal on the effective date of the amendment. Thus, we apply § 48-162.01.

Subsection (3) of that statute provides, in relevant part, as follows:

> An employee who has suffered an injury covered by the Nebraska Workers' Compensation Act shall be entitled to prompt medical and physical rehabilitation services. When as a result of the injury an employee is unable to perform suitable work for which he or she has previous training or experience, he or she shall be entitled to such vocational rehabilitation services, including job placement and

retraining, as may be reasonably necessary to restore him or her to suitable employment.

[5] A determination as to whether there is a reasonable probability that vocational rehabilitation services would reduce the amount of earning power lost by an injured worker is a question of fact to be determined by the Workers' Compensation Court. *Cords v. City of Lincoln*, 249 Neb. 748, 545 N.W.2d 112 (1996).

At trial, Gibson testified that he still experiences pain in his midback, along with occasional muscle spasms. While it is undisputed that Gibson was having problems with his legs in November 1993 when the functional capacity assessment was performed, the report reveals that during the specific portions of the assessment which tested his capacity for lifting, carrying, pushing, and pulling, Gibson complained only of pain in his midback. Moreover, the results from those portions of the assessment show that, at a maximum, Gibson is able to lift 36.8 pounds, carry 22 pounds in each arm, and push and pull 44.1 pounds. The defendants rely on the fact that Gibson admitted that if he did not have deep venous thrombosis, he could return to work at the 9/16ths machine if he received help from his coemployees in carrying parts trays that weighed 45 to 50 pounds. We cannot assume that Gibson will always be able to receive help from his "buddies" or that other employers will make special exceptions or provide help for him. His deep venous thrombosis aside, there is evidence that he could not perform all the duties of his job, even at the lightest machine, and therefore, we cannot say that the trial judge's determination that Gibson was entitled to vocational rehabilitation was clearly erroneous. The judgment of the review panel, remanding the determination of vocational rehabilitation to the trial judge, is thus reversed.

Loss of Earning Capacity.

The parties are at odds as to the time that loss of earning capacity is to be determined. The defendants contend that loss of earning capacity cannot be determined until after the employee completes vocational rehabilitation, and Gibson contends that such a determination can be, and should have been, made at the time of trial.

We have found cases where the trial judge simultaneously determined an employee's loss of earning capacity and awarded vocational rehabilitation. See, e.g., *Cords, supra* (affirming trial judge's award for 10-percent loss of earning power and vocational rehabilitation benefits); *Stansbury, supra* (where trial judge awarded benefits for 10-percent loss of earning capacity and for 12-week period of vocational rehabilitation); *Nunn v. Texaco Trading & Transp.*, 3 Neb. App. 101, 523 N.W.2d 705 (1994) (determination of loss of earning capacity made before completion of vocational rehabilitation); *Haney v. Aaron Ferer & Sons*, 3 Neb. App. 14, 521 N.W.2d 77 (1994) (after determining loss of earning capacity, court awarded vocational rehabilitation benefits). However, the timing of the award for loss of earning capacity was not challenged in those cases.

The Nebraska Supreme Court did discuss the timing of the determination of loss of earning capacity and its relationship with vocational rehabilitation in *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). In *Thom*, the compensation court found that the employee had suffered a loss of earning power and was entitled to vocational rehabilitation. In affirming the compensation court's award of vocational rehabilitation services, the court stated:

> Since the effort at rehabilitation is aimed at reducing the earning power loss [the employee] presently suffers, the compensation court properly suspended payment of benefits for said present loss and awarded compensation for temporary total disability during the period of vocational rehabilitation. *At the conclusion of the rehabilitative effort, the extent of* [*the employee's*] *loss of earning power will need to be reconsidered.* § 48-162.01.

(Emphasis supplied.) *Thom*, 226 Neb. at 743, 414 N.W.2d at 815.

Similarly, in *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990), the compensation court determined that the employee had sustained a 5-percent loss of earning power and awarded vocational rehabilitation benefits. The Nebraska Supreme Court upheld the award of vocational rehabilitation, stating:

> Because we determine that [the employee] is entitled to temporary total disability benefits while undergoing the

> vocational rehabilitation ordered by the compensation court, it is necessary to suspend the payment of benefits for the 5-percent loss of earning capacity the compensation court determined [the employee] has presently suffered. *At the conclusion of the rehabilitative effort, it will be necessary for the compensation court to determine whether the effort was successful and in fact reduced the loss of earning power* [*the employee*] *presently suffers.*

(Emphasis supplied.) *Id.* at 914-15, 457 N.W.2d at 836.

Gibson argues that *Thom, supra*, and *Bindrum, supra*, are no longer applicable, because they were decided under the previous version of the statute, see Neb. Rev. Stat. § 48-162.01(6) (Reissue 1988). However, Gibson does not specify the changes which he contends justify such a conclusion. After viewing § 48-162.01(6) (Reissue 1988), we are unable to agree with Gibson's argument. Further, he overlooks the fact that the goal of vocational rehabilitation is to restore the injured employee to gainful employment, see § 48-162.01(1) (Reissue 1993), which may, if successful, reduce the injured employee's loss of earning capacity. The fact that the injured employee may have reached maximum medical improvement does not bar an award for vocational rehabilitation. See, e.g., *Stansbury v. HEP, Inc.*, 248 Neb. 706, 539 N.W.2d 28 (1995); *Bindrum, supra.*

[6] It is important not to confuse physical impairment with earning capacity. An employee's disability as a basis for compensation 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. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). At its simplest, the former is a limitation on what the body can do, and the latter is what the individual, considering his various strengths and weaknesses, can earn in the marketplace. Simply because an employee has reached maximum medical improvement does not mean that his or her loss of earning capacity cannot thereafter be reduced through vocational rehabilitation.

[7] We hold, at least in injuries involving disability of the body as a whole, that when a compensation court awards voca-

tional rehabilitation, it should postpone a determination of loss of earning capacity until after the completion of that rehabilitation. As a result, the judgment of the review panel, remanding for immediate determination of loss of earning capacity, is also reversed.

CONCLUSION

The judgment of the Workers' Compensation Court remanding the cause to the trial judge for a redetermination of vocational rehabilitation and loss of earning capacity is hereby reversed. In all other respects, the judgment is affirmed. Gibson is awarded $2,500 for his attorney's services in this court.

AFFIRMED IN PART, AND IN PART REVERSED.

EVELYN A. O'CONNOR, APPELLEE, V. DAVID A. KAUFMAN AND VIRGINIA L. KAUFMAN, APPELLANTS.

574 N.W.2d 513

Filed January 13, 1998. No. A-97-860.

1. **Final Orders: Appeal and Error.** The three types of final, appealable orders are (1) an order which affects a substantial right and which determines the action or prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
2. **Statutes: Words and Phrases.** A special proceeding, although not statutorily defined, has long been construed to mean every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes.
3. **Final Orders: Appeal and Error.** The right of appeal is purely statutory, and unless the order appealed from is a final order, an appellate court cannot hear the case.
4. **Injunction: Final Orders: Appeal and Error.** A permanent injunction has long been recognized as a final order, but a temporary injunction is not an appealable order.
5. **Final Orders.** When no further action of the court is required to dispose of a pending cause, the order is final.
6. **Judgments: Final Orders: Appeal and Error.** While it may be appropriate under certain circumstances to bifurcate trials, an appellate court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken.
7. **Injunction: Final Orders: Liability: Damages: Appeal and Error.** In an action for injunctive relief and damages where the matter of liability has been bifurcated from the damages issue and decided, there has not been a final, appealable determination of the action until the district court also determines the damages issue.

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

John P. Weis, of Sorensen & Zimmerman, P.C., for appellants.

James Duffy O'Connor, of Maslon, Edelman, Borman & Brand, L.L.P., and Steven C. Smith, of Van Steenberg, Chaloupka, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellee.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

Our practice is to closely examine all cases in their initial stages to ensure that jurisdiction has been perfected. Our objective is to quickly terminate appeals when we lack jurisdiction to conserve judicial resources and avoid litigation expenses for the parties, which otherwise would be to no avail. Because neither the Nebraska Supreme Court nor this court has directly discussed the particular jurisdictional question which arises in this case, we believe that a published opinion explaining our decision is in order, rather than merely summarily dismissing this appeal as we usually do when jurisdiction is lacking. We have previously requested that the parties brief the issue of jurisdiction.

PROCEDURAL BACKGROUND

Evelyn A. O'Connor has filed suit against David A. Kaufman and Virginia L. Kaufman, husband and wife, to obtain (1) an implied easement on the Kaufmans' land for the use of a well, pump, and pipeline to supply water to O'Connor's land; (2) an injunction compelling the Kaufmans to reinstall the well, pump, and pipeline and permanently restraining the Kaufmans from interfering with the use of the well; and (3) damages in the amount of $12,811.73 and costs. Until January 2, 1965, William Ledingham, Jr., owned and farmed the land now belonging to O'Connor and the Kaufmans. Ledingham maintained a home on the parcel now owned by O'Connor. The well, pump, and pipeline in question were built by Ledingham over 40 years ago on the parcel now owned by the Kaufmans in order to furnish domestic water to his home located on what is now O'Connor's land.

Ledingham thereafter conveyed all the land to Ledingham, Inc., and upon his death, Ledingham, Inc., conveyed the land to his two children. The O'Connor parcel was conveyed to Ledingham's son, Jerry Ledingham, O'Connor's now deceased husband, and the Kaufman parcel was conveyed to William Ledingham's daughter, Sandra Carnesecca. This parcel passed from Carnesecca through a series of owners and, finally, to the Kaufmans by sheriff's deed. In September 1991, while no one was living in the house on the O'Connor parcel, the Kaufmans removed the well, pump, and pipeline from this land which served the O'Connor parcel and began farming the land where these things were formerly located. After the well was removed, O'Connor attempted to drill three wells on her parcel in order to supply water to the house on that land, giving rise at least in part to her claim for damages.

O'Connor's original petition alleged only a prescriptive right to the use of water from the well on the Kaufman parcel. The court granted O'Connor leave to amend her petition due to an error in the legal description of her property. In her amended petition, O'Connor added a claim based upon the existence of an implied easement. The Kaufmans answered the amended petition and filed a motion for summary judgment, which was granted. O'Connor appealed, and the Nebraska Supreme Court held that there was a genuine issue of material fact as to whether an implied easement for use of the well, pump, and pipeline was created at the time of the conveyances subdividing the property, and reversed, and remanded the matter for further proceedings. See *O'Connor v. Kaufman*, 250 Neb. 419, 550 N.W.2d 902 (1996).

Upon remand, O'Connor filed a second amended petition, requesting damages in addition to the other relief listed in her earlier petitions. O'Connor then filed a motion for partial summary judgment, requesting that judgment be given to her on the issue of an implied easement, on the request for reinstatement of the well, and on the request for a permanent injunction from further interference with her use of the well. The district court granted O'Connor's motion for summary judgment, giving O'Connor the judgment of an easement, ordering and enjoining the Kaufmans to reinstate the well, and permanently enjoining

the Kaufmans from interfering with O'Connor's easement. The court noted in its order that it was leaving the issue of damages for trial. The Kaufmans have appealed the district court order.

ANALYSIS

We have asked the parties to brief the issue of jurisdiction. In their brief, the Kaufmans contend that the order of the district court, requiring the Kaufmans to reinstate the well, pump, and pipeline in addition to enjoining them from further interference, affects a substantial right and that there would be no point in awaiting an appeal until after the damages portion of the lawsuit has been completed, because the expense of reinstating the well would already have to be incurred in order to avoid a contempt proceeding for failure to comply with the injunctive order.

[1] The Supreme Court has held that Neb. Rev. Stat. § 25-1902 (Reissue 1995) provides for three types of appealable, final orders and that a requirement for each of the three types is that a substantial right be affected by the order. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The three types are (1) an order which affects a substantial right and which determines the action or prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. *Jarrett v. Eichler*, *supra*. That the injunction issued by the district court affected substantial rights of the Kaufmans is quite clear. The next determination we must make, however, is whether the injunction can be a final order. Because this proceeding does not involve an application after judgment, the injunction can be a final order (1) only if it is an order that determines the action or (2) if it is an order in a special proceeding.

Is Injunction Special Proceeding?

The Kaufmans maintain that this action is a special proceeding that affects their substantial rights and that the order is therefore appealable even if there is no order effectually determining the action or preventing judgment. If this action is a special proceeding, the defendants are correct. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

In *In re Interest of R.G.*, 238 Neb. at 412-13, 470 N.W.2d at 787, the Supreme Court quoted with approval the following analysis from *Rehn v. Bingaman*, 157 Neb. 467, 59 N.W.2d 614 (1953) (Boslaugh, J., concurring):

> "Any proceeding in a court by which a party prosecutes another for enforcement, protection, or determination of a right or the redress or prevention of a wrong involving and requiring the pleadings, process, and procedure provided by the code and ending in a final judgment is an action. Every other legal proceeding by which a remedy is sought by original application to a court is a special proceeding. A special proceeding within the meaning of the statute defining a final order must be one that is not an action and is not and cannot be legally a step in an action as a part of it. . . . A special proceeding may be connected with an action in the sense that the application for the benefit of it and the other papers and orders concerning it may be filed in the case where the record of the filings in the action are [sic] made—as for instance garnishment or attachment—but it is not an integral part of or a step in the action or as it is sometimes referred to in such a situation a part of the 'main case.' The distinction between an action and a special proceeding has been clearly recognized by this court. In Turpin v. Coates, 12 Neb. 321, 11 N.W. 300, it is said: 'A special proceeding may be said to include every special statutory remedy which is not in itself an action.' "

[2] A special proceeding, although not statutorily defined, has long been construed to mean every civil statutory remedy which is not encompassed in chapter 25 of the Nebraska Revised Statutes. *In re Interest of R.G., supra.* If a party seeking an injunction does not seek damages in the same action, the right to damages is waived. *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959). Neb. Rev. Stat. § 25-1062 (Reissue 1995) states: "The injunction provided by this code is a command to refrain from a particular act. It may be the final judgment in an action or may be allowed as a provisional remedy . . . ." The injunction appealed from in the case at hand is final by its terms. A temporary injunction is not appealable. See, *Guaranty Fund Commission v. Teichmeier*, 119 Neb. 387, 229

N.W. 121 (1930); *Buda v. Humble*, 2 Neb. App. 872, 517 N.W.2d 622 (1994). As injunctions are provided for in chapter 25, i.e., Neb. Rev. Stat. § 25-1062 et seq. (Reissue 1995), a suit for an injunction is an action and is not a special proceeding, but this action also seeks damages.

Does Bifurcated Determination on Injunction Determine Action?

[3] The Nebraska Supreme Court has long held that the right of appeal is purely statutory and that unless the order appealed from is a final order, an appellate court cannot hear the case. *Clarke v. Nebraska Nat. Bank*, 49 Neb. 800, 69 N.W. 104 (1896) (if substantial rights of parties are determined, matter is appealable even though cause is retained for determination of matters incidental thereto). See *Standard Fed. Sav. Bank v. State Farm*, 248 Neb. 552, 537 N.W.2d 333 (1995) (declaratory judgment entered but court held that such did not determine entire action and that substantial right remained to be determined as damages had not been decided and, therefore, entry of declaratory judgment was not final, appealable order).

[4] A permanent injunction has long been recognized as a final order. *Rickards v. Coon*, 13 Neb. 419, 14 N.W. 162 (1882); *Galstan v. School Dist. of Omaha*, 177 Neb. 319, 128 N.W.2d 790 (1964), *overruled on other grounds, School Dist. of Waterloo v. Hutchinson*, 244 Neb. 665, 508 N.W.2d 832 (1993). A temporary injunction is not an appealable order, *Einspahr v. Smith*, 46 Neb. 138, 64 N.W. 698 (1895), even if the effect of the temporary injunction is to prohibit a matter from being submitted to the voters at the first regular election, see *Barkley v. Pool*, 102 Neb. 799, 169 N.W. 730 (1918). An order dissolving a temporary restraining order is not a final order. *Abramson v. Bemis*, 201 Neb. 97, 266 N.W.2d 226 (1978); *Horst v. Board of Supervisors of Dodge County*, 5 Neb. (Unoff.) 410, 98 N.W. 822 (1904). However, the Nebraska Supreme Court has not directly considered the question of whether an injunction issued in a bifurcated case is a final order when the issue of damages has not been determined.

[5] The Nebraska Supreme Court has, however, decided that in cases in which bifurcation leaves to be decided an essential

element of a claim, the decision, prior to a final order on all the essential elements, is not appealable. To be final, an order must ordinarily dispose of the whole merits of the case. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997). When no further action of the court is required to dispose of a pending cause, the order is final. *Id.* If the cause is retained for further action, the order is interlocutory. *Currie v. Chief School Bus Serv.*, 250 Neb. 872, 553 N.W.2d 469 (1996). For instance, in *Burke*, the court held that a summary adjudication of liability alone, in which the district court granted the plaintiff's petition for a declaratory judgment to establish his right to health insurance coverage but which did not decide the question of damages, is not appealable.

In *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991), the defendant appealed from a jury verdict that the plaintiff had the right of possession of certain land. The plaintiff had brought a petition in ejection and prayed for a judgment for delivery of possession of the land, for an accounting, for damages for withholding possession, and for costs. After the jury trial, the trial court made a journal entry in which it stated: "'Court discusses issue of damages and whether to be handled as an accounting (equity) or damages for withholding possession (law). Counsel to contact clients and advise Court on any potential settlement.'" *Id.* at 517, 471 N.W.2d at 732. The record showed that there was no determination of which approach would be followed, and an appeal occurred prior to the determination of either an accounting or damages. The *Wicker* court noted that a plaintiff may seek rents and profits in an ejectment action and that because the appeal was prosecuted before resolution of the issue of rents and profits, the district court did not dispose of the whole merits of the case. Thus, the court concluded, there was no final order which could be appealed.

[6] In *Johnson v. NM Farms Bartlett*, 226 Neb. 680, 414 N.W.2d 256 (1987), Johnson sought injunctive relief and damages because he claimed NM Farms Bartlett discharged diffused surface waters from NM Farms' property onto his land. The parties bifurcated the trial by stipulating that no evidence on damages would be adduced until there was a resolution of

liability. The district court denied Johnson a permanent injunction and determined that he was not entitled to damages. However, the district court resolved a matter not before it because there was a stipulation that no evidence concerning damages would be adduced until after resolution of the question of whether NM Farms had any liability to Johnson. The Supreme Court stated that it could not tell from the record whether the injunction had been denied, because the district court determined NM Farms had no liability to Johnson or for the reason that injunctive relief was inappropriate, which would not preclude the awarding of damages. The *Johnson* court held it could not tell whether there was a final resolution of the damage issue and, hence, whether there was a final order. The appeal was dismissed on that basis, and in making that ruling, the Supreme Court said: "While it may be appropriate under certain circumstances to bifurcate trials, this court acquires no jurisdiction until there has been a judgment or final order in the court from which the appeal is taken. . . . Thus, we dismiss Johnson's appeal for lack of jurisdiction." (Citations omitted.) *Id.* at 688, 414 N.W.2d at 263. The court did not state whether it considered an injunction issue a special proceeding.

We believe that *Johnson* cannot be distinguished from the case at hand. In *Johnson*, the parties stipulated that they would not introduce evidence of damages until the liability issue was determined, but this stipulation had the effect of allowing the court to determine the injunction issue without determining the damage issue. Therefore, both in *Johnson* and in this case, the damage issue was bifurcated from the injunction issue. In both cases, the trial court made what it regarded as a final order on the injunction. In *Johnson,* there was a possibility that the damage issue was not resolved, and that possibility prevented the order from being final and appealable. In this case, the damage issue was clearly not tried. The Nebraska Supreme Court has held that a plaintiff who seeks an injunction and who does not request damages during that action is precluded from seeking damages in a subsequent legal action. *Wischmann v. Raikes*, 168 Neb. 728, 97 N.W.2d 551 (1959). The basis of this decision was that the plaintiff could not split a cause of action, because the right to the two different types of relief, the injunction and dam-

ages, was fundamentally based upon the same facts and was therefore the same cause of action. Under the holding in *Wischmann*, the plaintiff in this action was required to seek both types of relief in one action. But if this court holds that it has jurisdiction over this appeal, then by the combined action of the trial court in bifurcating the issues at trial and of this court in taking jurisdiction of the appeal, the plaintiff will be required to have two trials. This is tantamount to splitting the plaintiff's cause of action.

[7] We conclude that in an action for injunctive relief and damages where the matter of liability has been bifurcated from the damages issue and decided, there has not been a final, appealable determination of the action until the district court also determines the damages issue. This appeal is premature, and we lack jurisdiction because of the lack of a final, appealable order.

APPEAL DISMISSED.

ALLEN E. DAUBMAN AND RENEE A. DAUBMAN, HUSBAND AND WIFE, APPELLEES, V. CBS REAL ESTATE CO., A NEBRASKA CORPORATION, AND ARLENE ENGELBERT, APPELLANTS.

573 N.W.2d 802

Filed January 20, 1998. No. A-96-734.

1. **Actions: Pleadings.** Whether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought.
2. **Actions.** Where none of the extraordinary powers of a court of equity are required in order to give either party the relief he seeks, and a court of law can afford complete relief, the action is one at law.
3. **Actions: Appeal and Error.** When a case presents an action at law, it will be reviewed as an action at law, notwithstanding the fact that the parties briefed the appeal as one in equity.
4. **Judgments: Appeal and Error.** When reviewing a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
5. ____: ____. When reviewing a question of law, an appellate court reaches conclusions independent of the lower court's ruling.
6. **Principal and Agent.** Where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent.

7. **Appeal and Error.** Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error.
8. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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.
9. **Brokers: Principal and Agent.** A broker or agent owes his or her principal the following duties: (1) to utilize the skill necessary to accomplish the task undertaken, (2) to be honest and act in good faith, (3) to be loyal, (4) to disclose all material facts, (5) to possess no undisclosed adverse interests, and (6) to be obedient to the principal.
10. **Contracts: Principal and Agent.** The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made.
11. **Principal and Agent.** Except when an agent is privileged to protect his or her own or another's interests, an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent.
12. **Brokers: Principal and Agent.** If a broker performs unauthorized acts, he is liable to his principal for the loss or damage which results therefrom.
13. **Contracts: Brokers: Real Estate.** When a broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted.
14. **Principal and Agent.** An agent who has rendered an agreed upon service is entitled to be paid, absent a breach of trust.
15. ____. An agent who is entitled to compensation for his services has a lien upon the principal's goods or property which comes lawfully in his possession.
16. ____. An agent who has earned a commission has a clear right to insist on being paid, and refusal to waive such right cannot be held to be a violation of the agent's duties.
17. **Contracts: Principal and Agent: Real Estate: Sales.** When an agent is hired to sell a certain piece of property to a certain person, the attempt to get the designated buyer to purchase the property cannot be interpreted as an act in the interests of the prospective buyer. Attempts by the agent to close the sale within the terms of the listing agreement cannot be interpreted as an act in the interests of the agent simply because the agent will receive a commission upon closing.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Judgment vacated, and cause remanded with directions to dismiss.

Mark S. Dickhute for appellants.

Richard J. Rensch, of Raynor, Rensch & Pfeiffer, for appellees.

HANNON, IRWIN, and INBODY, Judges.

HANNON, Judge.

Allen E. Daubman and Renee A. Daubman, husband and wife, brought suit against CBS Real Estate Co. (CBS), a Nebraska corporation, and Arlene Engelbert, an agent working for CBS, to recover the real estate commission CBS received for the sale of the Daubmans' home. The Daubmans allege that CBS, through Engelbert's actions, breached the fiduciary duty owed to the Daubmans as their real estate broker. After a bench trial, the court found that CBS and Engelbert had breached the fiduciary duty owed to the Daubmans in several respects and awarded a judgment against both CBS and Engelbert equal to the real estate commission received, plus prejudgment interest and costs. CBS and Engelbert appeal and allege the trial court erred in finding they breached their fiduciary duty to the Daubmans, in not finding the Daubmans had ratified their actions, and in awarding prejudgment interest. We conclude that the evidence does not establish that CBS and Engelbert materially breached any fiduciary duty they owed to the Daubmans. We therefore vacate the judgment and remand the cause with directions to dismiss.

FACTUAL BACKGROUND

The evidence in this case consists of a stipulation of the parties, oral testimony, and documents. As we are required to do, we review the evidence in the light most favorable to the Daubmans.

CBS is a licensed real estate broker, and Engelbert was the salesperson who primarily handled the sale of the Daubmans' house. Engelbert committed all of the acts which the Daubmans claim to be breaches of CBS' fiduciary duty to them. Her authority to act on behalf of CBS and its liability for her acts is not questioned. Allen Daubman (Daubman), a practicing attorney, actively participated in the transaction, and his authority to act for his wife is not questioned.

The Daubmans desired to sell their home in order to build a new one. On June 2, 1992, they contacted Engelbert to obtain a market analysis of their home. On June 9, Engelbert gave them her analysis, which the parties' stipulation shows a market value of $129,950. When the analysis was delivered, Engelbert

encouraged the Daubmans to list the property for sale with CBS. The Daubmans refused to sign a listing agreement. Engelbert then informed the Daubmans that she was working with a couple, Thomas and Brenda Pedersen, who was looking for a house in the same location and price range as the Daubmans' residence and that the Pedersens had been "pre-approved" to buy a house in that price range. Engelbert offered to show the house to the Pedersens, if the Daubmans signed a listing. The Daubmans told Engelbert they would consider signing a listing. Daubman testified he understood that preapproved buyers had the financial ability to purchase the home and that financing would not be a problem. He testified that Engelbert repeated this assertion later and that these assertions induced the Daubmans to sign the purchase agreement.

On June 10, 1992, the Daubmans signed an authorization to sell, which gave CBS a 3-month exclusive right to sell their house for $139,950, "cash or as terms agreed." The parties added the handwritten sentence, "This is a one party taken for Tom & Brenda Pederson," at the end of the document. The parties stipulated this provision authorized CBS to sell the property only to the Pedersens. The authorization provided for a 7-percent commission for CBS, payable in the event a purchaser who was ready, willing, and able to buy the property at the listed price and terms was found.

After obtaining the listing, Engelbert showed the house to the Pedersens, and they requested that Engelbert prepare an offer to buy the Daubmans' house for $132,000, with a $1,000 earnest money deposit. The offer was to provide that the deposit would be refunded if the Pedersens were unable to obtain financing or the sale was canceled. The Daubmans rejected this offer.

The Daubmans countered with an offer to sell for $139,900, which was accepted by the Pedersens. On June 12, the Daubmans and the Pedersens signed a standard purchase agreement which provided for a sale price of $139,900, with a $2,000 earnest money deposit. The balance was due, in cash, at the closing of the sale. The sale was conditioned upon the Pedersens being able to obtain a conventional or "P.M.I." mortgage loan of $132,900 with initial monthly payments of not more than $1,022 plus taxes and insurance. The agreement pro-

vided that the Pedersens were to apply for the loan within 5 business days and that the agreement was void if the loan was not approved within 30 days. The agreement also provided: "However, if processing of the application for financing has not been completed by the lending agency within the above time, such time limit shall be automatically extended until the lending agency has, in the normal course of its business, advised either approval or rejection." The "[a]pproximate closing date" was July 29, 1992, and the possession date was July 31, subject to the availability of a mover acceptable to the Daubmans.

After signing the agreement, the Daubmans proceeded with their plans and entered into a contract to build their new home. On June 15, the Pedersens applied for financing with Residential Mortgage Services (RMS). Daubman admits to having received periodic reports over the "next several days" from Engelbert regarding the loan application. Engelbert told Daubman there was a problem with the loan application because "there was a history of a prior mortgage foreclosure." On July 9, RMS notified Engelbert that the Pedersens' loan application would probably be rejected. RMS recommended the loan be moved to another lender. Engelbert learned from RMS that the past mortgage foreclosure was against a home owned by Thomas Pedersen and his former wife, who had been awarded the home when they divorced. The former wife had the obligation to pay the mortgage on the home but had defaulted, and that mortgage was foreclosed. The foreclosure showed up in Thomas Pedersen's credit file because he was still on the note. On the day that Engelbert learned RMS would probably not make the loan, she made arrangements for Capital Financial Services (CFS) to consider the loan. The following day, Engelbert learned that CFS could probably make the loan to the Pedersens.

Daubman testified that some time during the week of July 6, Engelbert told him there was a potential problem with the loan application. On July 10, she told him the loan application had been transferred the previous day, and she had assisted the Pedersens in making the new application with CFS. Daubman testified that he objected to the Pedersens' making an application with the second lender and told Engelbert that "we don't

have a purchase agreement anymore." Engelbert disagreed and told Daubman that she moved the application to where there was a good chance the loan would be approved. Daubman asked Engelbert to contact the Pedersens to see if they would agree to make the $2,000 earnest money deposit nonrefundable so the Daubmans could sign a 6-month lease with Washington Heights Apartments (WHA). The Pedersens rejected that request the same day. On the evening of July 16, Daubman and Engelbert met with an official from CFS to discuss the Pedersens' loan prospects, and after that meeting, Daubman informed Engelbert he would prepare a document for the Pedersens to sign and fax it to Engelbert the following day.

On July 17, Daubman faxed a proposed amendment to the purchase agreement to Engelbert. This amendment provided that if the loan application pending with CFS was rejected, the Pedersens would have until August 12 to obtain financing from a new lender. If the Pedersens did not obtain a loan by August 12, the sale would be canceled and the Daubmans would receive the $2,000 earnest money deposit. Daubman testified that if possession of their house was delivered to the Pedersens pursuant to the purchase agreement, the Daubmans would need to rent an apartment while their new home was being built. Obviously, if the sale to the Pedersens did not close, the Daubmans did not need the apartment. The amendment was intended to protect the Daubmans if, while waiting for the Pedersens to obtain financing, they were required to sign an apartment lease.

Engelbert presented the proposed amendment to the Pedersens on July 17. The next day, Brenda Pedersen called Engelbert and rejected the offer. At that time, Engelbert was told by Brenda Pedersen that she had called WHA to check on the availability of apartments. Engelbert then called WHA to learn whether any apartments were available. Engelbert also called Daubman to advise him the Pedersens had rejected the amendment.

Daubman testified that before Engelbert called, the WHA manager was not "pressing on us" to sign the lease; "we were trying to keep the apartment complex at bay." Shortly after Engelbert called WHA, the apartment manager called

Daubman, and as a result of that call, the Daubmans committed to signing the lease. Daubman testified that he learned, and Engelbert confirmed, that she had called the apartment complex to inquire about the lease without his authorization. Engelbert told Daubman she made the inquiry to see whether the apartment would still be available if there was a delay in closing the sale to the Pedersens.

On July 20, after learning Engelbert had contacted WHA, Daubman called Kevin Irish, a CBS general manager, and informed him the Daubmans wanted no further communications with Engelbert. Irish acted as liaison between the Daubmans and Engelbert until the sale of the Daubmans' home was closed.

Engelbert maintained daily contact with CFS and on July 24 learned the Pedersens' loan would be formally approved on July 27. On July 24, she faxed a letter so advising Daubman. The Pedersens received formal approval on July 27; on that date, the Daubmans were so advised and signed a lease with WHA.

Shortly before closing, Daubman informed CBS he did not feel Engelbert was entitled to a commission. Daubman insisted the commission not be paid to CBS upon closing, and CBS refused to waive the commission. The closing agent refused to close the sale without paying CBS the commission unless CBS agreed to waive it. The impasse was resolved when CBS agreed that payment of the commission to CBS would be without prejudice to any claim Daubman might have. Subject to this agreement, Daubman agreed to allow the closing agent to pay CBS a $9,793 commission at the closing.

The Daubmans brought suit in the district court for Douglas County. The court found Engelbert breached the fiduciary duty owed to the Daubmans by subordinating their interests to the interests of the Pedersens. The trial court awarded damages for the commission paid, $9,793, plus prejudgment interest and the Daubmans' costs.

ASSIGNMENTS OF ERROR

The appellants contend that the district court erred in finding that they breached their fiduciary duty toward the Daubmans, in not finding that the Daubmans ratified the appellants' actions if the fiduciary duty was breached, in finding that the Daubmans

sustained any damage from the appellants' actions, and in awarding prejudgment interest. We conclude the trial court erred in finding that the appellants materially breached any fiduciary duty they owed the Daubmans. This conclusion makes consideration of any but the first assignment unnecessary.

STANDARD OF REVIEW

Both parties assert this is a case in equity and therefore present the factual issues under that standard. This is a suit for only money, and since no equitable relief is sought, it appears that the case is a case at law. The parties base their positions on *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962). In *Schepers*, the Scheperses sued their real estate agent to recover an $8,000 profit the agent and his uncle made upon resale of the listed real estate, as well as to recover the $1,200 commission the Scheperses had paid. The *Schepers* opinion states that the Scheperses sought monetary damages plus equitable relief. We checked the operative petition in the transcript of that case (available in the state archives) and found that in that action, the Scheperses sought to have a constructive trust imposed on the profits made by the agent after reselling the property. This prayer is apparently the reason for the *Schepers* court to find that the Scheperses sought equitable relief. For that reason, *Schepers* is not authority in this case where the only relief that could have been sought is a money judgment.

[1] The applicable rule is that "[w]hether the nature of an action is legal or equitable is to be determined from its main object, as disclosed by the averments of the pleadings and relief sought." *White v. Medico Life Ins. Co.*, 212 Neb. 901, 902, 327 N.W.2d 606, 608 (1982). We find no case which was held to be a case in equity where the plaintiff sought only a money judgment. For example, in *Garbark v. Newman*, 155 Neb. 188, 51 N.W.2d 315 (1952), the Nebraska Supreme Court held that an action to recover the purchase price on a contract of sale was an action at law, notwithstanding the fact the action involved recission of the contract. Similarly, in *Barker v. Wardens & Vestrymen of St. Barnabas Church*, 171 Neb. 574, 106 N.W.2d 858 (1961), the court held that a suit to recover money given to a church under a promise to refund was a law action and stated,

"Wherever one person has money to which in equity and good conscience another is entitled, the law creates a promise by the former to pay it to the latter and the obligation may be enforced by assumpsit." *Id.* at 578, 106 N.W.2d at 860. The court also stated that "[a]n action for money had and received is an action at law," and it held the action was one at law. *Id.*

[2] In *Central Sur. & Ins. Corp. v. Atlantic Nat. Ins. Co.*, 178 Neb. 226, 132 N.W.2d 758 (1965), the Nebraska Supreme Court addressed the application of equity standards as opposed to the application of law standards. In *Central Sur. & Ins. Corp.*, two insurance companies disagreed on which was obligated for the defense of a claim against a common insured. They agreed to each pay one-half but reserved the right to litigate the question. The lawsuit brought by one insurance company for the expenses paid was met with a counterclaim by the defendant for the expenses paid. The court observed that the relief sought by both parties was a money judgment and said, "Where none of the extraordinary powers of a court of equity are required in order to give either party the relief he seeks, and a court of law can afford complete relief, the action is one at law." *Id.* at 228, 132 N.W.2d at 760. Based on this reasoning, this action is an action at law.

[3,4] In *White, supra*, the Supreme Court held that when a case presents an action at law, it will be reviewed as an action at law, notwithstanding the fact that the parties briefed the appeal as one in equity. When reviewing a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Richardson v. Mast*, 252 Neb. 114, 560 N.W.2d 488 (1997); *Bristol v. Rasmussen*, 249 Neb. 854, 547 N.W.2d 120 (1996). In reviewing a judgment awarded in a bench trial, an appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Sherrod v. State*, 251 Neb. 355, 557 N.W.2d 634 (1997); *Cotton v. Ostroski*, 250 Neb. 911, 554 N.W.2d 130 (1996).

The above standard is more favorable to the appellee than that applicable to the appeal of an equity action, that is, the

appellate court determines factual issues de novo on the record and reaches a conclusion independent of the trial court but gives weight to the trial judge's determination of facts upon which there is a material dispute. See *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962). We observe that the standard of review which we apply in this case is more advantageous to the Daubmans than the standard of review used by the parties in their briefs. However, we conclude that notwithstanding that advantage, we must reverse the trial court's decision.

[5] The issues presented in this case are questions of law, and when reviewing a question of law, an appellate court reaches conclusions independent of the lower court's ruling. *Baltensperger v. Wellensiek*, 250 Neb. 938, 554 N.W.2d 137 (1996); *Heins v. Webster County*, 250 Neb. 750, 552 N.W.2d 51 (1996).

ANALYSIS

Judgment Against Engelbert.

[6] The documents in evidence and the stipulation show that the property was listed with CBS under an agreement which provided that CBS, not Engelbert, was entitled to the commission. The commission was in fact paid to CBS. Engelbert was a disclosed agent of her principal, CBS, who was the broker or agent of the Daubmans. The action was clearly based upon the theory that the Daubmans' agent breached the contractual duty owed to its principal. As will be seen later, the agent who materially breaches his or her duty to a principal cannot collect the commission to which the agent is otherwise entitled. The Daubmans proceeded upon this theory and did not rely upon any other theories of liability such as breach of contract, negligence, or fraud. Engelbert's interest in the commission, if any, is dependent upon her agreement with CBS. Engelbert's duty to the Daubmans is that of a disclosed agent of CBS. "As a general rule, where an obligation is that of a principal, a court cannot enforce the obligation against the agent as long as he or she is merely acting as agent." *Mueller v. Union Pacific Railroad*, 220 Neb. 742, 748, 371 N.W.2d 732, 737 (1985). See, also, *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981); *Stoll v. School Dist. (No. 1) of Lincoln*, 207 Neb. 670, 301 N.W.2d 68 (1981); *Suzuki v. Gateway Realty*, 207 Neb. 562, 299

N.W.2d 762 (1980). This principle was applied in both *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975), and *Schepers, supra*, to grant a personal judgment against the defendant real estate brokers and other third persons for the amount of the actual damages the seller suffered. However, in both *Vogt* and *Schepers*, the court awarded judgment against only the listing brokers for the return of the commission, not against others. In the case at hand, the parties stipulated that the Daubmans did not suffer any damage by Engelbert's conduct. Under these circumstances, there is no legal basis for holding Engelbert personally liable for any amount.

[7,8] Although an appellate court ordinarily considers only those errors assigned and discussed in the briefs, the appellate court may, at its option, notice plain error. *Miller v. Brunswick*, 253 Neb. 141, 571 N.W.2d 245 (1997); *In re Interest of D.W.*, 249 Neb. 133, 542 N.W.2d 407 (1996); *In re Estate of Morse*, 248 Neb. 896, 540 N.W.2d 131 (1995). Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which 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. *Miller, supra; Law Offices of Ronald J. Palagi v. Dolan*, 251 Neb. 457, 558 N.W.2d 303 (1997). We conclude the trial court committed plain error in finding that Engelbert was personally liable. Any liability for breach of fiduciary duty would be borne by CBS. We therefore conclude that the judgment against Engelbert must be set aside.

CBS is clearly liable for Engelbert's actions. If Engelbert or any other agent or employee of CBS materially breached a fiduciary duty owed to the Daubmans, that breach would justify withholding the commission from CBS, and therefore, a judgment against CBS for the amount of the commission would be proper.

Duties of Broker to Principal.

In researching the cases for this opinion, we found that agents were generally accused of breaching their duty by one

act or scheme. For example, in *Pearlman v. Snitzer*, 112 Neb. 135, 198 N.W. 879 (1924), the agent located a buyer who was willing to pay $9,000 for certain property. The agent then went to the owner of the property and, without telling the owner about the prospective buyer, obtained a listing to sell the property for $8,500. Part of the agreement provided that the agent could keep anything over $8,500 as commission.

Similarly, in *Schepers v. Lautenschlager*, 173 Neb. 107, 112 N.W.2d 767 (1962), the agent knew of a buyer willing to pay more than the listing price. The agent did not disclose this information to his principal but, surreptitiously, purchased the property with the help of his uncle. The agent realized a profit when the land was resold.

In *Lee v. Brodbeck*, 196 Neb. 393, 243 N.W.2d 331 (1976), the agent assured the buyers she could easily sell certain real estate when she had no knowledge she could do so. The agent was then unable to sell the buyers' property after it was listed.

In *Firmature v. Brannon,* 223 Neb. 123, 388 N.W.2d 119 (1986), the broker attempted to convince his principal to sell a business for the price offered by a prospective buyer, rather than attempting to convince the buyer to pay the principal's asking price.

In *Allied Securities, Inc. v. Clocker*, 185 Neb. 524, 176 N.W.2d 914 (1970), the purchaser of certain property was also the president of the corporation which was the listing broker.

In *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975), the listing agent arranged a sale to a fellow broker, unknown to the principal, and the fellow broker later sold the house for a profit.

In this case, Engelbert is accused of breaching CBS' fiduciary duty to the Daubmans in several different ways. In deciding the above-cited cases, the Supreme Court enunciated several general principles applying to this area of law. For example:

> A real estate broker is an agent owing a fiduciary duty (1) to use reasonable care, skill, and diligence in procuring the greatest advantage for his client, and (2) to act honestly and in good faith, making full disclosures to his client of all material facts affecting his interests.

Firmature, 223 Neb. at 127, 388 N.W.2d at 121.

> "A broker owes to his employer the duty of good faith and loyalty, and is required to use such skill as is necessary to accomplish the object of his employment. . . . It is also his duty to give his client the fullest information concerning his transactions and dealings in relation to the property with reference to which he is employed . . . ." [Citation omitted.]
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> ". . . This requirement not only forbids conduct on the part of the broker which is fraudulent or adverse to his client's interests, but also imposes upon him the positive duty of communicating all information he may possess or acquire which is, or may be, material to his employer's advantage."

Schepers, 173 Neb. at 117-18, 112 N.W.2d at 773.

> An agent is entitled to no compensation for a service which constitutes a violation of his duties of obedience. . . . This is true even though the disobedience results in no substantial harm to the principal's interests and even though the agent believes that he is justified in so acting.

Restatement (Second) of Agency § 469, comment *a.* at 400 (1958).

[9] In summary, the above cases state that a broker or agent owes his or her principal the following duties: (1) to utilize the skill necessary to accomplish the task undertaken, (2) to be honest and act in good faith, (3) to be loyal, (4) to disclose all material facts, (5) to possess no undisclosed adverse interests, and (6) to be obedient to the principal. Our research of several authorities revealed that the above-listed duties include all of the fiduciary duties a real estate broker owes to his or her principal. See, also, *Jansen v. Williams*, 36 Neb. 869, 55 N.W. 279 (1893); *Wisnieski v. Harms*, 188 Neb. 721, 199 N.W.2d 405 (1972); the Restatement, *supra*, §§ 385 and 376; 12 Am. Jur. 2d *Brokers* § 203 (1997).

In this case, there is no claim that Engelbert did not utilize the skill necessary to sell the property, so we need not discuss that point. The requirement of full disclosure, the obligation to not possess an adverse interest, and the duty to obey are merely aspects of loyalty. However, the division of the duty of loyalty facilitates the analysis of the case.

[10] A broker's conduct must also be measured in the light of the following rules: "The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made . . . ." The Restatement, *supra*, § 376 at 173. The Restatement, *supra*, § 385, comment *a.* at 193, states that notwithstanding the agent's duty to obey reasonable instructions, "A real estate broker selling on commission has a right to use customary business methods without interference by the principal."

In analyzing Engelbert's conduct, we must recognize that the listing authorized her to sell the house only to the Pedersens. Therefore, the trial court's finding that she made "every effort . . . to consummate [a] sale of the premises with the Pedersens only" was merely a finding that she was doing what she contracted to do. Furthermore, after the purchase agreement was signed, the Daubmans were obligated to sell the home to the Pedersens unless the Pedersens breached the agreement. This is not to say that Engelbert could not still breach her fiduciary duty by putting her interests or the Pedersens' interests ahead of her principal's. However, Engelbert's efforts to sell the property only to the person with whom the sale is authorized does not tend to prove disloyalty on her part.

Breaches Alleged by Daubmans or Found by Court.

In their brief, the Daubmans argue that Engelbert breached the fiduciary duty owed to them in four ways: (1) by misrepresenting the Pedersens' financial condition, (2) by moving the Pedersens' loan application to a second lender, (3) by contacting WHA, and (4) by insisting the commission be paid at closing. We shall consider each of these points separately.

In its order of judgment, the trial court found that Engelbert made every effort to consummate a sale with only the Pedersens; that "[w]hen the Pedersens' financial condition was shown to be precarious, the defendant Engelbert took several steps to keep the transaction alive for the Pedersens"; that she put her interests and the interests of the Pedersens ahead of the Daubmans' interests; that the most "glaring example of [which was contacting WHA and the] [m]ore damaging was the fact

that closing of the sale of the Daubman home was [made] contingent upon payment of [the] commission." It appears the trial court treated the various acts relied upon by the Daubmans as breaches of fiduciary duty to support a more general breach of loyalty by finding that Engelbert put the Pedersens' interests and her interests ahead of the Daubmans' interests. To analyze all issues, we shall consider whether the evidence supports a finding that Engelbert put her interests and the interests of the Pedersens ahead of the Daubmans' as a separate, fifth issue.

Representations of Pedersens' Financial Condition.

The trial court made no specific findings in connection with this claim. However, the evidence establishes that Engelbert represented to the Daubmans that the Pedersens had been preapproved for credit in an amount greater than would be required to purchase the property. Daubman testified that Engelbert told the Daubmans the Pedersens had been preapproved and that he understood this to mean that the buyers had the financial ability to purchase the home and that financing would not be a problem. The evidence establishes the Daubmans relied upon this representation, both in listing the property and in signing the purchase agreement. This alleged breach of fiduciary duty is difficult to compare to any of the brokers' duties listed above. There is no evidence that Engelbert made the statement dishonestly or in bad faith. It is self-evident that Engelbert was wasting her time and talent if the Pedersens were not financially qualified to buy the home that Engelbert wanted a listing to sell. The evidence does not support an inference that Engelbert was disloyal in making the representation.

Engelbert's representation was vague in that it does not say or purport to say who preapproved the Pedersens' credit. Daubman testified he understood Engelbert to mean the buyers had the financial ability to purchase the home and financing would not be a problem. However, there is no proof the Pedersens did not have the financial ability to purchase the home, and in fact, they did obtain the required financing within the time allowed by the purchase agreement.

Even if the evidence were interpreted as proof that the Pedersens were not preapproved, the evidence does not support

a finding that the representation was a material breach of CBS' fiduciary duty to the Daubmans. The rule is that a " 'commission cannot be collected by the agent for his services if he has willfully disregarded, in a material respect, an obligation which the law devolves upon him by reason of his agency.' " *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 317, 231 N.W.2d 496, 502 (1975). In *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986), this rule was quoted. The court held that the breach of some duties by the agent in 1 year was willful and material, and the Daubs were prejudiced. The court disallowed Walker Land and Cattle Co.'s commission for the year in which that breach occurred, but with respect to other similar breaches in other years, the court noted: "[T]here is no showing that WLC [Walker Land and Cattle Co.] was either disloyal to Daub or that the commingling of grain and funds during this period was a material fault . . . ." *Id.* at 350, 389 N.W.2d at 565. The court held that the allowance of the commissions for prior years was proper. On this issue, the evidence does not establish that Engelbert deliberately misled the Daubmans on the Pedersens' financial ability, and the Pedersens proved to have the financial ability to close the sale according to the terms of contract. Engelbert's breach was therefore not willful, and the Daubmans were not prejudiced by her assurances, even if she did not have a sound basis for making them. This breach, if it is a breach, was not willful and material and therefore could not justify denying CBS its commission.

Moving Pedersens' Loan Application to CFS.

The trial court made no specific findings with regard to this claim by the Daubmans. This claim might be included within the finding of the trial court that

> every effort was made by defendant Engelbert to consummate sale of the premises with the Pedersens only. When the Pedersens' financial condition was shown to be precarious, the defendant Engelbert took several steps to keep the transaction alive for the Pedersens, and, more to the point, even when events became detrimental to the plaintiffs.

Engelbert's actions must be judged in the light of the circumstances that existed at the time Engelbert arranged for an

application to be filed with CFS. At that time, the Daubmans had signed a purchase agreement with the purchaser that Engelbert had produced, and that purchaser was ready and willing to buy the real estate upon the terms prescribed in the purchase agreement. The Daubmans had not indicated to Engelbert they did not want to close the sale to the Pedersens. CBS was contractually bound to sell the home to the Pedersens for the Daubmans. Engelbert's "every effort" to consummate the sale with the Pedersens was exactly what Engelbert was obligated to do. The evidence does not show that when Engelbert made the arrangements, she was aware of any desire of the Daubmans not to complete the sale within the time limits prescribed by the purchase agreement. Undoubtedly, Engelbert had a considerable interest in obtaining her commission. We find no cases suggesting that an agent's desire to obtain an agreed upon commission is a breach of his or her fiduciary duty.

Daubman told Engelbert after learning of the application to CFS that "we don't have a purchase agreement anymore." Assuming, but not deciding, that the purchase agreement would have allowed the Daubmans to treat the Pedersens' application to CFS as a breach or an anticipatory breach of the purchase agreement, the Daubmans did not choose to terminate the contract. At most, the Daubmans had the right to cancel the contract. Apparently, they sought to utilize the claimed breach to negotiate concessions from the Pedersens. There is no evidence that Engelbert impaired this attempt. The only evidence on the subject is to the effect that Engelbert carried the proposed amendment to the Pedersens as requested. Any thought that she violated a duty of loyalty in this process is strictly speculation. The evidence does not show that Engelbert was dishonest or acted in bad faith.

Engelbert did help to change the loan without telling the Daubmans that RMS had stated the Pedersens' loan application would probably not be approved. Assuming that the Daubmans desired to complete their contract by its terms, the act of moving the loan application could not be a material breach. There is no evidence that Engelbert had any interest or motive in doing this other than to close the sale that she had contracted to bring about.

Engelbert's Contact with WHA.

According to the stipulation, Engelbert called WHA to find out if any apartments were available for lease. When asked the purpose of this call, Engelbert testified that "[b]ecause time is of the essence . . . I needed to get this closed so they wouldn't have to — they wouldn't miss out on their lease, and all of the things that were pertinent to that." The amendment to the purchase agreement, prepared by Daubman, stated: "Sellers must sign a six-month apartment lease prior to the date by which Capital Financial Services will make a decision on whether to approve . . . ." There is no evidence that Daubman told Engelbert that he was stalling WHA or that she was not supposed to disclose the name or the identity of the apartment complex. Since Engelbert knew the name of the complex, it is not surprising that she would disclose it to the Pedersens.

[11] The Restatement (Second) of Agency § 383 at 187 (1958) provides: "Except when he is privileged to protect his own or another's interests, an agent is subject to a duty to the principal not to act in the principal's affairs except in accordance with the principal's manifestation of consent." The comment following the rule states that unless otherwise expressly provided or circumstances indicate otherwise, the agent is to act in accordance with custom and to use good faith and discretion.

[12] The fact the agent does something the principal does not desire does not necessarily mean the act is disloyal, particularly when there is no evidence showing that Engelbert should have known that Daubman did not want Engelbert to call WHA or that Brenda Pedersen had already called the complex. "If a broker performs unauthorized acts . . . he is liable to his principal for the loss or damage which results therefrom." 12 C.J.S. *Brokers* § 55 at 166 (1980). Even if Engelbert's action in calling WHA was unauthorized, it was not in violation of the fiduciary duties recognized by the above authorities. Therefore, at most, CBS would be liable only for damages, and the evidence established there were no damages.

The parties have stipulated that Engelbert was not told she could not contact WHA. She was not required to suspect that the Daubmans were not being forthright with WHA. The record contains no evidence that would support a finding that

Engelbert's call to WHA would have adversely affected the Daubmans' interests except for the fact that the Daubmans were stalling WHA. Engelbert had no knowledge of this fact. The evidence would not support a finding that Engelbert breached her fiduciary duty by calling WHA.

CBS' Refusal to Waive Commission.

The Daubmans argue that CBS violated its duty of loyalty by refusing to waive payment of the commission. The trial court found that the more damaging example of how Engelbert put her and the Pedersens' interests ahead of the Daubmans' "was the fact that closing of the sale of the Daubman home was contingent upon payment of Engelbert's and CBS' commission." At the time CBS refused to waive payment, it was contractually entitled to the commission unless it had breached its fiduciary duty before that time. As such, the question is whether an agent commits a breach of its fiduciary duty by refusing to waive payment of an earned commission realized by the efforts of the agent.

[13,14] "When the broker secures a prospective buyer who is ready, willing, and able to purchase the subject property, the person who hired the broker has received the service for which he or she has contracted . . . ." *Marathon Realty Corp. v. Gavin*, 224 Neb. 458, 462, 398 N.W.2d 689, 693 (1987). The case goes on to hold that an agent who has rendered the agreed upon service is entitled to be paid, absent a breach of trust.

In their brief, the Daubmans do not relate the "insisting that the commission be paid from the sale proceeds," brief for appellees at 26, to any specific breach of fiduciary duty, but, rather, base their position on the dilemma in which CBS' position placed them, that is, the Daubmans had to either allow the commission to be paid or lose the sale and subject themselves to a possible specific performance action by the Pedersens. We find no case which considers this question, but we cannot believe an agent is disloyal by insisting the principal pay a commission that has been earned. The authority we find on the agent's ability to insist upon being paid leads us to believe CBS did not have a duty to waive the commission or be adjudged disloyal.

The Restatement throws some light on the matter. Section 463 at 383 states: "An agent whose principal violates or threatens to violate a contractual or restitutional duty to him has an appropriate remedy. He can, in a proper case: (a) maintain an action at law . . . (d) refuse to render further services; (e) exercise the rights of a lien holder." Section 464 at 384 states:

> Unless he undertakes duties inconsistent with such a right or otherwise agrees that it is not to exist:
>
> (a) an agent has a right to retain possession of money, goods, or documents of the principal, of which he has gained possession in the proper execution of his agency, until he is paid the amount due him from the principal as compensation for services performed . . . .

[15,16] "An agent who is entitled to . . . compensation for his services, has a lien upon the principal's goods or property which comes lawfully in his possession . . . ." 3 C.J.S. *Agency* § 357 at 171 (1973). "An agent may retain his compensation out of funds of the principal in his hands." *Id.*, § 359 at 173. We find no law in Nebraska holding that a real estate agent does or does not have a lien on the property of the principal in the agent's possession, and in this case, CBS did not claim a lien. We cite the general authority on the agent's right to a lien to demonstrate that an agent who has earned a commission has a clear right to insist on being paid and that refusal to waive such right cannot be held to be a violation of the agent's duties. CBS had no obligation to waive its right to a commission.

Placing Pedersens' and Engelbert's Interests First.

[17] The trial court made a specific finding that Engelbert put her interests and the interests of the Pedersens before the Daubmans' interests. As we have indicated, this finding is based upon a misunderstanding of the duties Engelbert and CBS had toward the Daubmans. When an agent is hired to sell a certain piece of property to a certain person, the attempt to get the designated buyer to purchase the property cannot be interpreted as an act in the interests of the prospective buyer, and attempts by the agent to close the sale within the terms of the listing agreement cannot be interpreted as an act in the interests of the agent simply because the agent will receive a commission upon clos-

ing. The evidence would not support the finding that Engelbert placed her interests and the Pedersens' interests above those of the Daubmans' interests.

CONCLUSION

There is no evidence to support a finding that CBS, through Engelbert, breached its fiduciary duty to the Daubmans. Therefore, the judgment of the trial court against CBS and Engelbert cannot stand. The judgment of the trial court is vacated, and the cause is remanded with directions to dismiss.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTIONS TO DISMISS.

STEVE VACCARO ET AL., APPELLEES, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

573 N.W.2d 798

Filed January 20, 1998. No. A-96-1019.

1. **Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
2. **Jurisdiction: Appeal and Error.** An appellate court has the power and the duty to determine whether it has jurisdiction over the matter before it.
3. **Injunction.** An injunction will not lie where there is an adequate remedy at law.
4. **Administrative Law: Appeal and Error.** One must generally exhaust any available administrative remedies before one can seek judicial review.
5. **Administrative Law: Jurisdiction.** Before a court may exercise jurisdiction of a case, the litigant must have exhausted available administrative remedies, absent exceptions or legislation to the contrary.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Reversed and dismissed.

Sheri E. Cotton for appellant.

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

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Steve Vaccaro, Leland Drum, and Henry Brooks initiated proceedings in the district court for Douglas County on December 29, 1995. They sought an injunction requiring the City of Omaha (City) to promote them to the position of detention center supervisor. They alleged that the manner by which the City had filled three detention center supervisor positions was contrary to law. At trial, the plaintiffs changed the relief that they requested. They sought to have the selection process for the positions reopened and to have the hiring department, here the police division, conduct the interviews anew in accordance with the law. The district court granted this injunctive relief.

Following the denial of its motion for new trial, the City appealed the order of the district court directing it to "[reinterview] under guidelines dictated by the Personnel Department" all qualified candidates on the October 16, 1995, eligibility list for the three detention center supervisor positions. The court's order also directed that the interviewers should be the personnel director or "some one she appoints from her department" and "two police officers . . . appointed by Chief Skinner." On appeal, the City contends that the plaintiffs lacked standing to bring the suit, that the plaintiffs did not prove the elements necessary for injunctive relief, that the district court's findings were not supported by the record, and that the district court's order did not comply with statutory requirements.

For the reasons stated below, we reverse, and dismiss.

II. FACTUAL BACKGROUND

Prior to January 1, 1996, Vaccaro, Drum, Ruth Herndon, Petra Young, and Laura Kinkaid each held the position of detention technician II in the Omaha Police Division's detention unit. Brooks was a detention technician I. In 1994, the police division decided to reorganize the management and nonmanagement personnel at the detention unit. Initially, the police division created three detention center supervisor positions as a middle-management level of personnel.

The Omaha Home Rule Charter of 1956, art. VI, § 6.01, provides that city employees are to be appointed with reference

only to their merit and fitness for employment. The City's hiring process is divided into two parts: (1) the examination process, which is administered by the personnel department, by which the personnel department creates an eligibility list through the administration of an examination; and (2) the selection process, in which the hiring department determines whom it will hire from the eligibility list. Omaha Mun. Code, ch. 23, art. III, §§ 23-191 through 23-232, set forth in detail the requirements of and procedure for the examination process. The ordinances do not explicitly set forth a requirement for or a procedure to be followed during the selection process. The eligibility list provided to the hiring department by the personnel department states that the hiring department is required to interview the candidates on the list.

At the request of the police division made September 30, 1994, the personnel department developed a job classification for the position of detention center supervisor, posted a notice of examination, gave an examination, created a list of eligible names, and forwarded this list, which was dated February 7, 1995, to the police division. Frederick Power, the detention unit manager, selected three of the candidates and hired them. These three male hirees are not parties to this lawsuit. Power did not conduct any interviews prior to these hirings. As a result of these three hirings, Herndon, Young, Kinkaid, and another female candidate filed charges with the Nebraska Equal Opportunity Commission claiming that they were discriminated against because of their gender.

In 1995, the police division decided to eliminate the detention technician II positions and to create three more detention center supervisors. On September 27, 1995, Power requested that the personnel department submit candidates for the three additional detention center supervisor positions. The February 7, 1995, eligibility list created for the three original detention center supervisor positions, mentioned above, was still in effect. From this list, a new eligibility list dated October 16, 1995, was created, which contained 10 names, including the names of Herndon, Young, and Kinkaid. Brenda Smith, who was deputy chief of the administrative services bureau of the police divison, and Detention Manager Power interviewed the candidates. In

preparation for the interviews, Smith and Power prepared questions and a benchmark for scoring each question. The three candidates with the highest scores were to be hired. Herndon, Young, and Kinkaid scored the highest and were hired as detention center supervisors.

Due to the hiring of Herndon, Young, and Kinkaid to the detention center supervisor positions and the elimination of the detention technician II positions, Vaccaro is now training to be a crime lab technician and has taken a pay cut, Brooks has remained a detention technician, and Drum is employed by the City as a painter.

III. ASSIGNMENTS OF ERROR

We summarize the errors which the City assigns and argues as follows: (1) The plaintiffs lacked standing to bring this lawsuit; (2) the plaintiffs failed to prove irreparable harm, as required for injunctive relief; (3) the district court's findings and decision are not supported by the evidence; and (4) the district court's order of June 17, 1996, does not comply with the statutory requirements for an injunction order.

IV. ANALYSIS

[1] At the outset, we note that injunctive relief is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Omega Chem. Co. v. United Seeds*, 252 Neb. 137, 560 N.W.2d 820 (1997); *Central Neb. Broadcasting v. Heartland Radio*, 251 Neb. 929, 560 N.W.2d 770 (1997). An injunction action is reviewed de novo on the record. *Omega Chem. Co., supra.*

1. Doctrine of Exhaustion of Administrative Remedies

[2-4] Before addressing the City's assigned errors, we must determine whether this court and the district court had jurisdiction to hear this case. See *Trew v. Trew*, 252 Neb. 555, 567 N.W.2d 284 (1997) (appellate court has power and duty to determine whether it has jurisdiction over matter before it). It is

well established that an injunction will not lie where there is an adequate remedy at law. See *Central Neb. Broadcasting, supra.* Furthermore, one must generally exhaust any available administrative remedies before one can seek judicial review. This notion is premised on the doctrine of separation of powers. See, e.g., *Local 512 v Civil Service Dep't*, 209 Mich. App. 573, 531 N.W.2d 790 (1995); *Ron Smith Trucking, Inc. v. Jackson*, 196 Ill. App. 3d 59, 552 N.E.2d 1271 (1990); *South Bend Fed. of Teachers v. Nat'l Education Ass'n*, 180 Ind. App. 299, 389 N.E.2d 23 (1979); *State v. Scearce*, 303 S.W.2d 175 (Mo. App. 1957). See, generally, 73 C.J.S. *Public Administrative Law and Procedure* § 38 (1983).

The underlying rationale for the doctrine of exhaustion of administrative remedies has been explained as follows:

> " 'The rule requiring exhaustion of administrative or statutory remedies is supported by sound reasoning. The decisions of an administrative agency are often of a discretionary nature, and frequently require an expertise which the agency can bring to bear in sifting the information presented to it. The agency should be afforded the initial opportunity to exercise that discretion and to apply that expertise. Furthermore, to permit interruption for purposes of judicial intervention at various stages of the administrative process might well undermine the very efficiency which the Legislature intended to achieve in the first instance. Lastly, the courts might be called upon to decide issues which perhaps would never arise if the prescribed administrative remedies were followed.' "

Sec., Dep't of Human Res. v. Wilson, 286 Md. 639, 644, 409 A.2d 713, 717 (1979) (quoting *Soley v. St. Comm'n on Human Rel.*, 277 Md. 521, 356 A.2d 254 (1976)). As explained by another court, " '[t]his doctrine enables the agency to develop a factual record, to apply its expertise to the problem, to exercise its discretion, and to correct its own mistakes, and is credited with promoting accuracy, efficiency, agency autonomy, and judicial economy.' " *Kelly K. v. Town of Framingham*, 36 Mass. App. 483, 486, 633 N.E.2d 414, 417 (1994) (quoting *Christopher W. v. Portsmouth School Committee*, 877 F.2d 1089 (1st Cir. 1989)).

There are exceptions to the doctrine's application. Equitable relief may be sought where a statute is attacked as unconstitutional in its entirety or where irreparable harm will be suffered from pursuit of administrative remedies or it would be futile to pursue the administrative remedies. *Ron Smith Trucking, Inc., supra.* See, generally, 73 C.J.S., *supra*, § 40. Other jurisdictions also allow judicial relief where the controversy presents only a question of law. See, *Jones v. Dallas Independent School Dist.*, 872 S.W.2d 294 (Tex. App. 1994); *Horrell v. Department of Admin.*, 861 P.2d 1194 (Colo. 1993).

Some states provide that the doctrine of exhaustion of administrative remedies is a jurisdictional requirement. In these states, a court is without jurisdiction to bestow equitable relief until a party has exhausted administrative channels. See, *Marsh v. Illinois Racing Bd.*, 685 N.E.2d 977 (Ill. App. 1997); *Medical Licensing Bd. v. Provisor*, 678 N.E.2d 814 (Ind. App. 1997); *Abington Center v. Baltimore*, 115 Md. App. 580, 694 A.2d 165 (1997); *Premium Standard Farms v. Lincoln Tp.*, 946 S.W.2d 234 (Mo. 1997); *Jansen v. Lemmon Federal Credit Union*, 562 N.W.2d 122 (S.D. 1997); *Southwest Ambulance v. Superior Court*, 187 Ariz. 290, 928 P.2d 714 (Ariz. App. 1996); *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996); *Iowa Coal Min. Co. v. Monroe County*, 555 N.W.2d 418 (Iowa 1996); *Blair v Checker Cab Co*, 219 Mich. App. 667, 558 N.W.2d 439 (1996); *Community School Bd. Nine v. Crew*, 224 A.D.2d 8, 648 N.Y.S.2d 81 (1996); *Thompson v. Peterson*, 546 N.W.2d 856 (N.D. 1996); *Shumake v. Philadelphia Bd. of Educ.*, 454 Pa. Super. 556, 686 A.2d 22 (1996); *Washington v. Tyler Independent School*, 932 S.W.2d 686 (Tex. App. 1996); *Stone v. Errecart*, 675 A.2d 1322 (Vt. 1996); *McDowell v. Napolitano*, 119 N.M. 696, 895 P.2d 218 (1995); *Kelly K., supra*; *Flowers v. Blackbeard Sailing Club, Ltd.*, 115 N.C. App. 349, 444 S.E.2d 636 (1994); *Van Tran v. Dept. of Rev.*, 320 Or. 170, 880 P.2d 924 (1994); *Dept. Of Public Safety v. McKnight*, 623 So. 2d 249 (Miss. 1993); *State, Dep't of Taxation v. Scotsman Mfg.*, 109 Nev. 252, 849 P.2d 317 (1993); *Top Hat Liquors, Inc. v. Department of Alco. Bev. Con.*, 13 Cal. 3d 107, 529 P.2d 42, 118 Cal. Rptr. 10 (1974); *Daurelle v. Traders Federal Savings & Loan Ass'n*, 143 W. Va. 674, 104 S.E.2d 320 (1958); *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557 (1948).

Other states conclude that the doctrine of exhaustion of administrative remedies rests on considerations of comity and convenience and that, therefore, its application is discretionary. See, *Hammer v. N.J. Voice, Inc.*, 302 N.J. Super. 169, 694 A.2d 1080 (1996); *Rissler & McMurry Co. v. State*, 917 P.2d 1157 (Wyo. 1996); *Salvation Army v. Blue Cross & Blue Shield*, 92 Ohio App. 3d 571, 636 N.E.2d 399 (1993); *State, Etc. v. Biltmore Const. Co.*, 413 So. 2d 803 (Fla. App. 1982); *Cussimanio v. Kansas City Southern Ry. Co.*, 5 Kan. App. 2d 379, 617 P.2d 107 (1980); *State v. Wisconsin Employment Rel. Com'n*, 65 Wis. 2d 624, 223 N.W.2d 543 (1974).

The Nebraska Supreme Court has not expressly determined whether the doctrine of exhaustion of administrative remedies is a jurisdictional requirement. However, based on its holding in *Goolsby v. Anderson*, 250 Neb. 306, 549 N.W.2d 153 (1996), and other cases, the court appears to presume the doctrine is jurisdictional. See, also, e.g., *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994). In *Goolsby, supra*, the court held that Neb. Rev. Stat. § 20-148 (Reissue 1991) (providing that person or company, but not political subdivision, who deprives another of constitutional or statutory rights is liable in civil action) allows plaintiffs to pursue their rights under the Nebraska Fair Employment Practice Act, § 48-1101 et seq. (Reissue 1988), within the judicial system, without first exhausting statutory administrative remedies. The court stated: "Without § 20-148, the [Fair Employment Practice] [A]ct's review scheme would offer the only remedy for Goolsby's civil rights claims." 250 Neb. at 313, 549 N.W.2d at 158.

[5] We find the jurisdictional approach to be better reasoned. As stated by one court: "To leave the application of the requirement in the realm of discretion would be to depart from the rationale of the exhaustion rule." *State v. Scearce*, 303 S.W.2d 175, 180 (Mo. App. 1957). This approach is advantageous for several reasons. It promotes a uniform and orderly procedure by which litigants may enforce their rights. It ensures that claims will be heard by a body possessing expertise in the area and allows the parties to create a factual record necessary for meaningful judicial review. As a result, it prevents unwarranted inter-

ference by the judiciary in the administrative process. Finally, it avoids piecemeal application for judicial relief. We hold that before a court may exercise jurisdiction of a case, the litigant must have exhausted available administrative remedies absent the exceptions discussed above or legislation to the contrary.

2. Application of Doctrine to Facts

The doctrine of exhaustion of administrative remedies applies to the case before us. Omaha Mun. Code, ch. 23, art. II, § 23-72, provides that "[t]he personnel director shall receive and consider any complaints or protests from employees or department heads concerned with the administration of the provisions of this chapter." The code provides that an employee is to take his or her grievance to the department head, and if that fails to produce an acceptable solution, it provides for an "appeal [by the employee] to the personnel director for review and submission to the personnel board." Omaha Mun. Code, ch. 23, art. II, § 23-77. The process is streamlined when an employee is "suspended, removed or reduced in classification or pay." Omaha Mun. Code, ch. 23, art. II, § 23-71. Such an employee "shall have the right to appeal to the personnel board not later than ten (10) days after receiving notice of such action." *Id.*

In the case before us, each plaintiff had available to him the administrative appeals procedure set forth above. There is nothing in the record showing that any of the plaintiffs availed themselves of this procedure. There is also nothing in the record to suggest that any of the exceptions to the application of the doctrine of the exhaustion of administrative remedies apply. Because the plaintiffs have not exhausted their administrative remedies, we conclude that this court and the district court lacked jurisdiction of this case. We also note that the administrative appeals procedure provided an adequate remedy at law.

V. CONCLUSION

Accordingly, we reverse the judgment of the district court and dismiss the case.

Reversed and dismissed.

IN RE ESTATE OF MABEL E. POTTHOFF, DECEASED.
JANE DEWEY ET AL., APPELLEES, V. LLOYD POTTHOFF, APPELLANT.

573 N.W.2d 793

Filed January 20, 1998. No. A-96-1306.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Equity: Appeal and Error.** In an equitable proceeding, an appellate court makes an independent determination of both the facts and the applicable law.
3. **Contracts: Rescission.** Where parties have apparently entered into a contract evidenced by a writing, but owing to a mistake their minds did not meet as to all the essential elements of the transaction, so that no real contract was made by them, then a court of equitable jurisdiction will interpose to rescind and cancel the apparent contract as written, and to restore the parties to their former positions.
4. **Contracts: Reformation.** Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated in the instrument intended to be an expression of the actual agreement of the parties.

Appeal from the County Court for Red Willow County: CLOYD CLARK, Judge. Affirmed.

Terry L. Rogers, of Terry L. Rogers Law Firm, P.C., and Steven W. Hirsch, of Hirsch & Pratt, L.L.P., for appellant.

Stanley C. Goodwin for appellees Jane Dewey, Katherine Potthoff, and Susan Prentice.

SIEVERS, MUES, and INBODY, Judges.

MUES, Judge.

INTRODUCTION

This appeal seeks the reversal of the decision of a county court which imposed equitable remedies based upon a finding that fiduciary duties had been breached by the appellant, Lloyd Potthoff, in his borrowing of money from his mother, and that the promissory notes did not reflect the parties' true intentions.

FACTS

On May 21, 1990, Mabel E. Potthoff executed a durable power of attorney appointing her son, Lloyd Potthoff, her attorney in fact. Lloyd testified that prior to this time, his brother,

Wayne Potthoff, had been given Mabel's power of attorney until Wayne's death in 1989.

From August 3, 1990, until her death in 1995, Mabel made 15 separate loans to Lloyd totaling $241,408.84. For each loan, Lloyd issued Mabel a promissory note using a standard "fill in the blank" form. The first three promissory notes carried a 10½-percent annual interest rate and were due 1 year from the date of issue. All the subsequent promissory notes carried a 6½-percent interest rate and, with the exception of two notes, were due 5 years from the date of issue. Lloyd testified that on one of the two promissory notes he inadvertently put the date the note was issued, September 29, 1993, as the due date rather than September 29, 1998, the date the note was supposed to be due.

On August 10, 1992, the initial four notes were combined into one note with an interest rate of 6½ percent. At this time, two of the notes were approximately a year overdue, the third note was a week overdue, and the fourth note was not due for several more years. Lloyd testified that when he issued the replacement promissory note, he miscalculated the total amount due and made it out for $1,000 greater than the combined total of the amounts due under the four replaced notes. Thus, the total amount owing on the 12 promissory notes outstanding at Mabel's death was $242,408.84, plus interest.

When questioned why notes which had been issued at 10½ percent were reissued at 6½ percent, Lloyd testified that Mabel had received notice that the interest rate on her "NOW account" would be changing from 6 percent to 1.8 percent so they renegotiated the notes and "made a deal so that we was paying the interest." Lloyd further testified:

> A- So this is why we started negotiating and I said well, I'll pay you 6 1/2. I can use it. And she said will I get repaid? And I said, yes, I said I got the land in the estate and I thought — Gonna sell the land and pay ya off.
>
> Q- Sell what land?
>
> A- Her land. To pay off the notes that I have — Of the estate.
>
> Q- So you promised her that you would sell the land that was in her estate to pay off these notes?
>
> A- I promised to try to sell it and I have done that.

Prior to her death, Mabel amended her will and specifically devised certain real property to Lloyd and other real property to Wayne's issue. The remainder of the property was to be divided between Lloyd and Wayne's issue.

On August 25, 1996, the personal representative filed an amended motion seeking to set aside the promissory notes. The personal representative alleged, inter alia, that the notes were not negotiated at arm's length and that the terms of the notes were egregious and were the result of undue influence by Lloyd. The motion prayed that the court order the notes immediately due and payable and requested that if Lloyd did not immediately repay the notes, the land devised to him be sold to offset the debt.

At the November 22, 1996, hearing, the county court declared that based on the foregoing testimony of Lloyd, he and Mabel had anticipated that the loans would be paid off from the land Lloyd inherited upon Mabel's death and further that they intended that the loans be paid off on demand. In the county court's order, the court found that Lloyd had breached his fiduciary duty to Mabel but found no evidence of undue influence. The court held that the notes were immediately due and payable, with the indebtedness to constitute a lien on the real estate devised to Lloyd.

ASSIGNMENTS OF ERROR

Restated, Lloyd alleges the county court erred in accelerating the due dates of the notes and imposing a lien on the real estate and in failing to reform one of the promissory notes to reflect the intended due date.

STANDARD OF REVIEW

[1] An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of West*, 252 Neb. 166, 560 N.W.2d 810 (1997); *In re Estate of Disney*, 250 Neb. 703, 550 N.W.2d 919 (1996).

[2] In an equitable proceeding, an appellate court makes an independent determination of both the facts and the applicable law. *In re Estate of West, supra.*

DISCUSSION

Due Dates of Notes.

In Lloyd's first assignment of error, he alleges the county court erred in accelerating the promissory notes, because the court found there was no evidence of undue influence and there was no evidence of mutual mistake or of a unilateral mistake caused by Lloyd's fraudulent or inequitable conduct.

[3,4] At the hearing on the motion to set aside the promissory notes, the court declared that "the transaction anticipated that the [promissory] notes would be repaid and that the farm was security for the notes." The court further found that "it was the intention of the parties that [the promissory notes] be paid off on demand. So, I'm going to find that those notes should be accelerated and declare that those notes are due and owing . . . ."

> Generally, provided other requisites for equitable jurisdiction exist, an instrument may be canceled on the ground of a mistake of fact. More particularly, where parties have apparently entered into a contract evidenced by a writing, but owing to a mistake their minds did not meet as to all the essential elements of the transaction, so that no real contract was made by them, then a court of equitable jurisdiction will interpose to rescind and cancel the apparent contract as written, and to restore the parties to their former positions. . . .
>
> Furthermore, equity will grant relief on the ground of mistake, not only when the mistake is expressly proved, but also when it is implied from the nature of the transaction. It is not essential that either party should have been guilty of fraud.

12A C.J.S. *Cancellation of Inst.* § 40 at 706 (1980). See, also, *Eliker v. Chief Indus.*, 243 Neb. 275, 278, 498 N.W.2d 564, 566 (1993) (observing, "[g]rounds for cancellation or rescission of a contract include, inter alia, fraud, duress, unilateral or mutual mistake . . .").

> "Reformation is based on the premise that the parties had reached an agreement concerning an instrument, but while reducing their agreement to a written form, and as the result of mutual mistake or fraud, some provision or language was omitted from, inserted, or incorrectly stated

> in the instrument intended to be an expression of the actual agreement of the parties."

Jelsma v. Acceptance Ins. Co., 233 Neb. 556, 559, 446 N.W.2d 725, 727 (1989).

At the September 27, 1996, hearing on the motion to set aside the promissory notes, Lloyd gave the following testimony:

> A- . . . And she said will I get repaid? And I said, yes, I said I got the land in the estate and I thought — Gonna sell the land and pay ya off.
>
> Q- Sell what land?
>
> A- Her land. To pay off the notes that I have — Of the estate.
>
> Q- So you promised her that you would sell the land that was in her estate to pay off these notes?
>
> A- I promised to try to sell it and I have done that.
>
> Q- Okay. So, at the time you were negotiating these notes you were talking about trying to sell your share of the land to pay the notes. Is that correct?
>
> A- Yes.
>
> Q- All right.
>
> A- She knew that I intended to pay it off and in — That I would sell other land and I — As you know you made out a sales contract . . . last year and this was to pay off some notes, too. But it — As you know that contract didn't — Fell through.
>
> Q- So you're saying that you tried to sell the land that was in the estate last year to pay these notes?
>
> A- Yes.
>
> Q- And that deal fell through.
>
> A- Yes.

On appeal, Lloyd argues that although the parties discussed using the devised land to repay the loans after Mabel's death, there is no evidence that the parties intended to include these terms in their contract. We have a little difficulty distinguishing the two concepts. Lloyd and Mabel obviously discussed it, and they obviously did not put it in the notes. When and how repayment would occur were both essential terms of these loans. As Lloyd's testimony indicates, Mabel was clearly concerned that Lloyd would be unable to repay the money if she loaned it to

him. Lloyd had filed for chapter 12 bankruptcy in 1987, which was not dismissed until sometime in 1991 or 1992. At the second hearing on the motion to set aside the promissory notes, the following testimony was had:

> Q- . . . So, at the time these loans would've been made to you, you wouldn't have had a whole lot of net worth at — During the period of time - - -
>
> A- No.
>
> Q- - - - you were borrowing the money from your mother? Okay. So, it wouldn't be based upon any security you had but it was based upon your expected inheritance of your mother's estate that she was loaning you money?
>
> A- That's — When we had our conversation, she says, "How are you going to repay these?" And I said, "Well, you can sell the land or work it out somehow like that." I — *She wouldn't have made the loan if she wouldn't have thought that.*
>
> Q- All right. She wouldn't have made the loan if she didn't think you was gonna repay it?
>
> A- That's right.

(Emphasis supplied.)

Our de novo review of Lloyd's testimony leads us to conclude that the parties intended that the devised land would be sold to pay the loans if they were not repaid before Mabel's death. Mabel's death triggered the devise and thus the due date of the outstanding debts which were to then be paid by sale of such devised land. Lloyd's actions following Mabel's death are consistent with that intent, as he testified that subsequent to Mabel's death he attempted to sell the land to repay the debt "but the other heirs refused to go along with it."

For the foregoing reasons, we find that due to a mistake of fact the parties' "minds did not meet as to all the essential elements in the transaction" or due to a mutual mistake the promissory notes omitted a portion of their agreement. In the latter instance, reformation exists as an equitable remedy to enforce the agreement actually made (due date of the notes being Mabel's death rather than the specific due dates on the notes) and in the former instance, cancellation stands ready to restore

the parties to precontract status for failure of the minds to meet on an essential element (due date of the notes). Under either theory, the result is the same. The moneys loaned are now due and owing. A finding of no undue influence does not preclude either remedy, nor does either depend upon a finding of fraud or inequitable conduct on Lloyd's part.

As Lloyd argues, the county court's order was expressly premised upon a breach of a fiduciary duty by Lloyd. The nature of that duty and the facts supporting its breach are not fully explained in the order. The evidence is that the loans were made by Mabel to Lloyd, not by Lloyd, as attorney in fact, to himself. There is no evidence that Mabel loaned the money without full knowledge of what she was doing. There is no allegation of fraud on Lloyd's part or mental incapacity of Mabel, and the county court's finding that there was no undue influence exerted on Mabel goes unchallenged by the estate on this appeal. Accordingly, we have grave doubts that Lloyd breached any fiduciary duty as a result of these transactions. However, it is unnecessary for us to decide this issue, because in the final analysis, and no matter what words were chosen by the county court, it is apparent that the county court was convinced that Lloyd should be held to the promise that he made to his mother as part of her loaning him this money. The order accomplished that end, equitable principles and the evidence support the result, and Lloyd does not challenge the relief granted as being beyond the pleadings or the county court's equitable powers. 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. Allen*, 252 Neb. 187, 560 N.W.2d 829 (1997).

Because our de novo review convinces us that the notes were properly reformed or canceled, we need not address Lloyd's other assignments of error regarding the result reached by the county court. See *Kelly v. Kelly*, 246 Neb. 55, 516 N.W.2d 612 (1994).

Imposition of Lien.

To the extent Lloyd's assignments of error can be construed as separately challenging the county court's imposition of a lien

on his devised lands as security for repayment of the indebtedness found due and owing, we believe Neb. Rev. Stat. § 30-24,101 (Reissue 1995) offers guidance. It provides, in pertinent part, that "the amount of a noncontingent indebtedness of a successor to the estate . . . shall be offset against the successor's interest . . . ." The indebtedness here is noncontingent, it is due and payable, and Lloyd clearly has an interest in the estate.

While it might be argued that an order declaring that a successor's (Lloyd's) indebtedness shall constitute a *lien* on that successor's interest in the estate goes beyond simply *offsetting* the noncontingent indebtedness against his interest in the estate, any such distinction has little practical effect in this case. Lloyd is devised certain lands in Mabel's will, and he owes her estate a certain sum of money. We believe § 30-24,101 carries with it the authority of the county court to enter those orders necessary to carry it into effect. By definition, an offset is accomplished by a contemporaneous balancing of the successor's indebtedness against his or her credits or interests in the estate. See Webster's Encyclopedic Unabridged Dictionary 1001 (1989) (defining "offset" as "to counterbalance," "*to offset debits against credits*"). We believe the imposition of a lien was a reasonable method for the county court to ensure accomplishment of the offset mandated by § 30-24,101. Thus, that aspect of the order is also affirmed.

CONCLUSION

The county court correctly ordered the outstanding balance of the promissory notes as due and payable to the estate, with the indebtedness to constitute a lien on Lloyd's interest in the estate, the real estate devised to him by Mabel's will. We therefore affirm the county court's order accordingly.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE,
V. TODD R. BACHELOR, APPELLANT.
575 N.W.2d 625

Filed January 27, 1998. No. A-96-851.

1. **Judgments: Appeal and Error.** When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
2. **Convictions: Appeal and Error.** In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Assault: Words and Phrases.** Under the second degree assault statute, Neb. Rev. Stat. § 28-309 (Reissue 1995), a dangerous instrument is any object which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury.
4. ____: ____. Teeth are not a dangerous instrument under Nebraska's second degree assault statute, Neb. Rev. Stat. § 28-309 (Reissue 1995).
5. **Jury Instructions.** A trial court is under an affirmative duty, whether requested or not, to correctly instruct the jury on the law.
6. **Assault: Lesser-Included Offenses.** Third degree assault is a lesser-included offense of second degree assault, and the greater cannot be committed without at the same time committing the lesser.
7. **Double Jeopardy: Convictions: Assault.** Convictions for both second and third degree assault arising out of the same action would constitute unconstitutional multiple convictions for the same act.

Appeal from the District Court for York County: BRYCE BARTU and ROBERT R. STEINKE, Judges. Affirmed in part, and in part reversed.

Michael J. Hansen, of Berry, Kelley, Hansen & Burt, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

INTRODUCTION

This case has its inception in the bite that a bar bouncer, Todd R. Bachelor, took out of the nose of Paul Ellis. We are called upon to address, apparently for the first time in this state,

whether parts of the human body, specifically teeth, can constitute dangerous instruments under Neb. Rev. Stat. § 28-309 (Reissue 1995), Nebraska's second degree assault statute.

FACTUAL BACKGROUND

On November 18, 1992, Paul Ellis, a truckdriver from Washington State, was having his truck repaired in York, Nebraska, where he had decided to stay for the night at the U.S.A. Inn. Ellis went to the U.S. Mint Lounge (a bar in the U.S.A. Inn) that evening for a couple of drinks. Todd R. Bachelor was working as a self-appointed bouncer at the U.S. Mint Lounge on this same night.

According to Ellis, as he was sitting at the bar, he noticed Bachelor and Rick Hickman, a man Ellis had previously been drinking with, shoving each other. When Ellis attempted to assist Hickman, Bachelor allegedly told Ellis to mind his own business or Bachelor was going to bite Ellis' nose off. Ellis then fell and cut his elbow on a table. Ellis was asked to leave after this altercation. Ellis walked out of the lounge, caught his breath, and returned to the bar because "I wasn't the man in there provoking this thing . . . ."

Upon returning to the bar, Ellis and Bachelor engaged in a "stare down." Then, according to Ellis' testimony:

> Well, the people that were around Todd kind of dispersed. We walked to each other and there are some tables in here and I was walking pretty briskly and I'm sure I was moving chairs as I was walking towards him. I threw one three or four feet. I don't believe I hit anybody. We locked arms, the best I can remember. Somehow Todd came at me. Todd's arms were around my waist here. . . .
>
> . . . .
>
> . . . And I was trying to push him away and the last thing I really remember is a mouth coming over my — my nose and then the blood coming out profusely. And I started screaming.

With respect to the biting incident, Jacqueline Hickman, a witness for the plaintiff, the State of Nebraska, stated: "I was standing back there and the guy had Todd by the throat and Todd bit his nose." Another witness, Karen Kelly, stated that Ellis "had like a choke strangle hold on Todd."

York police sergeant Norm Cobb was dispatched to the U.S.A. Inn on a disturbance call at 12:30 a.m., November 19, 1992. Cobb was greeted by a screaming Ellis in the foyer of the motel. After Cobb attempted to calm Ellis down and after Ellis tried to go back into the bar, Ellis was arrested for disorderly conduct and taken to a hospital. Bachelor, after admitting he had bitten Ellis, was restrained and taken to the sheriff's department. Officer Mikki Hoffman booked Bachelor into jail that morning and noted that although Bachelor's hands were red, there were no bruises or lacerations around his neck.

PROCEDURAL BACKGROUND

Bachelor was charged by information on March 1, 1993, with one count of assault in the first degree, intentionally or knowingly causing serious bodily injury to another person, pursuant to Neb. Rev. Stat. § 28-308 (Reissue 1995); one count of assault in the second degree, intentionally or knowingly causing bodily injury to another person with a dangerous instrument or recklessly causing serious bodily injury to another person with a dangerous instrument, pursuant to § 28-309; and criminal mischief under $100. The information also alleged that Bachelor was a habitual criminal based on two previous convictions, one for distribution of a controlled substance and the other for aiding and abetting burglary.

In response to this information, Bachelor filed a plea in abatement on March 30, 1993. In this plea, Bachelor prayed that the information with respect to counts I and II be quashed because (1) there was no evidence that Bachelor used a dangerous instrument to cause bodily injury and (2) the evidence demonstrated that the injuries to Ellis were the result of a mutual fight, which made the assault, if anything, an assault in the third degree. The plea was overruled on August 10. Bachelor then filed a motion to quash count II "for the reason that the allegation therein set forth is in fact a lesser included offense of Count I thereby subjecting the Defendant to issues of double jeopardy within the pleading." The motion to quash was denied on September 21.

On January 18, 1994, the State moved to dismiss count III, criminal mischief, with prejudice. The district court granted the

motion, and the case proceeded to trial on the two assault charges.

Bachelor's trial lasted 4 days. During the first 3 days, the parties introduced conflicting evidence on the position of Ellis' hands during the seconds before he was bitten. Some witnesses testified that Ellis' hands were located around Bachelor's throat, while others maintained Ellis was merely pushing against Bachelor's chest. On the fourth day, the jury was instructed that on the charge of assault in the second degree, a "dangerous instrument is *anything* which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury." (Emphasis supplied.) Bachelor's attorney objected to this instruction and proposed that the term "object" be substituted for the term "anything." The court refused to change its instruction in the following exchange with Bachelor's attorney:

> [Counsel]: If I may go quickly back to the definitions, Your Honor. You've defined a dangerous instrument as anything . . . — in State v. Hatwoan, H-A-T-W-O-A-N [sic], 208 Neb. 450, [303 N.W.2d 779 (1981)] they define a dangerous instrument as any object which, because of its nature and the manner of its intention of use, is capable of inflicting bodily injury. And . . . they use the term object there rather than anything.
>
> THE COURT: I understand that, but here we didn't have an object in the sense that it was separate and apart from ones person. This was teeth.
>
> [Counsel]: Exactly my position, Your Honor.
>
> THE COURT: Well, I think anything covers it.
>
> . . . .
>
> THE COURT: . . . I'm not going to give it because in this case we don't have that. We have — We have a person's jaw and his teeth, much the same as a fist or a hand. . . .
>
> . . . .
>
> [Counsel]: I propose it as —
>
> THE COURT: Object.
>
> [Counsel]: — object and therefore would object to the term anything in that particular definition.
>
> THE COURT: Okay.

The district court also instructed the jury that if the State failed to carry its burden of proof with regard to first degree assault,

the jury was to consider whether Bachelor was guilty of the lesser-included offense of third degree assault.

On January 21, 1994, Bachelor was convicted of second degree assault, a Class IV felony, and third degree assault, a Class I misdemeanor. Bachelor, who was to be sentenced on March 8, failed to appear at the hearing, and the district court issued a bench warrant for Bachelor's arrest. Over 2 years later, on July 9, 1996, Bachelor was sentenced as a habitual criminal, under Neb. Rev. Stat. § 29-2221 (Reissue 1995), to an indeterminate sentence of imprisonment of not less than 10 nor more than 14 years for assault in the second degree. He received a sentence of imprisonment of 3 months for the third degree assault conviction, to run concurrent with the sentence on the second degree assault conviction. Bachelor timely appealed to this court.

ASSIGNMENTS OF ERROR

Bachelor contends on appeal that the district court erred in (1) accepting the jury's verdict with regard to second degree assault when the evidence was insufficient to convict, (2) refusing to give Bachelor's proposed jury instruction defining the term "dangerous instrument" as an "object" rather than as "anything," (3) accepting the jury's verdicts with respect to Bachelor's second and third degree assault convictions because this amounted to double jeopardy, and (4) accepting the jury's verdicts that Bachelor had not acted in self-defense.

STANDARD OF REVIEW

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Earl*, 252 Neb. 127, 560 N.W.2d 491 (1997); *State v. Privat*, 251 Neb. 233, 556 N.W.2d 29 (1996).

[1] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. LeGrand*, 249 Neb. 1, 541 N.W.2d 380 (1995).

[2] In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the

finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

ANALYSIS

Second Degree Assault and Dangerous Instruments.

Bachelor first argues that there was insufficient evidence for the jury to find that he used a dangerous instrument in his fight with Ellis. As a corollary to this argument, Bachelor asserts that the jury was improperly instructed on the definition of "dangerous instrument," in the context of § 28-309, to his detriment.

Nebraska has three statutes relating to assault upon persons: (1) assault in the first degree, § 28-308; (2) assault in the second degree, § 28-309; and (3) assault in the third degree, Neb. Rev. Stat. § 28-310 (Reissue 1995). A person commits first degree assault if he or she intentionally or knowingly causes serious bodily injury to another person. As is pertinent here, a person commits second degree assault if he or she intentionally or knowingly causes bodily injury to another person with a dangerous instrument or recklessly causes serious bodily injury to another person with a dangerous instrument. Third degree assault is when a person intentionally, knowingly, or recklessly causes bodily injury to another person or threatens another in a menacing manner.

While first and second degree assaults are considered felonies, Class III and Class IV respectively, third degree assault is a Class I misdemeanor (unless committed in a fight or scuffle entered into by mutual consent, in which case it is considered a Class II misdemeanor). In the case before us, Bachelor went to trial charged with first and second degree assault, and the jury was instructed on the elements of those crimes and told to consider third degree assault as a lesser-included offense of first degree assault. The jury found Bachelor guilty of second and third degree assault.

Instruction No. 5 directed the jury that it was its duty to convict Bachelor of second degree assault if he "(2) [i]ntentionally or knowingly caused bodily injury to Paul Ellis or recklessly caused serious bodily injury to Paul Ellis; (3) [w]ith a danger-

ous instrument; (4) [i]n York County, Nebraska; (5) [o]n or about November 19, 1992; and (6) [t]hat Todd R. Bachelor did not act in self defense." The district court further instructed that a "dangerous instrument is anything which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury." The record reveals that the only "thing" which possibly could have satisfied the element of "dangerous instrument" necessary for a second degree assault conviction was Bachelor's teeth. Bachelor argues that because his teeth are part of his body, they cannot be considered as a "dangerous instrument" under § 28-309.

> The inclusion of human body parts, such as fists and teeth, within the class of deadly weapons provokes several conceptual problems. Most obviously, unlike other kinds of weapons, fists and teeth are not external instrumentalities. However, like many other criminal instrumentalities, they may be used to cause death or serious physical injury. This quality has led some courts to classify their use, under some circumstances, as use of a deadly weapon, although the main line of authority discussed infra is to the effect that in no circumstances can fists or teeth be found to constitute deadly or dangerous weapons within the meaning of applicable statutes.

Annot., Parts of the Human Body, Other Than Feet, As Deadly or Dangerous Weapons for Purposes of Statutes Aggravating Offenses Such as Assault and Robbery, 8 A.L.R.4th 1268 at 1269 (1981).

[3] While the appellate courts of Nebraska have not addressed the specific issue of whether parts of the human body are dangerous instruments under the second degree assault statute, the Nebraska Supreme Court has defined "dangerous instrument" in that statute, § 28-309, as "any *object* which, because of its nature and the manner and intention of its use, is capable of inflicting bodily injury. It might, for example, be a piece of lumber, a hammer, or many other physical objects." (Emphasis supplied.) *State v. Hatwan*, 208 Neb. 450, 454, 303 N.W.2d 779, 782 (1981) (injury from telephone receiver swung by its cord). Approximately 10 years later, the court in *State v. Ayres*, 236 Neb. 824, 464 N.W.2d 316 (1991), reaffirmed its

decision in *Hatwan*, holding that a "spanking" board qualified as a dangerous instrument, remarking that "the nature of the instrument, the manner of its use, and the intent with which it was used made the board capable of inflicting bodily injury . . . ." *Ayres*, 236 Neb. at 828-29, 464 N.W.2d at 320. Clearly, teeth, given the manner of use and the intent behind their use, are readily capable of inflicting bodily injury, as the photographs of Ellis' face in this case attest. However, recalling the quote with which we began our analysis, see Annot., 8 A.L.R.4th, *supra*, the inquiry does not end here.

In *People v VanDiver*, 80 Mich. App. 352, 263 N.W.2d 370 (1977), VanDiver was charged with felonious assault, under Mich. Comp. Laws Ann. § 750.82 (West 1991), which provides:

> "Any person who shall assault another with a gun, revolver, pistol, knife, iron bar, club, brass knuckles or other dangerous weapon, but without intending to commit the crime of murder, and without intending to inflict great bodily harm less than the crime of murder, shall be guilty of a felony."

VanDiver's felonious assault charge arose out of an incident where VanDiver placed his hand around a 7-year-old child's mouth and nose so that she could not breathe and told her to be quiet or he would kill her. The child managed to escape, and VanDiver was subsequently apprehended. At trial, the child testified that VanDiver did not have a knife, gun, or other weapon.

VanDiver contended that he should not have been charged with felonious assault because the use of bare hands did not constitute a deadly weapon within the meaning of § 750.82. The Michigan Court of Appeals, in addressing an issue of first impression, stated:

> Michigan has at least ten statutes relating to assault upon private persons; among these are "Assault and simple assault" . . . and "Assault and infliction of serious injury" (commonly referred to as aggravated assault) . . . both misdemeanors, and "Assault with intent to do great bodily harm less than murder" . . . and "Assault with intent to commit murder" . . . both felonies. None of these four statutes require that the actor perpetrate the assault with a dangerous weapon. Bare hands are sufficient. What distin-

> guishes the misdemeanors, simple assault and aggravated assault, from the felonies, assault with intent to do great bodily harm less than murder and assault with intent to murder, is the actor's intended result. What distinguishes felonious assault . . . from simple assault and aggravated assault is the use of a dangerous weapon in the perpetration of the assault.

(Citations omitted.) *VanDiver*, 80 Mich. App. at 356, 263 N.W.2d at 372. Reasoning that if bare hands were to constitute a weapon, practically every assault would qualify as an aggravated assault, the Michigan Court of Appeals concluded that since the legislature could not have intended to merge separate offenses, assaults with bare hands must have been intended to be treated as assaults without weapons.

In *People v Malkowski*, 198 Mich. App. 610, 499 N.W.2d 450 (1993), the Michigan Court of Appeals extended its holding in *VanDiver* to include teeth. The court stated:

> In the present case, the claimed dangerous weapon was the defendant's teeth, which he used to bite the victim on the back. We are not aware of any Michigan authority that holds that teeth are dangerous weapons, unless they belong to a dog. . . . We conclude that a defendant's teeth are not dangerous weapons for the same reasons that his bare hands are not. . . . Our holding is consistent with the great weight of authority from other jurisdictions, which holds that parts of the human body alone cannot constitute a deadly or dangerous weapon.

(Citations omitted.) *Id.* at 614, 499 N.W.2d at 452.

The handful of state cases dealing with the mouth and teeth as a deadly and dangerous weapon have rejected the claim that the mouth and teeth could be considered a deadly and dangerous weapon under any circumstances. In *State v. Calvin*, 209 La. 257, 265, 24 So. 2d 467, 469 (1945), the Supreme Court of Louisiana stated, "We know of no authority of law . . . which classes one's bare hands or teeth as a dangerous weapon." The court also stated that the object must be inanimate to be considered a deadly and dangerous weapon. In *Commonwealth v. Davis*, 10 Mass. App. 190, 406 N.E.2d 417 (1980) (long before Tyson chewed on Holyfield's ears), the defendant bit off a piece

of the victim's ear, which had to be surgically reattached. The defendant was charged with assault and battery by means of a deadly and dangerous weapon. The Massachusetts Court of Appeals held that parts of the human body could never be considered dangerous weapons, "even on a case-by-case basis." *Id.* at 193, 406 N.E.2d at 420. Finally, in *People v. Owusu*, 172 Misc. 2d 357, 659 N.Y.S.2d 976 (1997), the court held that the defendant's natural teeth, which were not sharpened or altered to aggravate their use, were not a dangerous instrument, as a basis for enhancing burglary and assault charges against the defendant. But see *U.S. v. Sturgis*, 48 F.3d 784 (4th Cir. 1995) (where U.S. Court of Appeals found that HIV positive defendant's use of teeth to bite correctional officers amounted to use of "dangerous weapon" under federal and District of Columbia laws), *cert. denied* 516 U.S. 833, 116 S. Ct. 107, 133 L. Ed. 2d 60. The dissent in *Sturgis*, citing *People v VanDiver*, 80 Mich. App. 352, 263 N.W.2d 370 (1977), found that while it would perhaps have been preferable to distinguish assaults on the basis of the seriousness of the injuries inflicted, Congress chose instead to use "weapon" as the distinguishing concept, and that once body parts are deemed weapons, the term ceases to be of any use as a distinguishing factor. See, also, *U.S. v. Moore*, 846 F.2d 1163, 1164 (8th Cir. 1988) (holding teeth were used as "deadly and dangerous weapon" in assault on federal corrections officer, regardless of whether accused did or did not have HIV, as there was no evidence of HIV transmission by bites or via saliva, but court relied on evidence that there are 30 varieties of germs in human mouth which could cause serious infection).

We find the foregoing opinions in *VanDiver*, *Owusu*, *Davis*, and *Calvin* to be sound, as is the dissent in *Sturgis*. They represent the majority view. See Carlton D. Stansbury, Comment, *Deadly and Dangerous Weapons and AIDS: The* Moore *Analysis Is Likely To Be Dangerous*, 74 Iowa L. Rev. 951 (1989) (criticizing *Moore* and asserting that *Davis* and *Calvin* represent majority view as courts have been reluctant to expand definition of deadly and dangerous weapon to include human body parts). We now apply the majority view to the Nebraska assault statutes.

If we rule that teeth or other body parts are "dangerous instruments," then virtually every assault which would qualify as a

third degree assault would also be capable of prosecution as second degree assault. A mere push which causes a victim to fall down and be injured, albeit not a "serious bodily injury," has the potential to be a second degree assault if body parts can be dangerous instruments. As a result, the distinction in language between the second and third degree assault statutes, i.e., "dangerous instrument," becomes meaningless, and there is then no basis for distinguishing between second and third degree assault. To inflict bodily injury on another, the actor has to use either a physical object or the actor's own body—feet, hands, fingers, teeth, shoulder, forearm, et cetera. Without excluding body parts from the definition of dangerous instruments, the shove in the bar is no different from a slash with a knife or a gunshot unless there is serious bodily injury, defined as "bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body." Neb. Rev. Stat. § 28-109(20) (Reissue 1989).

[4] We note that any attack involving the use of a body part to inflict serious bodily injury, regardless of how inflicted, remains punishable under the most serious assault statutes, i.e., first degree assault. And mere bodily injury (physical pain, illness, or any impairment of physical condition), see § 28-109(4), by assault without a dangerous instrument, i.e., assault "by body part," is then relegated to the least serious category—third degree assault. Declaring body parts dangerous instruments makes the increased penalty for using a dangerous instrument meaningless and creates ambiguity, if not outright duplication, between second and third degree assault under Nebraska law. Therefore, we hold that, as a matter of law, Bachelor's teeth could not have been considered a dangerous instrument for the purpose of convicting Bachelor of second degree assault under § 28-309. Because the record shows that Bachelor's teeth were the only thing the jury could have found to be a dangerous instrument, we reverse the jury's finding that Bachelor was guilty of second degree assault.

[5] Although Bachelor made a motion to dismiss count II, second degree assault, at the close of the State's evidence, the basis of that motion when read in context is self-defense. At the

instruction conference, there was no motion to dismiss on the ground that teeth or body parts are not included within the meaning of dangerous instrument. Rather, Bachelor's counsel argued that the trial court's proposed definitional instruction of dangerous instrument using the word "anything" was erroneous and that the word "object" from *State v. Hatwan*, 208 Neb. 450, 303 N.W.2d 779 (1981), should be used. Bachelor's counsel also argued that teeth would not be such an object. But, as observed, there was no motion to dismiss. However, a trial court is under an affirmative duty, whether requested or not, to correctly instruct the jury on the law. *State v. Adams*, 251 Neb. 461, 558 N.W.2d 298 (1997). In the instant case, the correct course for the trial court would have been to not submit the matter of second degree assault to the jury under any instruction because teeth are not a dangerous instrument within the meaning of the second degree assault statute. We do not address Bachelor's argument that the district court erred with respect to the language used in its instruction on the definition of dangerous instrument because our holding and the reversal of the conviction for second degree assault makes resolution of this claim unnecessary.

Third Degree Assault as Lesser-Included Offense.

[6,7] Bachelor asserts that because third degree assault is a lesser-included offense of second degree assault, he has been punished twice for the same offense. We recognize that this issue has been "mooted" by our reversal of Bachelor's second degree assault conviction, but we observe that in *State v. Britt*, 1 Neb. App. 245, 493 N.W.2d 631 (1992), we held that third degree assault is a lesser-included offense of second degree assault. In *Britt*, we noted that the only difference in the offenses is simply whether the injury is caused with a dangerous instrument. Thus, *Britt* lends support to our determination that body parts should not be considered dangerous instruments for the purpose of second degree assault under § 28-309, while also recognizing the substance of Bachelor's argument, although moot now, that convictions for both second and third degree assault arising out of the same action would constitute unconstitutional multiple convictions for the same act. See *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

Self-Defense.

Bachelor's final argument is that there was sufficient evidence adduced at trial to prove that he had acted in self-defense and that the district court erred in accepting the jury's verdict that Bachelor had not acted in self-defense.

In reviewing a criminal conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Marks*, 248 Neb. 592, 537 N.W.2d 339 (1995); *State v. Null*, 247 Neb. 192, 526 N.W.2d 220 (1995).

There is ample evidence to support the jury's decision in this case that Bachelor was not acting in self-defense when he bit Ellis. According to Ellis' testimony, he and Bachelor had locked arms and were pushing and shoving one another when "his arms come around here . . . . His arms holding my waist around, I'd say, right in here, waist, rib area — cage." After Bachelor had Ellis in this "bear hug," Ellis said that Bachelor bit his nose. Some witnesses testified that Ellis had a "stranglehold" on Bachelor's neck prior to the assault, but they did not so indicate that when they were interviewed by police officers shortly after the incident. Moreover, Officer Robert Holmes, an investigating officer, testified that he did not observe any marks, redness, bruising, or lacerations of any type about Bachelor's throat or neck area. Officer Hoffman, the corrections officer who booked Bachelor at the sheriff's department, testified that she did see redness on Bachelor's hands but did not notice any type of markings, bruises, or lacerations on Bachelor's throat. Resolution of these conflicting facts and inferences was for the jury. There was certainly evidence from which the jury could, and did, find that Bachelor had not acted in self-defense when he bit Ellis' nose.

CONCLUSION

We conclude, as a matter of law, that teeth are not to be considered a "dangerous instrument" under § 28-309, and therefore, we reverse the conviction and sentence for second degree assault. We affirm the jury's verdict of guilty on the charge of

third degree assault. Inherent in that affirmance is our conclusion that there was sufficient evidence for the jury to find that Bachelor did not act in self-defense.

AFFIRMED IN PART, AND IN PART REVERSED.

ALICEANN SPEICHER, APPELLANT, V.
DOUGLAS MARTIN SPEICHER, APPELLEE.
572 N.W.2d 804

Filed January 27, 1998. No. A-96-1048.

1. **Divorce: Modification of Decree: Child Support.** Child support payments become vested rights of the payee in a dissolution action as they accrue, and such payments may be changed only by a proper modification proceeding based upon a material change in circumstances.
2. **Modification of Decree: Child Support.** A court may not forgive or modify past-due child support, but may modify the amount of child support becoming due in the future.
3. **Child Support: Proof.** A district court may order a child support arrearage discharged and canceled of record to the extent the court has received satisfactory proof that the arrearage has been paid or satisfied in whole or in part by the act of the parties.
4. **Divorce: Child Support: Accord and Satisfaction.** An oral agreement to suspend a right to enforce a judgment for child support may constitute an accord and satisfaction, entitling the payor to a release and satisfaction of a judgment for child support.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Michael N. Schirber, of Schirber Law Offices, P.C., for appellant.

James A. Adams, of Cohen, Vacanti & Higgins, for appellee.

MILLER-LERMAN, Chief Judge, and IRWIN and MUES, Judges.

IRWIN, Judge.

I. INTRODUCTION

Aliceann Speicher appeals from a decree of dissolution entered by the district court which, inter alia, awarded her the parties' marital home, including Douglas Martin Speicher's interest in the home in satisfaction of delinquencies in temporary

child support and temporary spousal support and in lieu of granting an attorney fee. For the reasons stated herein, we affirm.

II. BACKGROUND

Aliceann and Douglas were married on August 30, 1986. During the course of their marriage three children were born, all of whom were minors at the time of the dissolution proceedings. The names of the children and their dates of birth are as follows: Jacob, born February 12, 1987; Mitchell, born June 23, 1989; and Jillian, born November 8, 1990.

During the pendency of the proceedings, Douglas was ordered to pay temporary child support and temporary spousal support. At the time of the dissolution hearing, the clerk's office records indicated that Douglas was in arrears in his child support obligation in the sum of $2,400 and in arrears in his spousal support obligation in the sum of $3,250. The parties agreed at trial that Douglas made a payment in the sum of $1,800 to Aliceann which was not reflected in the records. No evidence was presented at trial as to whether this payment was intended to satisfy child support arrearages, spousal support arrearages, or both.

The primary asset of the parties was the marital residence. Aliceann testified that the house was valued by the assessor at $68,316. However, Aliceann presented an exhibit, as did Douglas, which indicated that the assessor's valuation of the house was actually $58,316. Neither party objected to the use of the assessor's valuation of the house as relevant evidence of the actual value. See *First Nat. Bank of York v. Critel*, 251 Neb. 128, 555 N.W.2d 773 (1996).

Aliceann acknowledged that she had valued the house at $79,000 in answers to interrogatories, apparently because Douglas had valued the house at $79,000 in his answers to interrogatories. Douglas testified at trial concerning the assessor's valuation, but further testified that he believed the actual value of the house to be approximately $70,000.

The parties agreed that the balance on the outstanding mortgage was $48,911.26. Additionally, Aliceann urged that a sales commission of $4,082, which would have to be paid in order to sell the house, should be considered in computing the equity in the house. Douglas' exhibit concerning the value of the house,

although mirroring Aliceann's exhibit concerning the assessor's valuation of the house and the mortgage balance, did not include any sales commission.

At the conclusion of trial, the district court stated the following:

> I am going to award the house to Mrs. Speicher. The equity in the house is probably somewhere between five thousand and fifteen thousand dollars. The evidence just isn't real clear, and Mr. Speicher is presently in arrears after crediting the eight hundred dollars [sic], is in arrears thirty-eight fifty on the temporary order, and in return for wiping out that arrearage and ordering Mrs. Speicher to pay her own attorney's fee, as far as I am concerned, that wipes his interest out in the house. In essence that's probably in the vicinity of — that would be in the vicinity of a twelve thousand dollar equity, because in this case I normally would have allowed an attorney fee approaching two thousand dollars.

Aliceann filed this appeal.

III. ASSIGNMENTS OF ERROR

On appeal, Aliceann has assigned three errors. However, our review of Aliceann's brief indicates that she has argued only the last two of her assigned errors. As such, we will deal only with those errors both assigned and argued on appeal.

Aliceann first asserts that the district court "erred in forgiving and abating past due child support delinquencies due from" Douglas to Aliceann under the provisions of the temporary order. Aliceann next asserts that the district court "erred in not awarding [her] reasonable attorney fees and costs."

IV. ANALYSIS

1. Child Support Delinquencies

[1,2] We first address Aliceann's assertion that the district court "erred in forgiving and abating" Douglas' child support arrearages. It is true that child support payments become vested rights of the payee in a dissolution action as they accrue and that such payments may be changed only by a proper modification proceeding based upon a material change in circumstances. *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991). Accord-

ingly, a court may not forgive or modify past-due child support but may modify the amount of child support becoming due in the future. *Id.*

However, we do not interpret the district court's action in the present case as "forgiving and abating" Douglas' arrearages. Rather, the district court acknowledged the arrearages and ordered them paid through offsetting Douglas' interest in the parties' primary asset, the marital residence, and awarding Aliceann title to that property. Although our research has not indicated any case directly on point, we do note that the Nebraska Supreme Court has, in the past, indicated that accord and satisfaction may be applied to satisfy a payor's obligation to pay child support arrearages. See, e.g., *Berg v. Berg, supra*; *Weber v. Weber*, 203 Neb. 528, 279 N.W.2d 379 (1979).

[3,4] The Supreme Court has held that a district court may order a child support arrearage discharged and canceled of record to the extent the court has received satisfactory proof that the arrearage has been paid or satisfied in whole or in part by the act of the parties. *Berg v. Berg, supra.* Additionally, the Supreme Court has held that an oral agreement to suspend a right to enforce a judgment for child support may constitute an accord and satisfaction, entitling the payor to a release and satisfaction of a judgment for child support. *Weber v. Weber, supra.*

In *Reed v. Reed*, 93 A.D.2d 105, 462 N.Y.S.2d 73 (1983), the New York Court of Appeals was presented with a situation similar to the present case. In *Reed*, the trial court awarded the wife additional equity in the parties' home to offset the husband's child support arrearages and awarded the wife exclusive occupancy of the home. On appeal, the appellate court held that the action of the trial court was an inadequate method to provide for the support of the children, which required current cash. The appellate court held, however, that the decree of the trial court should be modified to award the wife the entire title to the property to offset the arrearages, which would allow the wife to sell the property or take other action to recoup the arrearages.

The district court in the present case took the action recommended by the appellate court in *Reed v. Reed, supra*, and awarded Aliceann the entire interest in the marital residence. In reviewing these actions of the trial court, we are mindful of our

standard of review, which is that we review the case de novo on the record and affirm the decision of the district court in the absence of an abuse of discretion. See *Berg v. Berg, supra.*

Douglas' child support arrearage was $2,400 prior to his receipt of credit for a cash payment made directly to Aliceann. The record indicates that Douglas made a cash payment to Aliceann of $1,800, although the record does not indicate conclusively whether that sum was intended to be applied toward the child support arrearage, the spousal support arrearage, or both. On the facts of this case, we cannot say that the district court abused its discretion in offsetting the child support arrearage of $2,400, at the most, and $600, at the least, by awarding Aliceann the marital home in satisfaction of the arrearage. As such, Aliceann's first assigned error is without merit.

2. Attorney Fees

Aliceann also asserts that the trial court erred in failing to award her an attorney fee. Again, our review of the district court's actions indicates that the court awarded her the home in satisfaction of, or in lieu of, inter alia, a cash award of an attorney fee. The court specifically found that the equity in the home was approximately $12,000, a finding which is not appealed from. Aliceann was awarded Douglas' $6,000 interest in the home in satisfaction of the temporary arrearages, as discussed above, and in lieu of a cash attorney fee. The sum total of the child support and spousal support arrearages approached approximately $4,000, and the court indicated that the remainder of Douglas' equity was awarded to Aliceann in lieu of a cash award of an attorney fee which the court "normally would have allowed . . . approaching two thousand dollars." This assigned error is also without merit.

V. CONCLUSION

Because we conclude that the district court did not forgive or abate the child support arrearage and did not err in failing to specifically award an attorney fee, we affirm.

Affirmed.

STATE OF NEBRASKA, APPELLEE,
V. KATHERINE E. JAMES, APPELLANT.
573 N.W.2d 816

Filed January 27, 1998. No. A-97-499.

1. **Pleas.** Prior to sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea.
2. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea.
3. **Pleas: Appeal and Error.** The withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion.
4. **Pleas: Restitution.** The failure to inform a defendant of the possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution.
5. **Pleas: Restitution: Records.** The trial court's failure to apprise a defendant at arraignment that restitution is a potential penalty, where the record does not indicate that the defendant had any independent knowledge of that potential penalty, renders a plea of no contest involuntary and unintelligent in that regard and prevents the imposition of an order of restitution.
6. **Pleas: Restitution.** If a defendant is not ordered to pay any restitution, the plea is not impacted by the failure of the trial court to advise concerning restitution.
7. **Pleas: Controlled Substances.** Medications, drugs, or alcohol can, in some circumstances, have an impact on a defendant's state of mind such that the voluntariness of his or her plea may be affected, and inquiry regarding such at the time of the taking of a plea is prudent.

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

G. Anne Evans for appellant.

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

HANNON, IRWIN, and INBODY, Judges.

IRWIN, Judge.

I. INTRODUCTION

Katherine E. James brings this appeal from the district court's denial of her motion to withdraw a no contest plea and subsequent sentencing. On appeal, James challenges the voluntariness of her plea because the trial court failed to inform her at the time of the plea that restitution was statutorily authorized

for the crime of arson, pursuant to Neb. Rev. Stat. § 29-2280 (Reissue 1995). Additionally, James challenges the court's refusal to allow her to withdraw her plea because she was allegedly on medication at the time her plea was entered. Finally, James asserts that the sentence entered by the trial court was excessive. For the reasons stated herein, we affirm.

II. BACKGROUND

On October 6, 1995, James was charged by information with two counts of arson in the first degree and one count of arson in the second degree. The information alleged that on or about September 24, 1995, James intentionally started, or caused to have started, a fire, which damaged three homes in Omaha, Douglas County, Nebraska, under circumstances rendering the presence of persons in the homes a reasonable probability.

On November 19, 1996, James was arraigned on the three charges. The court advised James of the nature of the charges being brought against her, the constitutional rights to which she was entitled, and the potential fine and periods of incarceration which could be imposed upon a finding of guilt; James entered pleas of no contest to all three charges. The county attorney presented a factual basis for the plea, and the court entered findings of guilt on all three charges, pursuant to the no contest pleas.

On March 31, 1997, James was present in court for her sentencing hearing. After the hearing began, but prior to the court's actually imposing sentence, James sought to withdraw her pleas. James alleged that she had not been informed of the possibility of restitution at the time of her pleas. After granting a 1-week continuance, the court heard argument on James' motion to withdraw her pleas. Although the motion was not requested as part of the transcript in this case, it appears from the court's dialog that, inter alia, James sought to withdraw her pleas because she was not advised that restitution was a potential penalty and because she was allegedly on medication at the time her pleas were entered. After argument, the court overruled the motion to withdraw the pleas.

The court proceeded to sentence James to a period of 4 to 8 years' incarceration on the first count of arson in the first degree, a period of 4 to 8 years' incarceration on the second

count of arson in the first degree, and a period of 2 to 4 years' incarceration on the count of arson in the second degree, the sentences to be served consecutively. The court ordered that James be confined at the Nebraska Center for Women in York, Nebraska. The court did not order any form of restitution for the damage to the three homes destroyed by the fire.

III. ASSIGNMENTS OF ERROR

On appeal, James has assigned four errors, which we have consolidated for discussion to three. First, James asserts that the trial court erred in denying her motion to withdraw pleas because her pleas "were not entered voluntarily, knowingly, and intelligently." Second, James asserts that the trial judge erred "in assuming the role of a witness at the plea withdrawal hearing when the judge relied on his own observations of the Defendant." Finally, James asserts that the sentences imposed by the district court were excessive, constituting an abuse of discretion.

IV. ANALYSIS

1. Withdrawal of Pleas

(a) Plea Requirements

The Nebraska Supreme Court has established the necessary criteria for determining whether a defendant's plea of guilty or no contest is entered freely, intelligently, voluntarily, and understandingly. See *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). In *Irish*, the Supreme Court delineated the following requirements which must be met before a trial court can find that a guilty or no contest plea has been entered freely, intelligently, voluntarily, and understandingly:

> 1. The court must
>
> a. inform the defendant concerning (1) the nature of the charge; (2) the right to assistance of counsel; (3) the right to confront witnesses against the defendant; (4) the right to a jury trial; and (5) the privilege against self-incrimination; and
>
> b. examine the defendant to determine that he or she understands the foregoing.
>
> 2. Additionally, the record must establish that

a. there is a factual basis for the plea; and

b. the defendant knew the range of penalties for the crime with which he or she is charged.

We conclude that the taking of the foregoing steps is sufficient to assure that a plea represents a voluntary and intelligent choice among the alternative courses of action open to a criminal defendant, the ultimate standard by which pleas of guilty or nolo contendere are to be tested. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *State v. Turner*, 186 Neb. 424, 183 N.W.2d 763 (1971).

223 Neb. at 820, 394 N.W.2d at 883.

Our review of the record made at James' arraignment indicates that the court properly informed James concerning all of her rights and examined her to determine that she understood them. The court further informed James that the burden of proof would remain at all times on the State, that she was presumed innocent, and that the State would have to convince a jury to unanimously find her guilty beyond a reasonable doubt. Additionally, the record establishes that a factual basis for the pleas was established. Finally, the court informed James regarding the potential fine and periods of incarceration which could be imposed upon a finding of guilt as to the charges, as well as the fact that any periods of incarceration for the several counts could be ordered served consecutively or concurrently.

James asserts that her plea, despite the above compliances with *State v. Irish, supra*, was not made freely, intelligently, voluntarily, and understandingly, because the court did not inform her that restitution was within the range of penalties which could be imposed, and she asserts that the court erred in overruling her motion to withdraw the pleas. Additionally, James asserts that the trial court should have granted her motion to withdraw her pleas because she was under the influence of medications at the time her pleas were entered.

[1-3] The Supreme Court has held that prior to sentencing, a court should allow the defendant to withdraw his or her plea for any fair and just reason, provided that the prosecution would not be substantially prejudiced by its reliance upon the plea. *State v. Spahnle*, 238 Neb. 265, 469 N.W.2d 780 (1991). The

burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawing a plea. *Id.* However, the withdrawal of a plea is addressed to the discretion of the trial court, and its ruling will not be disturbed on appeal absent an abuse of that discretion. See, *State v. Dodson*, 250 Neb. 584, 550 N.W.2d 347 (1996); *State v. Spahnle, supra.* In the context of the present case, then, we are faced with determining whether the trial court abused its discretion in overruling James' motion for withdrawal of her pleas, either because she was not advised of the possibility of restitution or because the record establishes that she was under the influence of medications when her pleas were entered.

(b) Restitution

As noted above, because of the nature of the offenses in this case, restitution could have been ordered. See § 29-2280. In *State v. Duran*, 224 Neb. 774, 401 N.W.2d 482 (1987), the Supreme Court held that restitution under § 29-2280 is a criminal penalty imposed as punishment for the crime. See, also, *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988). James asserts that because she was not advised of this potential criminal penalty, her plea was "deficient as a matter of law." Brief for appellant at 8.

James relies upon the Supreme Court's holding in *State v. War Bonnett, supra*, in support of her argument. In *War Bonnett*, the Supreme Court was presented with a defendant who pled guilty to theft. When the defendant's plea was entered, the trial court did not advise him that restitution was a possible penalty for pleading guilty to theft. Nonetheless, the trial court ordered the defendant to pay restitution. On appeal, the Supreme Court found the plea to be deficient because the defendant had not been advised of the possibility of restitution. The Supreme Court held that "as required by *State v. Fischer*, 218 Neb. 678, 357 N.W.2d 477 (1984); *State v. Hall*, 222 Neb. 51, 381 N.W.2d 926 (1986); and *State v. Curnyn*[, 202 Neb. 135, 274 N.W.2d 157 (1979)], we remand the cause to the district court for further proceedings as mandated by those cases." 229 Neb. at 682, 428 N.W.2d at 509-10.

A review of the cases cited by the Supreme Court in *War Bonnett*, i.e., *State v. Hall, supra*; *State v. Fischer, supra*; and

State v. Curnyn, supra, reveals that none of them presented a situation where the defendant was not advised of the possibility of restitution. The cited cases presented situations where the trial court did not properly advise the defendant about the range of penalties for the offense committed, i.e., the potential for incarceration or fines. Notably, in *Curnyn* and *Fischer*, the Supreme Court appeared to place some emphasis on the fact that the respective records in those cases indicated that the defendant had some independent knowledge of the potential range of penalties, despite the trial court's inadequate advisement. As such, the Supreme Court reversed the sentences and remanded those cases to the trial court for a further determination of whether the defendant was sufficiently aware of the potential range of penalties from independent sources. In *Hall*, however (as well as in *War Bonnett*), the Supreme Court did not make mention of whether the record indicated that the defendant had any independent knowledge of the potential range of penalties (or, in *War Bonnett*, of the potential of restitution). Nonetheless, in both *Hall* and *War Bonnett*, the Supreme Court reversed the sentencing judgment and remanded the case.

[4] In *State v. Mentzer*, 233 Neb. 843, 448 N.W.2d 409 (1989), the Supreme Court was presented with another defendant who was not advised of the potential of restitution, but who was ordered, as part of his sentence, to make restitution. The court stated that "we have held that the failure to inform a defendant of the possibility of restitution renders the entry of a plea of guilty involuntary and unintelligent in that regard and consequently prevents the imposition of an order of restitution." *Id.* at 845, 448 N.W.2d at 410. The court cited *State v. War Bonnett, supra*, for that proposition. However, the court concluded that the record provided some evidence that the defendant was aware, from independent sources, of the potential for restitution and refused to disturb that portion of his sentence.

The Supreme Court was presented with the issue again in *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992), wherein a defendant was sentenced to probation and, as part of his probation order, was required to make restitution for burglary. The record indicated that the defendant had not been informed that restitution was a potential consequence of his

guilty plea. The court again held that the plea was rendered involuntary and unintelligent with respect to restitution and that the imposition of restitution was prevented, and again cited *State v. War Bonnett*, 229 Neb. 681, 428 N.W.2d 508 (1988), for that proposition. The *Sanders* court held that the plea, as a whole, was not rendered involuntary.

Although we recognize that unpublished decisions of this court do not carry precedential weight, we feel compelled to note that we have dealt with the issue now presented to us in at least two unpublished decisions. In *State v. Estrada*, 94 NCA No. 27, case No. A-93-1013 (not designated for permanent publication), we found plain error where a trial court ordered restitution without advising the defendant at arraignment that restitution was a potential penalty. Following the reasoning of *State v. Mentzer, supra*, and *State v. Sanders, supra*, we ordered the portion of the defendant's sentence which ordered restitution stricken. We did not, however, rule that his plea was entirely void as being involuntary. A petition for further review of *State v. Estrada* was overruled by the Supreme Court on August 24, 1994.

The case most similar to the present case, however, is another unpublished decision of this court, *State v. Reha*, 94 NCA No. 8, case No. A-93-166 (not designated for permanent publication). In *Reha*, a defendant was not ordered to pay restitution, but argued on appeal that his plea was involuntary because he had never been advised that restitution was a potential penalty for his guilty plea. Relying on the Supreme Court's rationale set out above, we held that the defendant's argument was meritless where no restitution was ordered.

[5,6] In the present case, James was never ordered to pay restitution. Despite the variance between the Supreme Court's disposition of *War Bonnett*, requiring a reversal of the sentence and a remand, and of *Mentzer* and *Sanders*, both holding that the sentence may be invalid only as to the restitution order, but not involuntary as a whole, we feel compelled to follow the Supreme Court's more recent holdings of *Mentzer* and *Sanders* and the underlying rationale therein. As such, in the present case, we hold that the trial court's failure to apprise James at arraignment that restitution was a potential penalty, where the record does not

indicate that James had any independent knowledge of that potential penalty, would render her pleas of no contest involuntary and unintelligent *in that regard* and would, consequently, prevent the imposition of an order of restitution. See, *State v. Sanders, supra*; *State v. Mentzer, supra*. However, because James was not ordered to pay any restitution, her pleas are not impacted by the failure of the trial court to advise her concerning restitution. As such, the trial court did not abuse its discretion in denying her motion to withdraw her pleas on this basis.

(c) Medication

James also asserts that the trial court should have granted her motion to withdraw her pleas because she was under the influence of two medications, Prozac and Xanax, at the time her pleas were entered. Our review of the record fails to contain clear and convincing evidence that James was under the influence of these medications or that they in any way impacted her state of mind when her pleas were entered.

[7] We initially note that a trial court is not specifically required by *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), to inquire as to whether the defendant is under the influence of any medications or alcohol when a plea is entered. The court is, however, required to examine the defendant and determine that he or she understands the rights which are waived by entry of a guilty or no contest plea. See *id.* Additionally, the Supreme Court held in *State v. Livingston*, 244 Neb. 757, 509 N.W.2d 205 (1993), that a defendant may be entitled to an evidentiary hearing on a motion for postconviction relief concerning whether the defendant was under the influence of any medications or otherwise impaired by drugs or alcohol when a plea was entered. As such, it is apparent that the Supreme Court has recognized that medications, drugs, or alcohol can, in some circumstances, have an impact on the defendant's state of mind such that the voluntariness of his or her plea may be affected and that inquiry regarding such at the time of the taking of a plea is prudent. See *id.*

As we noted above, the actual motion for withdrawal of pleas was not requested as part of the transcript in this appeal, nor does it appear elsewhere in the record. As such, it is difficult for us to ascertain exactly what James alleged with regard to medi-

cations. It is apparent, however, from the dialog of the trial court, that she alleged the court failed to ascertain whether she was "under the influence of any alcohol or drugs at the time of her plea" or whether she "had ever been or was currently being treated for mental illness." The court concluded that nothing in the record indicated that James was not in control of her senses when the pleas were entered and overruled the motion on this basis.

After reviewing the record, we cannot say that the trial court abused its discretion in concluding that James failed to establish that her pleas were involuntary because of the influence of medications. Although the presentence investigation report does include some information from Dr. Glenda Cottam, which indicates that James had been treated for some emotional difficulty and had been prescribed some medication, there is absolutely nothing in the record which indicates that James was, in fact, under the influence of any medications when she appeared before the court and entered her pleas. Similarly, there is absolutely nothing in the record which indicates that the medications in any way impacted her ability to rationally consider her alternatives and enter an intelligent plea. Because James failed to provide clear and convincing evidence to support this basis for withdrawing her plea, we cannot say that the trial court abused its discretion in denying the motion. This assigned error is without merit.

2. Judge as Witness

James assigns that the trial judge erred by assuming the role of witness at the plea-withdrawal hearing and relying on his observations of her, presumably during arraignment. James failed to argue this assigned error in her brief, however, and we will not further discuss it. See *State v. Merrill*, 252 Neb. 736, 566 N.W.2d 742 (1997) (absent plain error, errors assigned but not argued in appellant's brief will not be addressed on appeal). See, also, Neb. Ct. R. of Prac. 9D(1)(d) (rev. 1996).

3. Excessive Sentences

Finally, James asserts that the sentences imposed by the trial court were excessive and constituted an abuse of discretion. James was found guilty, upon no contest pleas, of two counts of

arson in the first degree and one count of arson in the second degree. First degree arson is statutorily defined as a Class II felony, see Neb. Rev. Stat. § 28-502 (Reissue 1995), and carries a potential penalty of 1 to 50 years' imprisonment, see Neb. Rev. Stat. § 28-105 (Reissue 1995). Second degree arson is statutorily defined as a Class III felony, see Neb. Rev. Stat. § 28-503 (Reissue 1995), and carries a potential penalty of 1 to 20 years' imprisonment, a $25,000 fine, or both, see § 28-105. As a result, James faced a potential sentence, if the sentences on each count were ordered to be served consecutively, of 1 to 120 years' imprisonment and a $25,000 fine. Instead, the trial court sentenced her to consecutive sentences which, in sum, result in a total sentence of 10 to 20 years' imprisonment.

A sentence imposed within the statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Schultz*, 252 Neb. 746, 566 N.W.2d 739 (1997). The sentences in the present case are obviously well within the statutory limits, and we do not see any abuse of discretion. As noted by the trial court, the fire which resulted in the three charges and the no contest pleas occurred during the early morning hours, when there were more than a half-dozen persons present in the homes which were destroyed by the fire, and "it is an extraordinary event that no one was seriously injured, that no one lost their life because of the tremendous fire that ensued in this case." This assigned error is without merit.

V. CONCLUSION

Finding that James' pleas were freely, intelligently, voluntarily, and understandingly entered and that the sentences imposed were not excessive, we affirm the judgment of the trial court.

AFFIRMED.