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THIS BOOK CONTAINS THE OFFICIAL

REPORTS OF CASES

DECIDED BETWEEN

JUNE 7, 2002 and DECEMBER 12, 2002

IN THE

Supreme Court of Nebraska

VOLUME CCLXIV

PEGGY POLACEK

OFFICIAL REPORTER

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

For the benefit of the State of Nebraska

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WILLIAM M. CONNOLLY, Associate Justice
JOHN M. GERRARD, Associate Justice
KENNETH C. STEPHAN, Associate Justice
MICHAEL M. MCCORMACK, Associate Justice
LINDSEY MILLER-LERMAN, Associate Justice

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DURING THE PERIOD OF THESE REPORTS

JOHN F. IRWIN, Chief Judge
EDWARD E. HANNON, Associate Judge
RICHARD D. SIEVERS, Associate Judge
EVERETT O. INBODY, Associate Judge
THEODORE L. CARLSON, Associate Judge
FRANKIE J. MOORE, Associate Judge

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

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Orville L. Coady	Hebron
		Paul W. Korslund	Beatrice
		Daniel Bryan, Jr.	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
		William B. Zastera	Papillion
Third	Lancaster	Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
		Karen Flowers	Lincoln
		Steven D. Burns	Lincoln
		John A. Colborn	Lincoln
Fourth	Douglas	Robert V. Burkhard	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Gary B. Randall	Omaha
		Patricia A. Lamberty	Omaha
		J. Michael Coffey	Omaha
		Sandra L. Dougherty	Omaha
		W. Mark Ashford	Omaha
		Peter C. Bataillon	Omaha
		Gregory M. Schatz	Omaha

JUDICIAL DISTRICTS AND DISTRICT JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

JUDICIAL DISTRICTS AND COUNTY JUDGES

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

SEPARATE JUVENILE COURTS AND JUVENILE COURT JUDGES

County	Judges	City
Douglas	Douglas F. Johnson	Omaha
	Elizabeth G. Crnkovich	Omaha
	Wadie Thomas, Jr.	Omaha
	Christopher Kelly	Omaha
	Vernon Daniels	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
	Linda S. Porter	Lincoln
Sarpy	Lawrence D. Gendler	Papillion
	Robert O'Neal	Papillion

WORKERS' COMPENSATION COURT AND JUDGES

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

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GREGORY BOLTON
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STEPHANIE BROWN
WILLIAM MICHAEL BROWN
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RYAN GILBRIDE
PAMELA ANN GOEHRING
KIRK EUGENE GOETTSCH
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H. JAY KNIPPLE
THERESA KOLLER
STEPHANIE GARNER KOTIK
JAMES S. KREAMER
RICHARD KUBAT
CHARLES LOREN KUPER
ERIKA ERZSEBET LACZKO
NICOLE LINDSEY-CLARK
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CHAD WYTHERS
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ALLEN P. ZENT

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No. S-01-172: **State v. Smith**. Affirmed. Per Curiam.

No. S-01-331: **Weidner v. Weidner**. Affirmed. McCormack, J.

No. S-01-661: **State v. Greer**. Affirmed. Per Curiam.

No. S-01-673: **Kleager v. Atkins**. Affirmed in part, and in part reversed. Wright, J.

Nos. S-01-696, S-01-697: **Fauss v. Norfolk Avenue Liquor Mart**. Affirmed. Wright, J. Gerrard, J., not participating.

No. S-01-725: **State v. Jones**. Affirmed. Connolly, J.

No. S-01-749: **Slate v. Slate**. Reversed and remanded with directions. Miller-Lerman, J.

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

No. S-01-1004: **In re Interest of Merissa F.** Affirmed. Miller-Lerman, J.

No. S-01-1079: **Yilek v. Yilek**. Appeal dismissed. Connolly, J.

No. S-01-1094: **Jameson v. Blackmer**. Affirmed as modified. Stephan, J.

No. S-01-1227: **In re Interest of Michael N.** Appeal dismissed. McCormack, J.

No. S-02-227: **Jones v. Stenberg**. Affirmed. Stephan, J.

No. S-02-278: **State v. Bussard**. Affirmed. Per Curiam.

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No. S-33-020033: **Winstrom v. Spethman**. Application to docket original action filed by petitioner denied.

No. S-34-020002: **In re Application of Henry**. Application for reinstatement granted; Thomas E. Henry reinstated to active membership status in the Nebraska State Bar Association.

No. S-86-848: **Kula v. Kula**. Cause not being shown, case dismissed.

No. S-99-1059: **State ex rel. NSBA v. Jensen**. Respondent reinstated to the practice of law in the State of Nebraska.

Nos. S-00-620, S-01-1249: **Benjamin v. City of Lincoln**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-01-362: **Cole v. Blum**. Affirmed. See, rule 7A(1); *Cole v. Blum*, 262 Neb. 1058, 637 N.W.2d 606 (2002).

No. S-01-634: **State ex rel. Counsel for Dis. v. Koenig**. Application of respondent for reinstatement granted; Lyle J. Koenig reinstated to active membership of the Nebraska State Bar Association.

No. S-01-718: **Heathman v. Kenney**. Affirmed. See, rule 7A(1); *Garza v. Kenney*, 264 Neb. 146, 646 N.W.2d 579 (2002); *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

No. S-01-1035: **United Neb. Bank v. Department of Banking**. Stipulation allowed; appeal remanded with directions; each party to pay own costs and attorney fees.

No. S-01-1339: **State v. Keyser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-032: **Carbajal v. Havely**. Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-02-133: **State v. Kinser**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-136: **Lowry v. Wireless II, L.L.C.** Appeal dismissed. See rule 7A(2).

No. S-02-234: **State v. Nelson**. Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-258: **State ex rel. Counsel for Dis. v. Huisinga.** Order of public reprimand.

No. S-02-284: **State v. Quintana.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-285: **State v. Quintana.** By order of the court, appeal dismissed for failure to file briefs.

No. S-02-293: **State v. Justice.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-02-366: **State v. Jackson.** Appellee's suggestion of remand sustained.

No. S-02-455: **State v. Ericksen.** By order of the court, appeal dismissed for failure to file briefs.

No. S-02-514: **State v. Smith.** Appeal dismissed. See rule 7A(2).

No. S-02-541: **State ex rel. Counsel for Dis. v. Sutera.** Order of disbarment.

No. S-02-635: **Patz v. Kinney.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-883: **State v. Lyle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See rule 7B(2).

No. S-02-944: **State v. Witmer.** Judgment reversed, and cause remanded to Court of Appeals for further consideration in light of *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958), and *State v. Owen*, 2 Neb. App. 195, 508 N.W.2d 299 (1993). See Neb. Ct. R. of Prac. 7A(3) (rev. 2001). Appellant's pending motions are referred to Court of Appeals for disposition.

No. S-02-988: **State ex rel. Counsel for Dis. v. Allen.** Having failed to show cause, respondent is suspended from the practice of law forthwith until further order of the court.

No. S-02-1189: **State ex rel. Gieschen v. Skinner.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

LIST OF CASES ON PETITION FOR FURTHER REVIEW

Nos. A-00-720, A-00-721: **State v. Beers**. Petition of appellant for further review overruled on August 29, 2002.

No. A-00-945: **Jacobitz v. Nebraska Dept. of Health & Human Servs**. Petition of appellant for further review overruled on July 17, 2002.

No. A-00-960: **State v. Schlondorf**. Petition of appellant for further review overruled on August 28, 2002.

No. S-00-967: **Rydberg v. I.H.S., Inc**. Petition of appellant for further review sustained on November 20, 2002.

No. A-00-995: **State v. Young**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-998: **Real Estate Financing v. Mock**. Petition of appellant for further review overruled on June 26, 2002.

No. A-00-1020: **Wagner v. Union Pacific RR. Co.**, 11 Neb. App. 1 (2002). Petition of appellant for further review overruled on July 3, 2002.

No. A-00-1035: **Beshaler v. Spalding Irrigation**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1035: **Beshaler v. Spalding Irrigation**. Petition of appellee Paulsen for further review overruled on August 28, 2002.

No. S-00-1051: **Dominium Illinois Three v. Arbor Dev. Group**. Petition of appellant for further review sustained on November 20, 2002.

No. A-00-1077: **Bellevue Health & Emerg. Clinic v. Bert Murphy L.L.C.** Petition of appellee Murphy for further review overruled on July 17, 2002.

No. A-00-1088: **McCray v. Pollack**. Petition of appellant for further review overruled on June 12, 2002.

No. A-00-1105: **Ramer v. Ramer**. Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1109: **Sgambellone v. Dobrovolny**. Petition of appellant for further review overruled on June 19, 2002.

No. A-00-1111: **Neubauer v. Neubauer**. Petition of appellee for further review overruled on August 28, 2002.

No. A-00-1201: **State v. Simmons**. Petition of appellant for further review overruled on June 5, 2002.

No. A-00-1224: **Farm Bureau Ins. Co. v. Nawojski**. Petition of appellant for further review overruled on June 26, 2002.

No. A-00-1229: **State v. Leggins**. Petition of appellant for further review overruled on June 5, 2002.

No. A-00-1244: **Randolph Oldsmobile Co. v. Nichols**, 11 Neb. App. 158 (2002). Petition of appellant for further review overruled on August 28, 2002.

No. A-00-1246: **Paulsen v. Paulsen**, 11 Neb. App. 362 (2002). Petition of appellant for further review overruled on October 23, 2002.

No. A-00-1257: **Parola v. Creighton University**. Petition of appellant for further review overruled on September 18, 2002.

No. A-00-1280: **Heggemeyer v. Heggemeyer**. Petition of appellant for further review overruled on August 28, 2002.

No. S-01-008: **Herrera v. Fleming Cos.**, 10 Neb. App. 987 (2002). Petition of appellee for further review sustained on July 3, 2002.

No. A-01-072: **Hartman v. Hartman**. Petition of appellant for further review overruled on September 11, 2002.

No. A-01-095: **Classe v. Windsor Group**. Petition of appellee for further review overruled on July 10, 2002.

No. A-01-164: **Talbot v. Bellevue Fantasy's, Inc.** Petition of appellant for further review overruled on August 28, 2002.

No. A-01-237: **State v. En Maati**. Petition of appellant for further review overruled on September 25, 2002.

No. S-01-251: **Pribil v. Koinzan**, 11 Neb. App. 199 (2002). Petition of appellant for further review sustained on August 28, 2002.

No. A-01-275: **Haghighi v. State**. Petition of appellant for further review overruled on October 23, 2002.

No. A-01-332: **W.F.M., Inc. v. Cherry Cty**. Petition of appellant for further review overruled on August 28, 2002.

No. A-01-365: **Duda v. American Family Ins. Group**. Petition of appellant for further review overruled on November 27, 2002; cross-petition for further review also overruled on November 27, 2002.

No. A-01-378: **Shaffer v. Shaffer**. Petition of appellee for further review overruled on August 28, 2002.

No. A-01-380: **State v. Devitt**. Petition of appellant for further review overruled on June 12, 2002.

No. S-01-440: **State v. West**. Petition of appellant for further review sustained on July 10, 2002.

No. A-01-462: **State v. Morgan**. Petition of appellant for further review overruled on August 28, 2002.

No. A-01-501: **State v. Colangelo**. Petition of appellant for further review overruled on June 11, 2002.

No. A-01-539: **Luedtke v. Ripa**. Petition of appellant for further review overruled on November 14, 2002.

Nos. A-01-554, A-01-555: **Saunders Cty. v. Metropolitan Utilities Dist.-A**, 11 Neb. App. 138 (2002). Petition of appellant for further review overruled on July 17, 2002.

No. A-01-562: **Tighe v. Cedar Lawn, Inc.**, 11 Neb. App. 250 (2002). Petition of appellant for further review overruled on August 28, 2002.

No. A-01-593: **In re Interest of Andrew M. et al.**, 11 Neb. App. 80 (2002). Petition of appellant for further review overruled on July 17, 2002.

No. A-01-639: **Borowiak v. Neafus Land & Cattle Co.** Petition of appellant for further review overruled on November 14, 2002.

No. A-01-656: **Dyer v. Dyer**. Petition of appellant for further review overruled on June 19, 2002.

No. A-01-671: **State v. Robinson**, 10 Neb. App. 848 (2002). Petition of appellant for further review overruled on June 12, 2002.

No. A-01-676: **Carlson v. Skradski**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-693: **Crouse v. Crouse**. Petition of appellant for further review overruled on September 11, 2002.

No. S-01-755: **State v. March**. Petition of appellant for further review sustained on November 20, 2002.

No. S-01-777: **State v. Putz**, 11 Neb. App. 332 (2002). Petition of appellant for further review sustained on October 23, 2002.

No. A-01-803: **State v. Caldwell**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-807: **Brozek v. Herd**. Petition of appellant for further review overruled on October 30, 2002.

No. A-01-808: **Hamm v. Champion Manuf. Homes**, 11 Neb. App. 183 (2002). Petition of appellant for further review overruled on July 17, 2002.

No. S-01-810: **Lewis v. Reiter**. Petition of appellant for further review sustained on June 5, 2002.

No. S-01-810: **Lewis v. Reiter**. Petition of appellant for further review dismissed on September 25, 2002, as having been improvidently granted.

No. A-01-849: **State v. Lopez**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-863: **Lacivita v. Drivers Mgmt., Inc**. Petition of appellant for further review overruled on June 19, 2002.

No. A-01-872: **State v. Dvorak**. Petition of appellee for further review overruled on August 28, 2002.

No. A-01-880: **In re Interest of Brettany M. et al.**, 11 Neb. App. 104 (2002). Petition of appellant for further review overruled on June 26, 2002.

No. A-01-887: **State v. Bockman**, 11 Neb. App. 273 (2002). Petition of appellant for further review overruled on August 28, 2002.

No. A-01-898: **Brown v. Marion**. Petition of appellant for further review overruled on June 5, 2002.

No. A-01-900: **State v. Robles**. Petition of appellant for further review dismissed on September 11, 2002, for lack of jurisdiction.

No. A-01-902: **State v. SapaNajin**, 11 Neb. App. 190 (2002). Petition of appellant for further review overruled on August 29, 2002.

No. A-01-907: **Wilson v. Wilson**. Petition of appellant for further review overruled on June 5, 2002.

No. A-01-932: **Wolfenbarger v. Buchanan**. Petition of appellant for further review overruled on November 20, 2002.

No. A-01-958: **In re Interest of Nicholas C.** Petition of appellant for further review overruled on October 9, 2002.

No. A-01-958: **In re Interest of Nicholas C.** Petition of appellee Robert C. for further review overruled on October 9, 2002.

No. S-01-1004: **In re Interest of Merissa F.** Petition of appellant for further review sustained on October 9, 2002.

No. A-01-1006: **State v. Shirley.** Petition of appellant for further review overruled on July 3, 2002.

Nos. A-01-1021, A-01-1022: **In re Interest of Michael C.** Petition of appellant for further review overruled on September 11, 2002.

Nos. A-01-1024, A-01-1050: **State v. Miller.** Petition of appellant for further review dismissed on September 11, 2002, for lack of jurisdiction.

No. A-01-1071: **State v. Alcorta.** Petition of appellant for further review overruled on October 9, 2002.

No. A-01-1077: **Ignacio v. ConAgra Beef Co.** Petition of appellee for further review overruled on August 29, 2002.

No. S-01-1083: **Zavala v. ConAgra Beef Co.,** 11 Neb. App. 235 (2002). Petition of appellee for further review sustained on August 29, 2002.

No. A-01-1086: **State v. Garcia.** Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1093: **State v. Wilger.** Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1104: **Keeler v. Whitehead Oil Co.** Petition of appellant for further review overruled on July 17, 2002.

No. A-01-1108: **State v. Miller.** Petition of appellant for further review overruled on September 18, 2002.

No. A-01-1120: **Coffey v. Waldinger Corp.,** 11 Neb. App. 293 (2002). Petition of appellant for further review overruled on September 11, 2002.

No. A-01-1121: **Trouba v. Cather & Sons Constr. Co.** Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1124: **Jones v. IBP, inc.** Petition of appellant for further review overruled on September 11, 2002.

No. A-01-1128: **Nebraska Furniture Mart v. Duffy.** Petitions of appellant for further review overruled on June 19, 2002.

No. A-01-1151: **State v. Henry.** Petition of appellee for further review overruled on August 29, 2002.

No. A-01-1153: **State v. Motschenbacher**. Petition of appellee for further review overruled on July 3, 2002.

No. A-01-1180: **In re Interest of Zachary H.** Petition of appellant for further review overruled on September 18, 2002.

No. A-01-1191: **State v. Foreman**. Petition of appellant for further review overruled on October 9, 2002.

No. A-01-1208: **State v. Parks**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1211: **State v. Johnson**. Petition of appellant for further review dismissed on October 9, 2002. See rule 2F(1).

No. A-01-1212: **State v. Mata**. Petition of appellant for further review overruled on September 16, 2002.

No. A-01-1218: **State v. Leibel**. Petition of appellant for further review overruled on October 23, 2002.

No. A-01-1230: **State v. Janis**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1274: **State v. O'Dell**. Petition of appellee for further review overruled on November 14, 2002.

No. A-01-1280: **State v. Borders**. Petition of pro se appellant for further review overruled on June 5, 2002.

Nos. A-01-1287, A-01-1295, A-01-1296: **In re Interest of Marcus W. et al.**, 11 Neb. App. 313 (2002). Petition of appellant for further review overruled on November 27, 2002.

No. A-01-1322: **In re Interest of Marie S.** Petition of appellant for further review overruled on June 19, 2002.

No. A-01-1327: **Buhrman v. Jayhawk Boxes, Inc.** Petition of appellant for further review overruled on September 18, 2002.

Nos. A-01-1333, A-01-1334: **In re Interest of Emilio L.** Petition of appellant for further review overruled on September 11, 2002.

No. A-01-1338: **State v. Chapman**. Petition of appellant for further review overruled on July 3, 2002.

No. A-01-1375: **State v. Martinez**. Petition of appellant for further review overruled on November 27, 2002.

No. A-01-1390: **State v. Steele**. Petition of appellant for further review overruled on August 29, 2002.

No. A-01-1405: **State v. Wahrman**, 11 Neb. App. 101 (2002). Petition of appellant for further review overruled on July 3, 2002.

No. A-01-1409: **Plymate v. Chapin**. Petition of appellant for further review overruled on July 3, 2002.

No. A-02-002: **State v. Pofahl**. Petition of appellant for further review overruled on June 5, 2002.

No. A-02-003: **State v. Anway**. Petition of appellant for further review overruled on July 17, 2002.

No. A-02-018: **Abdullah v. State**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-020: **State v. Allen**. Petition of appellant for further review overruled on July 3, 2002.

No. A-02-030: **State v. Cheshek**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-040: **State v. Metzger**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-078: **State v. Kellogg**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-080: **Johnson v. Martin**. Petition of appellant for further review overruled on June 26, 2002.

No. A-02-125: **State v. Stovall**. Petition of appellant for further review overruled on June 19, 2002.

No. A-02-137: **State v. Durst**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-205: **State v. Hopp**. Petition of appellant for further review overruled on October 23, 2002.

Nos. A-02-214, A-02-215: **State v. Warburton**. Petition of appellant for further review overruled on October 15, 2002. See rule 2F(1).

No. A-02-220: **Matthews v. Stockton**. Petition of appellant for further review overruled on July 3, 2002.

No. A-02-240: **State v. Hovendick**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-247: **State v. Chamberlain**. Petition of appellant for further review overruled on November 12, 2002, as untimely filed.

No. A-02-248: **State v. Chamberlain**. Petition of appellant for further review overruled on November 12, 2002, as untimely filed.

No. A-02-262: **State v. Billups**. Petition of appellant for further review overruled on October 15, 2002. See rule 2F(1).

No. A-02-275: **State v Heil**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-300: **State v. Kinsey**. Petition of appellant for further review overruled on November 27, 2002.

Nos. A-02-301, A-02-302: **State v. Heidelberg**. Petition of appellant for further review overruled on September 25, 2002.

No. A-02-313: **State v. Marshall**. Petition of appellant for further review overruled on October 9, 2002.

No. A-02-328: **State v. Hiatt**. Petition of appellant for further review overruled on November 14, 2002.

No. A-02-482: **State v. Gratto**. Petition of appellant for further review overruled on November 27, 2002.

No. A-02-501: **Martin v. Cameron**. Petition of appellant for further review overruled on June 17, 2002.

No. A-02-501: **Martin v. Cameron**. Petition of appellant for further review overruled on August 29, 2002.

No. A-02-505: **Martin v. Nesbitt**. Petition of appellant for further review overruled on June 17, 2002.

No. A-02-505: **Martin v. Nesbitt**. Petition of appellant for further review overruled on July 17, 2002.

No. A-02-506: **Martin v. Bagley**. Petition of appellant for further review overruled on June 17, 2002.

No. A-02-506: **Martin v. Bagley**. Petition of appellant for further review overruled on July 17, 2002.

No. A-02-613: **Martin v. Nebraska Dept. of Corr. Servs.** Petition of appellant for further review overruled on October 30, 2002.

No. A-02-768: **State v. Al-Sayagh**. Petition of appellant for further review overruled on October 9, 2002.

No. A-02-770: **State v. Al-Sayagh**. Petition of appellant for further review overruled on October 9, 2002.

No. S-02-944: **State v. Witmer**. Petition of appellant for further review sustained on October 30, 2002.

No. S-02-953: **River City Life Center v. Douglas Cty. Bd. of Equal**. Petition of appellant for further review sustained on November 20, 2002.

No. A-02-1041: **Ash v. Hehner**. Petition of appellant for further review overruled on November 14, 2002.

SANDRA J. PAWLUSIAK, APPELLEE, V.
KEITH A. PAWLUSIAK, APPELLANT.
645 N.W.2d 773

Filed June 7, 2002. No. S-00-1114.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Property Division: Appeal and Error.** The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion.
3. **Evidence: Appeal and Error.** One may not introduce evidence and then maintain that it was error for the court to consider the evidence introduced by that party.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

John F. Eker III for appellant.

Judith D. Retelsdorf for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this appeal, Keith A. Pawlusiak asks us to review two findings of the district court for Douglas County arising from the dissolution of his marriage with Sandra J. Pawlusiak. The first issue is whether the $30,000 annuity payment made as part of a workers' compensation settlement award to Keith constitutes income for purposes of calculating child support. The annuity was payable at the end of 5 years. The district court divided the $30,000 evenly over 5 years and increased Keith's monthly

income by $500 per month. The second issue is whether the district court abused its discretion in deducting real estate sales expenses from the value of the marital home.

BACKGROUND

On March 15, 2000, the district court entered a decree dissolving the 18-year marriage of Sandra and Keith. The district court did not make any findings related to the marital estate or any other financial matters, but, rather, ordered that a hearing on these matters would be held at a later date. This hearing was subsequently held on August 10. At the hearing, no testimony was received but a number of exhibits were offered and received pertaining to the parties' assets and liabilities.

Two of these exhibits related to Keith's workers' compensation settlement award. In 1986, Keith was involved in an accident arising out of and in the course of his employment. As a result, Keith filed a petition with the Nebraska Workers' Compensation Court.

On April 10, 1995, the compensation court approved a settlement between Keith and his employer and the employer's insurance company. The agreement provided that in exchange for a release of all liability arising from the 1986 accident, the employer and insurance company would (1) pay Keith an initial cash payment of $140,000, (2) pay outstanding medical expenses, (3) establish a medical trust fund to pay future medical expenses, and (4) purchase an annuity for Keith's benefit. This annuity would pay Keith $30,000 after 5 years, $50,000 after 10 years, $75,000 after 15 years, $100,000 after 20 years, $125,000 after 25 years, $150,000 after 30 years, and $150,000 after 35 years. The initial $30,000 payment was due within 1 month of the date of the decree in this case and had been received by Keith at the time of the August 10, 2000, hearing.

At the August 10, 2000, hearing, Keith offered two exhibits relating to the value of the marital home. One of the exhibits was an appraisal report from a certified residential appraiser. Both exhibits deducted "sales charges" of approximately 8 percent to arrive at the present equity. Sandra offered no evidence disputing the exhibits offered by Keith.

In calculating the child support, the district court found that Keith received monthly income of $712 in the form of Social Security disability payments. Addressing the $30,000 annuity payment, the court found that the annuity payment represented "reimbursement of post-decree lost earning capacity" and concluded that the annuity constituted income under the Nebraska Child Support Guidelines. For calculation of child support, the district court divided the $30,000 evenly over 5 years and thus added $500 per month to Keith's income. When added to the Social Security payments, Keith's monthly income was determined to be $1,212 per month. The court ordered Keith to pay $409.91 in child support per month. The decree provided that when only one child remains a minor, which occurred on October 25, 2000, the child support dropped to $285.32 per month.

Regarding the marital home, the district court found that "[t]he property has a present fair market value of $84,000.00, with a mortgage balance of $69,947.69. Assuming hypothetical real estate expenses of $6,720.00, the home has a present net equity of $7,332.31." The home was awarded to Sandra, but because Sandra did not have the resources to purchase Keith's interest, Keith was awarded a lien over the home in the amount of his half of the net equity, or $3,666.15.

ASSIGNMENTS OF ERROR

Keith assigns that the district court erred in (1) finding that the $30,000 annuity payment was income for purposes of calculating child support and (2) deducting "hypothetical real estate expenses" from the present fair market value of the home when calculating Keith and Sandra's equity in the home.

STANDARD OF REVIEW

[1] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion. *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001).

[2] The division of property is a matter entrusted to the discretion of the trial judge, which will be reviewed de novo on the record and will be affirmed in the absence of an abuse of discretion. *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001).

ANALYSIS

ANNUITY

As previously noted, the 5-year, $30,000 annuity payment was received in full prior to the district court's decision in this case. The district court found that this $30,000, divided evenly over 5 years, was an income item of $500 per month. The court factored $500 per month into Keith's income to arrive at his child support obligation. The district court stated that it was relying on *Parde v. Parde*, 258 Neb. 101, 602 N.W.2d 657 (1999), and further found that the $30,000 contemplated pain and suffering, disfigurement, disability, or the loss of postdivorce earning capacity. In *Parde*, we granted further review to clarify a conflict in the law regarding the extent to which an injured party's personal injury or workers' compensation award should be included in a marital estate. See *id.* We held that

> compensation for an injury that a spouse has or will receive for pain, suffering, disfigurement, disability, or loss of postdivorce earning capacity should not equitably be included in the marital estate. On the other hand, compensation for past wages, medical expenses, and other items that compensate for the diminution of the marital estate should equitably be included in the marital estate as they properly replace losses of property created by the marital partnership.

Id. at 109-10, 602 N.W.2d at 663. Here, the trial court properly considered *Parde* in determining whether the annuity payment should be included as part of the marital estate or excluded as indemnity for loss of postdivorce earning capacity. The court incorrectly believed, however, that the annuity payment could represent compensation for pain and suffering. The discussion of pain and suffering in *Parde* was included because the analytical approach was intended to apply to claims for both personal injury and workers' compensation.

Under the Nebraska Workers' Compensation Act, benefits payable to or on behalf of an employee may take the form of payment for medical, surgical, and hospital services, Neb. Rev. Stat. § 48-120 (Reissue 1993); indemnity benefits, Neb. Rev. Stat. § 48-121 (Reissue 1993); or death benefits, Neb. Rev. Stat. § 48-122 (Reissue 1993). Pain and suffering as a separate element

of damages is not recoverable in a workers' compensation case. *Turney v. Werner Enters.*, 260 Neb. 440, 618 N.W.2d 437 (2000).

The $30,000 annuity payment was made to Keith as a result of a workers' compensation settlement award. In addition to the annuity payments made at 5-year intervals, the settlement award separately provided for the payment of past and future medical expenses. Thus, the annuity payment could have been intended only to indemnify Keith for loss of future earning capacity. We conclude that the $30,000 annuity payment, therefore, was in lieu of income.

In our de novo review, we determine that the district court did not abuse its discretion in considering the $30,000 annuity payment to be income for purposes of determining Keith's child support obligation under the guidelines. See, also, *Becker v. Becker*, 6 Neb. App. 277, 573 N.W.2d 485 (1997); *Mehne v. Hess*, 4 Neb. App. 935, 553 N.W.2d 482 (1996).

Real Estate Commission

In determining that the marital home of Keith and Sandra had a present net equity of $7,332.31, the district court subtracted "hypothetical" real estate expenses of $6,720 from the marital home's present fair market value. Keith argues that these expenses should not have reduced the value of the marital home because they were not necessary or mandatory expenses.

Two exhibits received into evidence at the August 10, 2000, hearing formed the basis for the district court's calculation of the marital home's present net equity. One was a report from a certified residential real estate appraiser, which report stated that real estate sales charges in the amount of 8 percent of the marital home's present fair market value should be deducted to arrive at the home's present net equity. The other exhibit expressly deducted $6,720 of real estate sales charges from the marital home's present fair market value and listed the home's present net equity as $7,332.31. Both exhibits were offered by Keith at the hearing, and the district court accepted Keith's offer and received the exhibits into evidence without objection from any party.

[3] We have previously held that one may not introduce evidence and then maintain that it was error for the court to consider the evidence introduced by that party. *Lincoln Co. Sheriff's Emp.*

Assn. v. Co. of Lincoln, 216 Neb. 274, 343 N.W.2d 735 (1984). For that reason, Keith's assignment of error is without merit.

CONCLUSION

We determine that the district court did not abuse its discretion in including as income in determining Keith's child support obligation the $30,000 annuity payment received from the workers' compensation settlement.

As to the marital home, the only evidence adduced as to the value of the marital home was produced by Keith. Both of Keith's appraisals had deductions for sales charges. In our de novo review, we therefore conclude that Keith's assignment of error as to the district court's determination of the value of the marital home is without merit.

AFFIRMED.

THOMAS BOWLEY, APPELLANT AND CROSS-APPELLEE, V. W.S.A., INC., A MINNESOTA CORPORATION, AND THOMAS ADAMSON, AN INDIVIDUAL, APPELLEES AND CROSS-APPELLANTS.

645 N.W.2d 512

Filed June 7, 2002. No. S-01-097.

1. **Motions for New Trial: Appeal and Error.** A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion.
2. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
3. **Libel and Slander: Damages: Proof.** Under Neb. Rev. Stat. § 25-840.01 (Reissue 1995), special damages in a libel action are damages that the plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication.
4. **Judgments: Directed Verdict.** When the record contains evidence about which reasonable minds could differ and when the record further sustains a finding for the plaintiff, the record precludes the entry of a directed verdict against the plaintiff.
5. **Directed Verdict: Appeal and Error.** The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence.
6. **New Trial: Verdicts: Damages.** Under Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2000), a verdict shall be vacated and a new trial granted on the application of the party

aggrieved where excessive damages, appearing to have been given under the influence of passion or prejudice, have been awarded.

7. **New Trial: Appeal and Error.** In reviewing a district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded.

Robert E. O'Connor, Jr., for appellant.

Thomas A. Grennan and Donald P. Dworak, of Gross & Welch, P.C., for appellees.

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

CONNOLLY, J.

In this libel action, Thomas Bowley appeals from the district court's order granting a motion for a new trial. The appellees, W.S.A., Inc., and Thomas Adamson, cross-appeal. Adamson sent a letter to Bowley's employer, and Bowley was later terminated from his employment. W.S.A. and Adamson's motion for a directed verdict was overruled, and the jury found for Bowley and awarded damages in the amount of $150,000.

The court found that the jury awarded excessive damages and sustained W.S.A. and Adamson's motion for a new trial. Bowley contends that there was sufficient evidence to support the jury's award of damages. On cross-appeal, W.S.A. and Adamson contend that Bowley failed to prove that he was terminated because of the letter and that he failed to plead and prove special damages. Thus, W.S.A. and Adamson contend that the court erred in failing to grant their motion for a directed verdict.

We reverse, and remand because sufficient evidence was presented that showed the jury verdict was not a result of passion or prejudice.

BACKGROUND

Bowley filed a petition alleging a cause of action for libel per se and libel per quod. He alleged that after Adamson sent a letter to Bowley's employer, he was terminated from his employment and had difficulty obtaining new employment. He alleged that as a result, he suffered general and special damages.

At trial, Bowley testified that he was employed as a general manager for Harmon Glass (Harmon) from 1989 until September 1993. In September 1993, he was paid about $36,000, had various benefits, and received raises for performance. He did not have an employment agreement with Harmon and did not make any formal agreements with Harmon regarding confidentiality or trade secrets. Adamson was a chief executive officer of W.S.A., a division of a holding company that included Harmon. Thomas Hill was Bowley's direct supervisor at Harmon.

Bowley testified that in August 1993, Hill and Adamson came to the store he managed and informed him that it would be sold. The three men then met with Frank Charles Weaver II, the owner of another glass company, about selling the store to Weaver. Bowley testified that he had experienced problems with Weaver in the past. According to Bowley, Weaver complained to Bowley's supervisors when Bowley out-bid Weaver on contracts. Bowley had also stopped purchasing wholesale products from Weaver. According to Bowley, he did not think Weaver would offer him a job and he did not want to work for Weaver. He testified that the meeting did not lead to an agreement regarding the sale. He also stated that Adamson became upset because Weaver would not sign a purchase contract and that Adamson slammed his briefcase shut in disgust. Bowley said that after the meeting, he provided Weaver with information that was requested about the sale.

Bowley testified that after the meeting, he suggested that employees of Harmon not be immediately told about the sale. He said he did not tell any of the employees about the sale, but that some employees did overhear another person discuss it. Eventually, several employees found out about the possible sale.

Bowley testified that he had previously been offered a job with Harding Glass (Harding), a competitor of Harmon. The record shows that Hill knew that Bowley had been solicited by Harding and had no complaints with Bowley's seeking a job from Harding. Bowley contacted Harding about a position and met with Danny Grim, a vice president of Harding. During the interview process, Bowley took Grim and Bob Hardwick, another vice president of Harding, through the Harmon building and discussed the possibility of Harding's leasing the building.

He said that he did so with the permission of an interim manager at Harmon. He also told Grim and Hardwick about the negotiations between Harmon and Weaver and testified that he had cleared that information with Hill.

On September 1, 1993, Grim sent Bowley a letter offering him a job with Harding. The letter described the job position as "Regional Manager of Retail operations in Omaha" and listed a base salary of $37,700, a base bonus of $9,400, and a car allowance of $4,080. The letter listed benefits of vacation, profit sharing, 401K, and disability insurance. Bowley stated that his understanding was that he would oversee all of the retail stores in Omaha. Bowley then told Harmon that he was leaving to accept the offer at Harding. At the request of Harmon, he continued to work there for 2 more weeks.

Bowley started work at Harding on September 13, 1993. He stated that he met with Frederick W. Pierce III, the president of Harding. According to Bowley, Pierce told him that a shop known as the South 90th Street location was operating at an 8-percent profit margin and would be closed if it remained at 8 percent. Bowley said that Pierce told him that he was to work on that shop first and could do whatever it took to get the numbers up. Pierce did not discuss with him any change in his job title or job duties. He testified that while he worked for Harding, he was always paid as a regional manager.

The next night, Hill, Bowley's former supervisor at Harmon, called him and warned him that a letter was going to be sent to someone at Harding and that it was not going to paint him in a good light. On September 15, 1993, Pierce faxed him a copy of a letter that had been sent to him. The letter was from Adamson and was addressed to Bowley, with copies sent to Hill and Pierce. The letter stated:

> Dear Tom:
>
> I am very disappointed.
>
> A few weeks ago you asked me to trust you, which I did without hesitation. Now that trust has been broken several times by your continual attempts to undermine our efforts to sell/transition the Omaha operation.
>
> Perhaps you were mistreated in the past. I do not know. You never said you were.

> Perhaps you see this as a way to impress your new employer. Again, I do not know. I am not familiar with their method of operation or what they think of you.
>
> I do know that trust is an essential part of any business relationship, whether it is with a coworker, investor, supplier or customer. Are you a person that can be trusted, Tom? You should give it some thought—your future will depend on it.

Bowley testified that Pierce and Hardwick called him to discuss the letter and that he was on the telephone with them for 30 to 45 minutes discussing the letter. He discussed the letter again with both men about 4 weeks later. Bowley sent several letters to Adamson seeking a retraction and received no response.

According to Bowley, immediately after his employers received the letter, his duties were limited. He was told to oversee only a single shop and was told not to engage in any new construction projects or contact insurance companies. He stated that there was a change in the way he was treated after the letter was received and that he was excluded from meetings and lunches.

Bowley testified that Grim claimed that there were several issues that concerned him other than the letter. First, there was an issue regarding the use of scratch pads instead of inventory sheets. According to Bowley, he never used scratch pads, but had a problem with some of the employees doing so. Bowley stated that scratch pads were also used at all of the Omaha locations. Second, there was money missing from the cash drawer. Bowley testified that he accounted for it by showing Grim that there were two $100 bills placed underneath the drawer. Third, Grim questioned if sales had been raised. Bowley testified that he did a good job at Harding; that he increased sales by 25 percent; and that by organizing inventory, he realized an inventory gain of $5,000 for the month of November. Bowley also stated that he could not bring in new business because his duties had been limited and he was unable to call on customers. The record contains a letter sent by Bowley to Grim suggesting ways Harding's business could be improved. Bowley concedes that Grim did not mention the letter sent by Adamson at the termination meeting.

Bowley testified that after he was terminated from his employment at Harding, he was unable to find employment with a glass company, either as a manager or in sales. He first applied to the

top 10 or 12 stores and then applied to every glass company in the telephone book, which was about 50 shops. He never obtained employment as a manager, but did find work as a journeyman glazer. He stated that his current rate of pay is $15.50 per hour and that he has health insurance, but does not have paid vacations, paid holidays, a car allowance, or an employer-contributing pension plan.

In a motion in limine before trial, W.S.A. and Adamson sought to exclude evidence consisting of Bowley's tax returns and W-2 forms for the years 1993 to 2000. The documents were not allowed into evidence during trial. W.S.A. and Adamson later moved to strike Bowley's testimony regarding his income. The motion was overruled.

After Bowley testified, he moved to amend his pleadings to conform to the proof. The motion was sustained. Bowley presented no other evidence, and W.S.A. and Adamson moved for a directed verdict. The motion was denied.

Adamson testified that he had discussed confidentiality regarding the sale with Bowley and that it had been Bowley's suggestion to keep the sale secret. Adamson was concerned that his competitors would learn about the sale and that Harmon would lose customers, employees, and its telephone number. He stated that he sent the letter to Harding after Weaver had contacted him complaining that Harding was encouraging Bowley to interfere with the sale to Weaver. He said he sent a copy to Pierce, Harding's president, because he believed that Bowley's actions were motivated by Harding. Adamson conceded that Bowley did not have an employment or confidentiality contract with Harmon.

Weaver testified that he had expressed to Adamson the importance about confidentiality of the sale. He stated that confidentiality was discussed when he met with Bowley, Hill, and Adamson and stated that Bowley did not provide him with requested information after the meeting. He said that he would not have hired Bowley.

Weaver stated that he contacted Adamson about Bowley when he learned that two of Weaver's employees were going to work at Harding. He was "very hot" and told Adamson that his people were getting stolen.

Pierce testified that the letter had nothing to do with Bowley's termination. Hardwick testified that the letter had a positive effect on him and made him think that Harding may have picked up a good man and that Adamson was upset that he had lost him. Both stated that they generally were not involved in the termination of employees.

Grim testified that when he first hired Bowley, he was looking for someone to oversee the three Omaha stores. He initially gave Bowley one store to run and told Bowley that if he did well there, he would increase Bowley's level of responsibility. According to Grim, Bowley agreed to this. He stated that Bowley was paid a regular manager's pay.

Grim said that he learned that Bowley was using scratch pads instead of formal invoices and that he directed Bowley to use invoice sheets. He later learned that invoice forms were still not being used properly after he directed Bowley to do so. An employee of Harding also testified that Bowley did not use invoices properly. Grim stated that he asked Bowley on one occasion to explain how he was making the store profitable and that Bowley gave him no answer and instead complained that Harding had a bad reputation and that the employees were incompetent. Grim also stated that the cash register was long on money and that he suspected that some invoices were not being written up. Thus, he was concerned that the store was not accounting for cash properly. Grim stated that he terminated Bowley's employment from Harding because Bowley failed to follow company procedures and that the letter had nothing to do with it. On cross-examination, he admitted that Bowley had reported to him that employees were failing to use invoices properly and had expressed concerns that some employees might be stealing money from the company.

At the end of the testimony, W.S.A. and Adamson renewed their motion for a directed verdict and it was denied. The jury returned a verdict for Bowley and awarded damages in the amount of $150,000. W.S.A. and Adamson moved to set aside the verdict and moved for a new trial, arguing that there was no evidence that the letter caused Harding to terminate Bowley's employment and that the verdict was excessive. The district

court granted the motion for a new trial. Bowley appeals, and W.S.A. and Adamson cross-appeal.

ASSIGNMENTS OF ERROR

Bowley, rephrased, assigns that the district court erred in sustaining the motion for a new trial. On cross-appeal, rephrased, W.S.A. and Adamson assign that the district court erred in overruling their (1) motion for a directed verdict and (2) motion to strike testimony regarding Bowley's income.

STANDARD OF REVIEW

[1] A motion for new trial is addressed to the discretion of the trial court, whose decision will be upheld in the absence of an abuse of that discretion. *Paulk v. Central Lab. Assocs.*, 262 Neb. 838, 636 N.W.2d 170 (2001); *Maxwell v. Montey*, 262 Neb. 160, 631 N.W.2d 455 (2001).

[2] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001).

ANALYSIS

Motion for Directed Verdict

On cross-appeal, W.S.A. and Adamson contend that the court should have sustained their motion for a directed verdict because Bowley failed to prove that the letter caused special damages. W.S.A. and Adamson also contend that Bowley failed to plead and prove special damages.

[3] Special damages in a libel action are damages that the "plaintiff alleges and proves were suffered in respect to his or her property, business, trade, profession, or occupation as the direct and proximate result of the defendant's publication." Neb. Rev. Stat. § 25-840.01 (Reissue 1995).

[4] When the record contains evidence about which reasonable minds could differ and when the record further sustains a finding for the plaintiff, the record precludes the entry of a directed verdict against the plaintiff. *Rod Rehm, P.C. v. Tamarack Amer.*, 261 Neb. 520, 623 N.W.2d 690 (2001).

Here, Bowley alleged that after Adamson sent a letter to Harding, he was terminated from his employment and had difficulty obtaining new employment. He alleged that as a result, he suffered general and special damages. At trial, Bowley successfully moved to amend his petition to conform to the proof. Under these facts, we determine that he pled special damages.

[5] At trial, Bowley testified that he was treated differently immediately after his employers received the letter. Bowley also testified that he had difficulty in finding employment as a manager and that he earned less in his new employment. Bowley's duties were reduced, and he was excluded from meetings and lunches. His testimony contradicted evidence that Harding terminated his employment for reasons other than the letter. For example, Bowley contradicted Grim's testimony that Bowley improperly used invoice forms, that he improperly accounted for money, and that he failed to increase sales. Although W.S.A. and Adamson presented evidence that directly contradicted Bowley's testimony, this court does not reweigh the evidence. Instead, the party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence. See *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). The court concluded that the issue of liability was properly a question of fact for the jury. We agree. We determine that when all reasonable inferences are afforded to Bowley's case, the court was correct in overruling W.S.A. and Adamson's motion for a directed verdict.

Motion to Strike Testimony Regarding Income

W.S.A. and Adamson next contend that Bowley's testimony about his income was irrelevant and highly prejudicial because there was a lack of evidence that the letter caused any loss of income. Thus, W.S.A. and Adamson contend that the district court erred in failing to strike the testimony.

We have already determined that there was evidence that the letter caused Bowley to lose income. Evidence of Bowley's earnings before and after his employment was terminated was relevant to determining the amount of damages he incurred and was not unduly prejudicial. We determine that this assignment of error is without merit.

MOTION FOR NEW TRIAL

Bowley contends that the jury's verdict was supported by the evidence and that the court erred in granting W.S.A. and Adamson's motion for a new trial.

[6,7] Under Neb. Rev. Stat. § 25-1142 (Cum. Supp. 2000), a verdict "shall be vacated and a new trial granted on the application of the party aggrieved for any of the following causes affecting materially the substantial rights of such party: . . . (4) excessive damages, appearing to have been given under the influence of passion or prejudice." In reviewing the district court's order granting a new trial, the decision of the trial court will be upheld in the absence of an abuse of discretion. *Holmes v. Crossroads Joint Venture*, 262 Neb. 98, 629 N.W.2d 511 (2001).

Here, the jury was instructed that Bowley could recover both general and special damages, including loss of income for a reasonable period after termination. Bowley testified that he was unable to secure employment as a manager or in sales. At the time of trial, almost 7 years after Bowley was terminated from Harding, he was working in a position as a glazer, earning $15.50 per hour. The evidence showed that at Harding, Bowley earned $37,700 per year, along with a base bonus of $9,400 and a car allowance of $4,080. He also testified that he no longer had certain benefits such as paid vacation or a pension plan. When the income differential, lost bonus, and lost car allowance are considered over a period of 6 years 11 months—the amount of time between when Bowley's employment was terminated and trial—a jury could reasonably conclude that Bowley's lost income exceeded $130,000. When the additional value of benefits are included, an award of $150,000 is supported by the evidence. Under these circumstances, the jury's verdict does not appear to have been given under the influence of passion or prejudice. We conclude that the court was incorrect when it determined that there was insufficient evidence to support the jury verdict. Accordingly, the court abused its discretion when it sustained W.S.A. and Adamson's motion for a new trial.

CONCLUSION

We conclude that the district court was correct in overruling W.S.A. and Adamson's motion for a directed verdict and in

refusing to strike testimony regarding Bowley's income. We determine, however, that the district court abused its discretion when it sustained W.S.A. and Adamson's motion for a new trial. Accordingly, we reverse, and remand with instructions that judgment be entered in this cause.

REVERSED AND REMANDED.

GARY L. REICHERT, AN INDIVIDUAL, AND FRED REICHERT, JR., AN INDIVIDUAL, ALSO DOING BUSINESS AS MONUMENT JEWELERS AND REICHERT JEWELERS, INC., APPELLEES, V. RUBLOFF HAMMOND, L.L.C., APPELLANT.

645 N.W.2d 519

Filed June 7, 2002. No. S-01-128.

1. **Contracts: Appeal and Error.** The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below.
2. **Injunction: Equity: Appeal and Error.** An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Contracts: Intent.** When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract.
4. **Contracts: Parties.** The implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract.
5. **Breach of Contract: Words and Phrases.** A breach is a nonperformance of a duty.
6. **Breach of Contract: Leases.** When a lessor covenants in a lease for retail space to forebear from leasing space or allowing space to be leased to a competing store, the lessor breaches the covenant when it executes a contract to lease space to a competitor.
7. **Contracts: Intent.** A contract will not be construed to limit the remedial rights of the parties unless that intention is clearly expressed.
8. **Contracts: Breach of Contract: Stipulations.** Parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach.
9. **Contracts: Breach of Contract: Stipulations: Damages.** Contracting parties have the right to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances.

10. **Breach of Contract: Damages.** Agreed-upon damages can be so small as to be stricken as unconscionable in light of a breach of contract.
11. **Contracts: Liability: Damages.** When the parties to a contract are experienced business people, the damages are economic, and the parties had fair opportunity to consider the agreement, courts rarely find that liability limitations are unconscionable.
12. **Contracts: Appeal and Error.** Although a party may in retrospect be dissatisfied with a bargained-for provision, an appellate court will not rewrite a contract to provide terms contrary to those which are expressed.
13. **Contracts: Breach of Contract: Intent.** A court may not grant a permanent injunction where the parties clearly intend that the exclusive remedy in the event of a breach is the termination of the contract or a reduction in rents.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Reversed.

John F. Simmons, of Simmons, Olsen, Ediger, Selzer, Ferguson & Carney, P.C., for appellant.

Michael J. Javoronok, of Michael J. Javoronok Law Firm, for appellees.

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

CONNOLLY, J.

This is an appeal from a permanent injunction imposed by the district court against appellant, Rubloff Hammond, L.L.C. (Hammond), from leasing space to a competitor of appellees, Gary L. Reichert and Fred Reichert, Jr. (Reicherts). The court found that Hammond, the lessor, had intended that the Reicherts would have the exclusive right to operate fine jewelry stores in Monument Mall in Scottsbluff, Nebraska. The court further found that an " 'exclusive remedy' " provision in a commercial lease did not provide an adequate remedy at law or prevent it from giving injunctive relief. The exclusive remedy gave the Reicherts the right to terminate their lease agreement or reduce their rent by 50 percent for a specified period if Hammond breached the lease agreement.

We determine that Hammond breached the lease agreement by executing a lease with a competing store. However, because the exclusive remedy provision limited the Reicherts' rights to reduced rents or a termination of the lease agreements, the district court erred in granting the injunction.

BACKGROUND

In 1986, Fred Reichert opened Reichert Jewelers, Inc., in Monument Mall in Scottsbluff. In 1994, Fred Reichert learned that Ridco, Inc., a retail jewelry chain doing business as Riddles Jewelers (Riddles), sought to lease space in Monument Mall. In August 1994, the Reicherts reached a 4-year lease agreement with the owners for space to open a second store in Monument Mall, known as Monument Jewelers. The lease agreement was with Mid-America Realty Investments, Inc. (Mid-America), the predecessor in interest to Hammond. The minimum monthly rent over the term averaged $2,137.50 for 1,140 square feet plus 5.5 percent of gross receipts in excess of an average of $513,000. According to an affidavit from Fred Reichert, the lease was executed to prevent the owners from leasing space for a Riddles store. The Reicherts renewed their lease agreement for the Reichert Jewelers store space in 1997 for a term of 2 years, which expired in August 1999. The minimum monthly rent was $1,162.33 plus 5.5 percent of gross receipts in excess of $275,000.

Mid-America later sold its ownership of the mall to Hammond. Sometime in 1999, the mall manager for Hammond informed Fred Reichert that Ridco had again sought to lease space in Monument Mall for a Riddles store. In August 1999, the Reicherts and Hammond agreed to amend both lease agreements. The amendments extended the term for both leases to 10 years, or until July 2009.

Under the amendments, the minimum monthly rent for Reichert Jewelers during the first 5 years was $1,585—an increase in monthly rent of $422.67. However, the threshold for determining the 5.5 percentage rent increased by $150,000. The minimum monthly rent for Monument Jewelers for the first 5 years increased by $109.25 from its monthly rent at the end of the 1994 lease to $2,294.25. The threshold for determining its percentage rent decreased by about $23,800 compared to the final year under its 1994 lease. The combined changes increased the thresholds for both of the Reicherts' stores by approximately $126,200, from a total threshold of $799,400 to approximately $925,600.

Both amendments to the lease agreements contained the following provision:

> So long as Tenant is open and operating its business as provided for in the Lease . . . and is not otherwise in default under the Lease . . . then Landlord covenants and agrees that during the period commencing on August 1, 1999 and expiring on July 31, 2004, no space in the Shopping Center will be leased or allowed to be leased, other then [sic] Tenant's operation, for the primary business of the operation of a jewelry store selling fine jewelry. The foregoing restriction shall not apply to (i) "Anchor Tenants" . . . (ii) any tenant, its successor, assign or replacement, open and operating in the Shopping Center as of August 1, 1999 . . . .
>
> Landlord and Tenant acknowledge that in the event of a breach of this restriction, Tenant shall give Landlord written notice of such breach and Landlord shall have thirty (30) days from the date of said notice (or such longer period as may be reasonably required if Landlord is diligently attempting to remedy same) to remedy same. If Landlord fails to remedy such breach . . . Tenant shall have the rights set forth in the next paragraph as its sole and exclusive remedy because of such breach. . . .
>
> . . . Tenant shall have, as its sole and exclusive remedy under the Lease, the right to either (i) decrease annual fixed minimum rent by 50% during the period such store . . . is open and operating . . . or (ii) terminate the Lease . . . . If Tenant elects (i) above, then Tenant shall resume paying full fixed minimum rent on the date such Competing Store ceases violating the restriction. If such Competing Store continues to violate the restriction for 270 days after the date said Competing Store opened for business, then Tenant shall have the further right to terminate the Lease . . . no later than 290 days after the date the Competing Store opened for business . . . .

On September 15, 2000, Hammond executed a lease agreement with Ridco to lease space for a Riddles store. Three days later, the Reicherts filed a petition for declaratory judgment and a permanent injunction against Hammond. In its answer, Hammond alleged that the Reicherts were limited to the exclusive remedy provision in the lease agreements.

At trial, the Reicherts adduced evidence to show that Ridco had received a more favorable rent arrangement than the Reicherts, both in terms of minimum rent per square foot and percentage rent. The Ridco lease agreement also contained a premises use restriction. The restriction provided that Ridco could terminate its lease agreement if one of the existing jewelry stores in the mall departed and Hammond then leased space to more than two tenants for the operation of a jewelry store. The chief financial officer for Ridco admitted in a deposition that this provision indicated to Ridco that the demographics of the area would support only two jewelry stores in the mall.

The Reicherts also presented expert testimony that the economy of Scotts Bluff County had remained flat for many years and that in such an economy, Riddles' gross receipts would have a substantial negative impact on the Reicherts' sales volume.

In its order, the court found:

• Hammond intended to give the Reicherts an exclusive right of operation for fine jewelry stores in the mall through July 2004.

• Hammond reasonably knew that this right constituted an important economic lease provision to the Reicherts.

• Even if the Reicherts chose to reduce their rent by 50 percent for 9 months, they would still pay almost $27,000 more during that period than Ridco for approximately the same store space.

• The evidence showed that there was a flat economy in the area and that Ridco's lower rent gave it an unfair competitive advantage.

• Hammond and Ridco anticipated that the addition of a Riddles store would force the closure of one of the Reicherts' stores before July 2004.

• Although parties are free to contract for a particular remedy for a breach of contract, this case was an equitable action to prevent a breach, or further breach, of the lease agreements.

The court relied upon a 1925 case for its ruling. See *Nebraska Wheat Growers Ass'n v. Norquest*, 113 Neb. 731, 204 N.W. 798 (1925) (holding that liquidated damages provision did not provide adequate remedy at law or prevent injunctive relief). The court held the reduction in rent was an inadequate remedy at law and that the Reicherts would incur irreparable damage without injunctive relief. It permanently enjoined Hammond from leasing or

allowing to be leased space for the primary purpose of operating a fine jewelry store to any mall tenant other than the Reicherts, so long as the Reicherts continued to operate their stores and were not otherwise in default, through July 31, 2004.

ASSIGNMENTS OF ERROR

Hammond assigns that the district court erred in (1) enjoining it, (2) failing to read the lease provision as part of an integrated whole, (3) determining that the leasing of space to a competing jeweler is a violation of Hammond's obligation to the Reicherts, (4) giving no effect to the exclusive remedy provision of the contract, (5) determining that the additional rights given to the Reicherts in the event of Hammond's leasing space to a competing jeweler are exclusive only if they provide adequate recourse, and (6) determining that the Reicherts did not have an adequate remedy at law even if it correctly determined that Hammond breached its agreement.

STANDARD OF REVIEW

[1] The construction of a contract is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002).

[2] An action for injunction sounds in equity. In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Village of Winslow v. Sheets*, 261 Neb. 203, 622 N.W.2d 595 (2001).

ANALYSIS

Hammond contends that it did not breach the lease agreements because the exclusive remedy provision qualifies its obligations under the lease agreements. Alternatively, Hammond argues that the court erred in failing to enforce the lease agreements of the parties as to their rights in the event of a breach.

The Reicherts contend that the court correctly determined that the exclusive remedy provision was inapplicable when an injunction is imposed to prevent a breach, or further breach, of a contract. They also contend that the court correctly determined that no adequate remedy at law existed and that, therefore, a permanent injunction should be entered against Hammond.

The first issue is whether Hammond promised, by the amendments to the lease agreements, to give the Reicherts the exclusive right to operate fine jewelry stores in the mall.

[3] When the terms of a contract are clear, a court may not resort to rules of construction, and terms are accorded their plain and ordinary meaning as an ordinary or reasonable person would understand them. In such a case, a court shall seek to ascertain the intention of the parties from the plain language of the contract. *In re Estate of Jakopovic*, 261 Neb. 248, 622 N.W.2d 651 (2001).

Hammond argues that the lease agreements must be read as a whole. Because the exclusive remedy provision gave the Reicherts the right to reduce rents or terminate the lease agreements if Hammond leased space to a competitor, Hammond argues that its promise was modified to include that contingency. We disagree.

The first sentence of the provision in the amendments to the lease agreements in question provides:

> So long as Tenant is open and operating its business as provided for in the Lease . . . and is not otherwise in default under the Lease . . . then Landlord covenants and agrees that during the period commencing on August 1, 1999 and expiring on July 31, 2004, no space in the Shopping Center will be leased or allowed to be leased, other then [sic] Tenant's operation, for the primary business of the operation of a jewelry store selling fine jewelry.

This sentence states that the right to be the exclusive operators of jewelry stores in the mall is the benefit for which the Reicherts bargained. Hammond agreed by this provision to refrain from leasing space to a competing store, or allowing space to be leased to a competing store, so long as the Reicherts were open for business and not in default until July 31, 2004.

The provision did not reserve to Hammond the right to either perform its promise or provide an alternative performance, such as liquidated damages. Rather, the right to termination of the lease agreements or reduced rents inured to the Reicherts upon Hammond's breach. Thus, the purpose of the termination provision is most reasonably construed as providing incentive for Hammond to perform its promise.

[4] In addition, the implied covenant of good faith and fair dealing exists in every contract and requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract. *Strategic Staff Mgmt. v. Roseland*, 260 Neb. 682, 619 N.W.2d 230 (2000); *Cimino v. FirsTier Bank*, 247 Neb. 797, 530 N.W.2d 606 (1995). Allowing parties to claim that they have not promised a performance because of a remedy provision for their breach would undermine this important doctrine of contract law. Parties generally bargain for performance, not nonperformance. The plain language of the contract supports the court's finding that the parties intended the lease to provide the Reicherts an exclusive right to operate a fine jewelry store.

[5,6] The second issue is whether the court correctly concluded that this was an action to prevent a breach of the exclusivity provision. A breach is a nonperformance of a duty. *Phipps v. Skyview Farms*, 259 Neb. 492, 610 N.W.2d 723 (2000). As discussed, Hammond agreed not to lease space or allow space to be leased to a competing store in the mall that operated for the primary purpose of selling fine jewelry. To "lease" is to "grant the possession and use of (land, buildings, rooms, movable property, etc.) to another in return for rent or other consideration." Black's Law Dictionary 900 (7th ed. 1999). Although the lease agreements provided Hammond with a 30-day opportunity to remedy the breach, the breach occurred when it executed a contract to lease space to Ridco for the operation of a jewelry store. The court erred in determining that this was an action to prevent a breach.

[7] As the trial court recognized, the parties stipulated to a particular remedy in the event of a breach. The court, however, relied upon *Nebraska Wheat Growers Ass'n v. Norquest*, 113 Neb. 731, 204 N.W. 798 (1925), to conclude that this provision

did not prevent the Reicherts from seeking injunctive relief. In that case, this court held that a liquidated damages clause was an inadequate remedy at law and did not preclude injunctive relief. However, the damages clause in *Nebraska Wheat Growers Ass'n* did not specify that it was the sole and exclusive remedy under the lease. A contract will not be construed to limit the remedial rights of the parties unless that intention is clearly expressed. See, *Roberts Constr. Co. v. State*, 172 Neb. 819, 824, 825, 111 N.W.2d 767, 770, 771 (1961) (holding that "extension of time" provision was not sole remedy for highway improvement contractor against State when contract "*in the absence* of a 'no-damage clause' or other provision to the contrary in the contract" (emphasis supplied)); 17A Am. Jur. 2d *Contracts* § 748 (1991).

In contrast, the remedy provision in the amendments to the lease agreements provided:

> In the event Landlord fails to proceed with all diligence to remedy such violation, then, upon the expiration of thirty (30) days from the date of Tenants notice, Tenant shall have, *as its sole and exclusive remedy under the Lease*, the right to either (i) decrease annual fixed minimum rent by 50% during the period such store . . . is open and operating . . . or (ii) terminate the Lease . . . .

(Emphasis supplied.)

[8,9] In the context of liquidated damages provisions, this court has held that "parties to a contract may override the application of the judicial remedy for breach of a contract by stipulating, in advance, to the sum to be paid in the event of a breach." *Kozlik v. Emelco, Inc.*, 240 Neb. 525, 535, 483 N.W.2d 114, 120-21 (1992); *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989). "This court has consistently upheld the right of contracting parties to privately bargain for the amount of damages to be paid in the event of a breach of contract, provided the stipulated sum is reasonable in light of the circumstances." *Kozlik*, 240 Neb. at 535, 483 N.W.2d at 121. Other jurisdictions have held that a trial court erred in granting specific performance when an exclusive remedy clause limited the injured party's rights. See, *Doyle v. Ortega*, 125 Idaho 458, 872 P.2d 721 (1994); *Sun Bank of Miami v. Lester*, 404 So. 2d 141 (Fla.

App. 1981). This result is justified when the parties foresee the specific nonperformance and agree to an exclusive remedy in that event.

Here, the remedy provision in the amendments is not ambiguous and limits the Reicherts' rights for this particular breach to decreased rents or termination of the lease agreements. Just as Hammond is bound by the plain language of its covenant to forebear leasing space to a competing store, so the Reicherts must be held to the plain language of the exclusive remedy provision. No conflict exists between the two provisions, and effect may be given to both.

[10,11] The question of the reasonableness of a remedy generally addresses whether a liquidated damages clause is so great as to constitute a penalty. See *Kozlik, supra*. Agreed-upon damages can also be so small as to be stricken as unconscionable in light of the breach. See, *Purcell Tire & Rubber v. Executive Beechcraft*, 59 S.W.3d 505 (Mo. 2001); Restatement (Second) of Contracts § 356, comment *a*. (1981). When, however, the parties are experienced in business, the damages are economic, and the parties had fair opportunity to consider the agreement, courts rarely find that liability limitations are unconscionable. See *Purcell Tire & Rubber, supra*. Compare *Darr v. D.R.S. Investments*, 232 Neb. 507, 441 N.W.2d 197 (1989) (method set forth in partnership agreement for valuing retiring partner's interest was not unconscionable when evidence showed that partners were experienced businessmen with opportunity to read partnership agreement and to discuss it before signing).

[12] The right to terminate a lease agreement is an important bargaining tool and, in most cases, a significant economic benefit. See, generally, *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). This benefit is demonstrated by Ridco's termination right in the restrictive use provision in its lease agreement with Hammond. Although the Reicherts may in retrospect be dissatisfied with this bargained-for provision, this court will not rewrite a contract to provide terms contrary to those which are expressed. See, *Kozlik, supra*; *Kansas-Nebraska Nat. Gas Co. v. Swanson Bros.*, 215 Neb. 398, 338 N.W.2d 774 (1983).

CONCLUSION

[13] The district court erred in granting a permanent injunction when the parties clearly intended that the exclusive remedy in the event of a breach would be the termination of the lease agreements or a reduction in rents.

REVERSED.

STATE OF NEBRASKA, APPELLEE, V.
MICHAEL T. GEORGE, APPELLANT.
645 N.W.2d 777

Filed June 7, 2002. No. S-01-415.

1. **Postconviction: Proof: Appeal and Error.** A criminal defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
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. **Postconviction: Expert Witnesses: Appeal and Error.** The denial of a motion to appoint an expert witness in a postconviction action is reviewed for abuse of discretion.
4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
5. **Prosecutorial Misconduct: Appeal and Error.** A presumption of prosecutorial vindictiveness arises when the defendant is charged with a more serious offense after pursuing an appeal.
6. **Postconviction: Effectiveness of Counsel: Proof: Appeal and Error.** In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. The two prongs of this test, deficient performance and prejudice, may be addressed in either order.
7. **Effectiveness of Counsel: Proof.** If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
8. **Effectiveness of Counsel: Presumptions: Appeal and Error.** The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice.
9. **Effectiveness of Counsel: Proof.** In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
10. **Prosecuting Attorneys: Evidence: Due Process.** The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Affirmed.

David T. Schroeder, of Kelly & Schroeder, for appellant.

Don Stenberg, Attorney General, and Martin W. Swanson for appellee.

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

HENDRY, C.J.

INTRODUCTION

Michael T. George brought a motion for postconviction relief pursuant to Neb. Rev. Stat. § 29-3001 (Reissue 1995), alleging that his convictions in 1993 for robbery and use of a weapon to commit a felony and his convictions in 1996 for first degree assault and use of a weapon to commit a felony were obtained in violation of his constitutional rights. After an evidentiary hearing, the district court denied George relief. George appeals.

FACTUAL BACKGROUND

On March 28, 1993, Tessa Taylor was working at Coffin's Corner convenience store in Hall County, Nebraska. While talking with a customer, William Ostrander, Taylor saw a man standing at the door to the store. The man pulled up his shirt, covering the bottom part of his face to the tip of his nose. Taylor was able to see the man's entire face briefly before he pulled up his shirt. The man then walked in and stabbed Ostrander in the stomach with a knife.

After a brief scuffle with Ostrander, the assailant approached the cash register. He attempted to open the register by banging on it with his knife. Eventually, he pointed the knife at Taylor and ordered her to open the cash register. Taylor could see the man, and the exposed part of his face, throughout the incident. She was approximately 1 to 2 feet away from him when she opened the cash register. After she opened the register, the man took approximately $200 in cash and left. Taylor called the police.

Ostrander was taken to the hospital where he underwent surgery to repair serious internal wounds caused by the stabbing.

Ostrander remained in the hospital for 1 week, but recovered from his injuries.

Taylor described the assailant to the investigating officers as a man approximately 5 feet 10 inches tall, with shoulder-length dark hair with a lot of gray, wearing blue jeans and a blue shirt. Ostrander later provided a similar description of the assailant to the officers. The police showed Taylor three photographic lineups consisting of six photographs each. Taylor picked out a photograph of George, which was included in one of the lineups, and stated that the photograph looked like the robber, but she would have to see a more recent photograph to be sure. The photograph of George was approximately 1 year old. Ostrander was also shown the same three lineups at the hospital, but was unable to conclusively identify anyone. He did, however, identify the photograph of an individual other than George as a " 'guy that looked something like the one that did it.' "

About 2 weeks after the incident, George came into Coffin's Corner to purchase cigarettes. Taylor was working at the time and recognized George as the assailant from March 28, 1993. Although frightened, Taylor looked at him carefully, memorized his license plate number, and called the police immediately after George left the store. The police thereafter arrested George and took a Polaroid photograph of him in his "street clothes." The "street clothes" George was wearing in this Polaroid photograph were similar to the clothing worn by the assailant during the stabbing and robbery.

The officers then showed a fourth photographic lineup separately to Taylor and Ostrander, which included the Polaroid photograph of George in "street clothes." The lineup consisted of six photographs, George's being the only Polaroid. Taylor identified George from this fourth lineup. Ostrander also picked out George's photograph from the fourth lineup, but was not completely certain in his identification.

George was charged with attempted second degree murder, a Class II felony, use of a weapon to commit attempted murder, robbery, and use of a weapon to commit the robbery. George's trial counsel was Jerry Fogarty.

At trial, Taylor testified she recognized George when he came into Coffin's Corner 2 weeks after the incident as the man who

stabbed Ostrander and robbed the store, and she identified him in court. Taylor stated she was positive George was the assailant, recognizing, among other things, his eyes and hair. Ostrander also made an in-court identification of George as the assailant, but acknowledged that he was not "100 percent sure." Finally, Taylor and Ostrander testified regarding the four photographic lineups and their respective identifications resulting from that procedure.

The jury was instructed on the elements of attempted second degree murder and "attempted manslaughter." The jury was also instructed, inter alia, on the elements of robbery and the elements related to the two weapons charges. The jury found George guilty of robbery, attempted manslaughter, use of a weapon to commit a robbery, and use of a weapon to commit attempted second degree murder. George was sentenced to a term of 16 years 8 months' to 50 years' imprisonment on the robbery charge, along with three additional consecutive sentences of 6 years 8 months' to 20 years' imprisonment for the remaining three convictions.

George appealed his convictions, asserting that (1) the conviction for attempted manslaughter was invalid in that attempted manslaughter was not a lesser-included offense of attempted second degree murder, (2) the conviction for use of a weapon to commit attempted second degree murder was invalid because he had been acquitted of attempted second degree murder, and (3) the sentences imposed were excessive. George's counsel on appeal was Harry Moore. In *State v. George*, 3 Neb. App. 354, 358, 527 N.W.2d 638, 642 (1995) (*George I*), the Nebraska Court of Appeals reversed George's conviction for attempted manslaughter, stating:

> The combination of the elements of the crime of criminal attempt with the elements of involuntary manslaughter creates a peculiar animal. The trial court instructed the jury that "[t]he elements of Attempted Manslaughter are: 1. That the defendant . . . engaged in conduct which constituted a substantial step to culminate in his commission of the crime of attempted manslaughter. 2. That he attempted to kill another without malice . . . unintentionally while in the commission of an unlawful act." A person cannot perform the same act intentionally and unintentionally at the same time. This instruction is a contradiction because a person

> cannot intentionally take a substantial step toward the commission of a crime when that crime is an unintentional crime. Thus, attempted manslaughter does not and cannot exist under current Nebraska law.

The court also determined that because George had been acquitted of attempted second degree murder, the conviction for use of a weapon to commit attempted second degree murder must also be reversed.

The court went on to note that

> this court cannot remand this cause for a retrial on the charge of attempted second degree murder or the use of a weapon to commit the underlying felony when the jury has already found George not guilty of attempted second degree murder. Furthermore, we cannot remand this cause for a retrial on the charge of attempted manslaughter because it does not statutorily exist. Therefore, we hereby reverse George's convictions under counts II and IV and vacate the sentences imposed for those convictions.

Id. at 361-62, 527 N.W.2d 643-44. George's convictions for robbery and use of a weapon to commit the felony of robbery were affirmed.

In 1996, Hall County Prosecutor Mark Young filed an information charging George with first degree assault, a Class III felony, and use of a weapon to commit first degree assault regarding the stabbing of Ostrander. George's trial counsel at the second trial was James Truell. Virtually the same evidence was adduced by the State at the second trial. Taylor again identified George in court as the robber. She stated that she was positive George was the person who attacked Ostrander and that she had recognized George when he came into the store 2 weeks after the incident. Ostrander identified George in court at the second trial as well, but again stated he was not "a hundred percent sure." Both Taylor and Ostrander again related to the jury the circumstances surrounding the four photographic lineups and their identifications as a result. George was found guilty of both charges and sentenced to two consecutive sentences of 6 years 8 months' to 20 years' imprisonment.

George appealed his convictions, asserting the trial court erred in (1) overruling George's motion to dismiss because there

was no credible eyewitness testimony produced by the State; (2) overruling George's motion to remove defense counsel; (3) receiving into evidence, over George's relevancy objection, the fourth photographic lineup; and (4) imposing excessive sentences. George's appellate counsel in his second appeal was Charles Maser. In a memorandum opinion, the Court of Appeals found all of George's claimed errors to be without merit and affirmed George's convictions and sentences. *State v. George*, 5 Neb. App. xxvii (No. A-96-861, Apr. 29, 1997) (*George II*).

On February 2, 2000, George filed a postconviction motion pursuant to § 29-3001, seeking to vacate his convictions for robbery and use of a weapon to commit robbery in *George I*, and first degree assault and use of a weapon to commit first degree assault in *George II*. George alleged, among other things, that he had received ineffective assistance of appellate and trial counsel during both his first and second trials. The court granted George's request for an evidentiary hearing and appointed counsel for George.

Postconviction counsel asserted that George received ineffective assistance of appellate counsel in *George I* and *George II*. Postconviction counsel alleged, inter alia, that appellate counsel in *George II* was ineffective in failing to raise on appeal trial counsel's failure to assert at trial the issue of prosecutorial vindictiveness. Postconviction counsel also alleged that appellate counsel in both *George I* and *George II* were ineffective in failing to raise on appeal trial counsels' failure to attempt suppression of the eyewitness identification evidence and trial counsels' failure to request an instruction regarding eyewitness testimony. Lastly, postconviction counsel alleged that the State had failed to disclose material evidence favorable to George in both *George I* and *George II*.

George also filed a motion in the postconviction proceedings requesting that the court authorize the appointment of an expert witness to testify on George's behalf regarding the reliability of eyewitness identification. The court denied the motion.

At the evidentiary hearing, Young testified that the decision to prosecute George for first degree assault and use of a weapon to commit first degree assault in *George II* was not made in retaliation for George's successful appeal in *George I*. He stated:

I think I talked to both [Ostrander and Taylor] before the appellate court decision came out, warning them that I thought there was a strong likelihood that the Court of Appeals would find that the [attempted manslaughter] conviction was a nullity. And I discussed that with them so they wouldn't be surprised . . . .

After the reversal, I went back and visited with both of them to get their input. . . .

. . . They both indicated their willingness and belief that it was appropriate to undertake a second trial, and that entered somewhat into my decision-making process.

Q. So the victims expressed to you some sort of feeling that if the case stayed where it was at after the appeal, that justice would not have been served?

A. Yeah, yeah. Mr. Ostrander in particular strongly expressed that opinion to me.

Q. And did you consider those opinions when making the decision or the recommendation to file the charge of first degree assault and use of a weapon?

A. I did.

Q. Was there any thought when the decision was made to file the — this new charges [sic], was there any thought or discussion that needed to be done to discourage Mr. George or others from filing — from exercising their right to appeal —

A. No.

Q. — convictions?

A. No.

Q. Did that play any part in your decision or your recommendation?

A. None whatsoever.

Young also testified that shortly after the opinion was released in *George I*, he discussed the situation with his superior and believed that "there was some indication in the opinion that Mr. George could be retried on the crime of first-degree assault [because] first-degree assault was not a lesser included [offense] of attempted murder."

Trial counsel in *George I*, Fogarty, testified. He stated that he did not raise any issues concerning the photographic lineups

because "I don't think we had a strong case in that regard." Regarding the State's alleged failure to disclose exculpatory information, Fogarty testified, "I'm not really certain about any of this, since it's been so long, but . . . these documents here I've put out, Exhibits 28, 47, 46, and 36, are the ones that are I can't say for sure were [disclosed]." These exhibits consisted of investigative police reports attempting to ascertain whether any of George's acquaintances could verify his whereabouts on March 28, 1993. Fogarty also stated, "I'm not sure whether they were provided or not. They don't seem familiar to me at the present time. Some of the information was provided to me by other means."

Trial counsel in *George II*, Truell, also testified. He stated that he did not raise the issue of prosecutorial vindictiveness at trial because he did not believe the issue had any merit. Truell further testified that after he had read the transcript of the first trial, and in particular the witnesses' in-court identifications of George, he elected not to raise any issues concerning whether the photographic lineups were unduly suggestive. Regarding the State's alleged failure to disclose exculpatory evidence, Truell testified, "I don't recall seeing [exhibits] 34, 36, 39, 41, 44, 46, 47, 28, 30, and 31."

Finally, appellate counsel in *George II*, Maser, testified. He stated that he did not raise the issue of prosecutorial vindictiveness on appeal because he "didn't believe it applied . . . I didn't see any evidence from the record that there was any vindictiveness on the part of the State."

The district court denied George's motion for postconviction relief. The district court determined in its order that prosecutorial vindictiveness "is **not** presumed in this case since the charges in the second complaint and information are not more serious than those contained in the original complaint and information filed against the defendant." The court also concluded that George "failed to present proof of actual vindictiveness on the part of the prosecution" regarding the filing of charges in *George II*. The court further found that the photograph of George contained in the fourth photographic lineup "was not unduly suggestive" and that based on *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990), the juries in

both trials "were properly instructed on the evaluation of witness credibility."

Finally, the court concluded that George had failed to prove his assertion that the State did not disclose material evidence favorable to George during either the first or second trial. The court noted that "Fogarty did not recall seeing the actual exhibits but did recall being aware of the information contained therein." In addition, the court stated that "[a]lthough Truell testified he did not recall receiving the [police reports], Truell was not asked whether the prosecution had disclosed the contents of said [police] reports to him." The court found that the testimony of Fogarty and Truell did not show that prosecutors had failed to disclose the information contained in the exhibits. The court also found that the information contained in the police reports referenced by Fogarty and Truell contained merely "suspicions, speculations, and rumors," which did not constitute material evidence favorable to George. George appealed, and we moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Court of Appeals. Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

George asserts, rephrased and renumbered, that the district court erred in failing to find ineffective assistance of appellate counsel in that the court erroneously found (1) there was no presumption of prosecutorial vindictiveness in *George II*, (2) there was no actual prosecutorial vindictiveness in *George II*, (3) the photographic lineups admitted in *George I* and *George II* were not unduly suggestive, and (4) a jury instruction concerning the reliability of eyewitness evidence was not required in either *George I* or *George II*. George further asserts the district court erred in (5) finding that the prosecution in *George I* and *George II* did not fail to disclose material evidence favorable to George and (6) overruling George's motion made during postconviction proceedings to hire an expert witness.

STANDARD OF REVIEW

[1] A criminal defendant requesting postconviction relief must establish the basis for such relief, and the findings of the

district court will not be disturbed unless they are clearly erroneous. *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001); *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001).

[2] When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

[3] The denial of a motion to appoint an expert witness in a postconviction action is reviewed for abuse of discretion. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

ANALYSIS

[4] At the outset, we recognize that because George had different counsel at trial and on appeal in *George I* and *George II*, issues not raised on direct appeal regarding the ineffective assistance of trial counsel are waived. See *Caddy, supra*. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *Id.* However, George is asserting the alleged ineffective assistance of appellate counsel in *George I* and *George II*, in failing to raise on appeal the issue of ineffective assistance provided by the respective trial counsels below. This postconviction action is George's first opportunity to raise any alleged ineffective assistance provided by appellate counsel regarding both direct appeals. We therefore address the merits of George's assignments of error.

Prosecutorial Vindictiveness

George asserts in his first assignment of error that under *Blackledge v. Perry*, 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), the district court erred in finding no presumption of prosecutorial vindictiveness in the filing of charges in *George II*. Whether George is entitled to a presumption of vindictiveness pursuant to *Blackledge* presents a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Hunt, supra*.

In *Blackledge*, the defendant was charged with misdemeanor assault in a prison administrative proceeding. He was found guilty and appealed his conviction. While that case was on appeal, the prosecutor indicted the defendant for felony assault. The defendant pled guilty to felony assault, but then appealed, asserting that

the felony charge was the result of prosecutorial vindictiveness and thus a violation of the defendant's constitutional rights.

[5] The Court held that the defendant had a due process right under the 14th Amendment to the U.S. Constitution to pursue his initial appeal of the misdemeanor conviction "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." 417 U.S. at 28. The Court also noted that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.'" 417 U.S. at 27. The Court found that the facts in *Blackledge* gave rise to a presumption of prosecutorial vindictiveness because the defendant was charged with a more serious offense after pursuing an appeal. The Court further determined that the state failed to rebut this presumption, and reversed the felony conviction. *Id.*

In *George I*, George was first charged with attempted second degree murder, a Class II felony. In *George II*, he was charged with first degree assault, a Class III felony. He was not charged with a more severe crime in *George II*.

George, however, argues that we should compare the severity of "attempted manslaughter" with the severity of first degree assault. Because there is no crime of "attempted manslaughter" in Nebraska, it is not possible to make such a comparison. Under *Blackledge*, it is the "charge" in the first trial which is compared with the "charge" in the second trial. 417 U.S. at 28. See, also, *U.S. v. Rodgers*, 18 F.3d 1425 (8th Cir. 1994). George was never charged with attempted manslaughter, nor, under Nebraska law, could he have been charged with such a crime. There is no presumption of vindictiveness in this case. This assignment of error is without merit.

George asserts in his second assignment of error that even without the benefit of a presumption of vindictiveness, the district court erred in failing to find actual prosecutorial vindictiveness and, accordingly, that appellate counsel was not ineffective in failing to raise the issue in *George II*. See, *United States v. Goodwin*, 457 U.S. 368, 384, 102 S. Ct. 2485, 73 L. Ed. 2d 74 (1982) ("[i]n declining to apply a presumption of vindictiveness, we of course

do not foreclose the possibility that a defendant in an appropriate case might prove objectively that the prosecutor's charging decision was motivated by a desire to punish"); *Rodgers, supra* (defendant may demonstrate prosecutorial vindictiveness by proving through objective evidence that prosecutor's decision was intended to punish defendant for exercise of legal right, or by showing that circumstances of case give rise to presumption of vindictiveness).

[6-9] In order to establish a right to postconviction relief based on a claim of ineffective counsel, the defendant has the burden first to show that counsel's performance was deficient; that is, counsel's performance did not equal that of a lawyer with ordinary training and skill in criminal law in the area. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See, also, *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Next, the defendant must show that counsel's deficient performance prejudiced the defense in his or her case. *Id.* The two prongs of this test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *Id.* The entire ineffectiveness analysis is viewed with a strong presumption that counsel's actions were reasonable and that even if found unreasonable, the error justifies setting aside the judgment only if there was prejudice. *Id.* In order to show prejudice, the defendant must demonstrate a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Becerra*, 261 Neb. 596, 624 N.W.2d 21 (2001).

Young testified that his motivation for filing the charges in *George II* was Taylor and Ostrander's desire that George be held accountable for the stabbing of Ostrander. There is no indication in the record that Young's actions were motivated by a desire to punish George for exercising his right to appeal the decision in *George I*. The district court found no prosecutorial vindictiveness in *George II*, and our review of the record shows that this finding is not clearly erroneous. See *State v. Hunt*, 262 Neb. 648, 634 N.W.2d 475 (2001). Because there was no prosecutorial vindictiveness, George cannot show any prejudice which resulted from

Maser's failure to raise this issue on direct appeal. This assignment of error is also without merit.

PHOTOGRAPHIC LINEUP

George asserts in his third assignment of error that he received ineffective assistance of counsel in that his appellate counsel in both direct appeals failed to raise the issue of whether the eyewitness identifications from the photographic lineups were based on unduly suggestive lineups and should have been suppressed. George's argument regarding this assignment of error is that the "Polaroid picture of the defendant contained in [the fourth photographic lineup] is unduly suggestive because the other photos appear to be 35mm photos and the defendant is the only one wearing clothes matching the description given by the eyewitness." Brief for appellant at 19.

Even assuming for purposes of argument that the fourth photographic lineup was unduly suggestive, George has failed to show that he suffered any prejudice. The U.S. Supreme Court in *Strickland*, 466 U.S. at 695-96, stated:

> [A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. . . . [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

See, also, *State v. Buckman*, 259 Neb. 924, 613 N.W.2d 463 (2000).

The record shows that Taylor identified George prior to viewing the fourth lineup. She testified at both trials that she recognized George as the assailant 2 weeks after the incident when he came into the store to buy cigarettes. She was "positive" it was him, because she recognized his eyes and hair, among other things.

Regarding her identification of George in the convenience store, Taylor testified at trial in *George I*:

> He came in and he wanted a carton of cigarettes. Where I was at the time was close to the cigarettes so I grabbed them off there and that's when I seen him. And my heart started beating really fast and I got really shaky and I couldn't

breathe. So I got a very good description of him and waited until he left the store and then said something to my sister that that was him. . . .

[Young:] Is the same person you saw on that afternoon in April the same person you saw the night of March 28 when you were robbed?

A. Yes, it is.

Q. Is that person in the courtroom today?

A. Yes, he is.

Q. Would you point him out and describe what he's wearing?

A. This man over here. He has a blue tie with a — like a gray shirt.

[Young]: Your Honor, may the record reflect the witness has identified the defendant?

[The Court]: It will so reflect.

Q. Are you absolutely sure that's the man who robbed you?

A. Yes, I am positive.

In *George II*, Taylor similarly testified at trial:

[Young:] When you saw the person who asked for the cigarettes, what did you know [sic]?

A I kept it to myself, but after he had left the store I told them that that was the man who robbed me.

Q Did you know that as soon as you saw him?

A Yes, I did.

Q Is there any doubt in your mind that that was the man who robbed you?

A No, there is not.

Q Is the man that you saw on March 28th and then again on April 16th here today?

A Yes, he is.

Q Could you point him out and describe what he's wearing?

A He's the defendant. He's wearing a light blue shirt and a tie with blue and brown in it.

[Young]: Your Honor, may the record reflect the witness has identified the defendant?

> [The Court]: The record will reflect that the witness has identified the defendant.
>
> . . . .
>
> Q What was your physical reaction when you saw him in [the convenience store]?
>
> . . . .
>
> A I got very shaky and I was having a hard time like breathing. I was just kind of — I was scared, but I didn't want to like — I don't know how to describe it.

Taylor was not shown the fourth photographic lineup until after she had already recognized George as the assailant upon seeing him when he entered the store 2 weeks after the initial incident. Given the facts of this case, George has failed to show a reasonable probability that the outcome of either *George I* or *George II* would have been different had the fourth photographic lineup, or identifications related to the fourth photographic lineup by Taylor or Ostrander, been suppressed. The district court's finding that there was no ineffective assistance of counsel is not clearly erroneous. This assignment of error is without merit.

EYEWITNESS INSTRUCTION

In his fourth assignment of error, George claims he received ineffective assistance of appellate counsel in both direct appeals when appellate counsel failed to assert that trial counsel should have requested a specific jury instruction concerning the reliability of eyewitness evidence. George argues the jury instructions at both trials were flawed in that "the trial court's instructions did not highlight the problems with eyewitness identification, the sole basis for conviction was eyewitness identification, [and] there is the possibility of misidentification." Brief for appellant at 21.

A similar claim was raised in *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990), in the context of a postconviction action. In *Sanders*, we held:

> [I]t is the jury's function to determine the credibility of the eyewitness. Sanders' jury was instructed on credibility, the State's burden of proof, and the substantive elements of the crimes involved. These instructions allowed the jury to properly evaluate the credibility of the witnesses' identification testimony. . . . Therefore, Sanders' attorney was not

> deficient in failing to request such a jury instruction [on eyewitness evidence reliability].

(Citations omitted.) 235 Neb. at 194, 455 N.W.2d at 116.

As in *Sanders*, the record here shows that in both trials, the jury was instructed on credibility, the State's burden of proof, and the substantive elements of the crimes for which George was convicted. The district court's finding that there was no ineffective assistance of counsel on this issue is not clearly erroneous. This assignment of error is without merit.

Brady Violation

[10] George contends in his fifth assignment of error that the district court erred in finding that the prosecution in *George I* and *George II* did not fail to disclose material evidence favorable to George. In *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."

In its order, the district court found trial counsels' testimony, that they did not recall seeing certain exhibits, insufficient to show that the information contained in the exhibits was not disclosed. Fogarty, trial counsel in *George I*, testified that he was not sure which of the exhibits he received and that some of the information in the exhibits "was provided to me by other means." Truell testified only that he did not "recall seeing" the exhibits. The court also found that because the exhibits contained only "suspicions, speculations, and rumors," George had failed to show any prejudice which could have resulted from any alleged nondisclosure.

Upon our review of the record, we conclude the district court's finding that the prosecution did not withhold material evidence favorable to George during *George I* or *George II* is not clearly erroneous. This assignment of error is without merit.

Expert Witness

George asserts in his final assignment of error that the district court erred in overruling George's motion to appoint an expert witness concerning the reliability of eyewitness identification.

The denial of a motion to appoint an expert witness in a postconviction action is reviewed for abuse of discretion. *State v. Gagliano*, 231 Neb. 911, 438 N.W.2d 783 (1989); *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

In *State v. Ammons*, 208 Neb. 812, 814-15, 305 N.W.2d 812, 814 (1981), we held that expert testimony on the reliability of eyewitness identifications was unnecessary, stating:

> The general rule is that expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens. If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, expert testimony may be admissible. . . . The accuracy or inaccuracy of eyewitness observation is a common experience of daily life. Such testimony would invade the province of the jury.

(Citations omitted.)

A review of this record discloses no circumstances which would distinguish this court's holding in *Ammons*. As such, the district court did not abuse its discretion in denying George's request for an expert witness. This assignment of error is without merit.

CONCLUSION

The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JARON DEAN, APPELLANT.
645 N.W.2d 528

Filed June 7, 2002. No. S-01-729.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights

under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.

3. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
4. **Postconviction: Constitutional Law: Proof.** An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution.
5. **Postconviction.** An evidentiary hearing is not required when a motion for postconviction relief alleges only conclusions of fact or law.
6. ____. In considering a motion for postconviction relief, the district court need not grant an evidentiary hearing if the motion and the files and records of the case affirmatively show that the defendant is not entitled to relief.
7. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
8. **Jury Trials: Waiver.** The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear the responsibility for that decision.
9. **Effectiveness of Counsel: Jury Trials: Waiver.** Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right.
10. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
11. **Postconviction.** Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing.
12. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.

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

JaRon Dean, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

GERRARD, J.

I. NATURE OF CASE

Following a bench trial in 1993, JaRon Dean was found guilty of second degree murder and use of a firearm to commit a felony and sentenced to life imprisonment. This court affirmed Dean's convictions and sentences on direct appeal. See *State v. Dean*, 246 Neb. 869, 523 N.W.2d 681 (1994), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998). Dean subsequently filed this postconviction action, alleging, inter alia, ineffective assistance of counsel and police and prosecutorial misconduct. The district court reviewed the files and records in this case and denied Dean's motion for postconviction relief without conducting an evidentiary hearing. We affirm.

II. BACKGROUND

The facts surrounding the initial crime in this case are summarized below, but are set forth in greater detail in *State v. Dean, supra*. Following a dispute between Phillip Secret and Deron Haynes on October 22, 1992, a group of men including Secret and Dean surrounded a trailer inhabited by Haynes and repeatedly fired shots into a lighted section of the trailer. Witnesses and evidence indicated that Dean was present and armed with an AK-47 rifle. Police later found Haynes' body inside the trailer; the pathologist who performed the autopsy opined that Haynes' death resulted from a bullet fired from an AK-47 rifle.

While in custody, Dean, having been arraigned and appointed an attorney, asked to talk to Sgt. Gregory H. Sorensen. Sorensen confirmed that Dean was aware of his *Miranda* rights before talking with him. Dean and Sorensen discussed Haynes' murder: Dean asked about a plea bargain, stated that he did not know why he shot into the trailer but that he wanted to blame drug use for his actions, stated that he thought he was shooting high enough to miss anyone in the trailer, and stated that he thought the trailer was empty at the time of the shooting.

Dean pled not guilty to charges of first degree murder and use of a firearm to commit a felony. The district court's minutes reflect that Dean, with counsel present, waived his right to a jury trial. At Dean's bench trial, Sorensen repeated statements made by Dean during their conversation, after Dean unsuccessfully

attempted to suppress the statements made to Sorensen. The district court issued an order finding Dean guilty of second degree murder and use of a firearm to commit a felony. Dean received sentences of 25 years' to life imprisonment for the second degree murder count and 4 to 6 years' imprisonment on the firearm count, to be served consecutively. We affirmed the district court's order on appeal. See *id.* The same counsel represented Dean at trial and on direct appeal.

On June 19, 2000, Dean filed a verified motion to vacate and set aside the convictions and sentences, pursuant to the Nebraska Postconviction Act, Neb. Rev. Stat. § 29-3001 et seq. (Reissue 1995). Dean's motion raised four primary issues: ineffective assistance of trial counsel, ineffective assistance of appellate counsel, denial of Dean's right to a jury trial, and prosecutorial and police misconduct. The State responded by filing a motion to deny evidentiary hearing and postconviction relief.

The district court held a hearing on March 16, 2001, at which the State appeared in court and Dean appeared pro se via telephone for consideration of the State's motion to deny Dean an evidentiary hearing. The State offered, and the court received in evidence, the complete bill of exceptions from the original trial and the court's minute entry from the initial proceedings through March 16. The court also took judicial notice of Dean's verified motion to vacate and set aside the convictions and sentences, and heard arguments of the parties. There was no testimony offered by either party, nor was this hearing purported to be an evidentiary hearing on Dean's motion for postconviction relief.

Thereafter, in an order issued on June 14, 2001, the district court concluded that Dean failed to demonstrate ineffectiveness of counsel or that his counsel's alleged ineffectiveness would have changed the outcome of the trial. Dean's motion alleged that counsel failed to properly question Sorensen, but the district court attributed counsel's decision to trial strategy within counsel's discretion and the standard of reasonableness. The district court also deemed trial counsel's decision to raise only certain issues on appeal to counsel's judgment, education, and expertise in trying and appealing cases of this nature. Finally, the district court determined that Dean waived his right to a jury trial on the record, which defeated Dean's allegation that his counsel did not

inform Dean of his right to a jury trial. The court concluded that Dean made no factual allegations that constituted a denial or infringement of Dean's due process rights. Thus, the district court denied Dean an evidentiary hearing and overruled Dean's motion for postconviction relief.

Further facts relating to Dean's assignments of error are set forth below as necessary.

III. ASSIGNMENTS OF ERROR

Dean assigns, consolidated and restated, that the district court (1) erred in denying Dean an evidentiary hearing by concluding that Dean was not denied ineffective assistance of counsel, as counsel (a) did not allow Dean to testify, (b) failed to inform Dean of his right to a jury trial, (c) failed to adequately question Sorensen, and (d) was ineffective in processing his appeal; (2) erred in failing to consider Dean's allegations of prosecutorial misconduct; (3) abused its discretion by not determining the merits of Dean's postconviction motion before hearing the State's motion to deny an evidentiary hearing and failing to list the portions of the record used by the court in concluding that Dean was not entitled to relief; and (4) erred in identifying three witnesses as sergeants of the Lincoln Police Department when only one witness was a police officer.

IV. STANDARD OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

V. ANALYSIS

[2,3] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Caddy*, 262 Neb. 38, 628 N.W.2d 251 (2001). The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. *Id.* Although Dean assigns that the district court erred in refusing to grant him an evidentiary hearing, his argument often centers on his entitlement to relief.

We will consider Dean's arguments in light of whether he should have received an evidentiary hearing.

[4-6] An evidentiary hearing on a motion for postconviction relief is required on an appropriate motion containing factual allegations which, if proved, constitute an infringement of the movant's rights under the Nebraska or federal Constitution. *State v. Billups, supra.* An evidentiary hearing is not required when the motion alleges only conclusions of fact or law. *Id.* Further, when the motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. *Id.* See § 29-3001.

1. Ineffective Assistance of Counsel

[7] Dean raises four issues under his error assigning that he received ineffective assistance from his trial counsel: counsel refused to allow Dean to testify, did not inform Dean of his right to a jury trial, failed to adequately question Sorensen, and ineffectively processed Dean's appeal. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Billups, supra.*

(a) Right to Testify

Dean argues that trial counsel violated Dean's right to testify by refusing to allow him to testify at trial. Dean alleges that counsel's refusal to let him testify violated his rights under the 5th, 6th, and 14th Amendments to the U.S. Constitution and article I, §§ 3 and 11, of the Nebraska Constitution.

At trial, however, Dean voluntarily waived his right to testify. Dean's counsel requested an on-the-record conference outside the presence of the State's counsel and the district court for the purpose of a confidential attorney-client communication regarding Dean's right to testify. Following a private conversation on the record between Dean and his attorneys, Dean's counsel requested that the record of the private conversation be sealed until Dean waived the attorney-client relationship; the district court ordered the record sealed until further order.

The district court then advised Dean of his right to testify under oath, which would subject him to cross-examination. Dean waived his right to testify, freely and voluntarily, with knowledge and understanding of the consequences. Dean acknowledged that there were no threats, force, promises, or inducements used to get him to waive his right to testify. Dean further acknowledged that he had consulted with his attorney about whether or not to testify and that he still waived his right to testify. The district court accepted Dean's waiver, and Dean's counsel rested his case.

In considering a motion for postconviction relief, the district court need not grant an evidentiary hearing if the motion and the files and records of the case affirmatively show that the defendant is not entitled to relief. See, *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002); § 29-3001. The record affirmatively shows that Dean waived his right to testify. Therefore, the district court did not err in denying Dean an evidentiary hearing on this issue.

(b) Failure to Inform of Right to Jury Trial

Dean assigns that the district court erred in failing to grant an evidentiary hearing on the issue of whether Dean's counsel violated his right to a jury trial. Dean alleges that counsel never advised him of his constitutional right to a jury trial and that counsel allowed him to make an uninformed decision about a jury trial.

Dean pled not guilty to charges of first degree murder and use of a firearm to commit a felony at his arraignment on December 9, 1992, and trial was set for the jury term starting February 22, 1993. At the start of Dean's bench trial on July 26, the district court stated: "My notes show that on the 19th of July the defendant waived a jury and that we are now here for a bench trial." Dean's counsel agreed that that was his understanding. Dean admits that he waived his right to a jury trial on the record. At the hearing regarding the State's motion to deny Dean an evidentiary hearing, the judge's minutes were accepted into evidence without objection. The minutes reflect that on July 19, 1993, Dean appeared with his counsel and waived his right to a jury trial.

[8,9] The decision to waive a jury trial is ultimately and solely the defendant's, and, therefore, the defendant must bear

the responsibility for that decision. *State v. Hansen*, 252 Neb. 489, 562 N.W.2d 840 (1997). Counsel's advice to waive a jury trial can be the source of a valid claim of ineffective assistance only when (1) counsel interferes with his or her client's freedom to decide to waive a jury trial or (2) the appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right. *Id.*

The State argues that the district court's finding that Dean waived his right to a jury trial on the record is not clearly erroneous. We agree. Dean's motion merely alleges that "trial counsel did not explain to defendant his right to be tried by a Jury of his peers." The district court considered Dean's right to an evidentiary hearing based on the files and records before the court, and Dean did not allege specific advice from counsel as part of his motion for postconviction relief. The district court did not err in determining that the files and records affirmatively showed that Dean knowingly and intelligently waived his right to a jury trial.

(c) Failure to Adequately Question Witness

Dean argues next that counsel failed to adequately question Sorensen. The district court stated that Dean "has not set forth the specific questions that he wanted to have asked of the witness; therefore, he is only stating a conclusion." The State did not address Dean's allegations on this issue in its brief.

Dean's motion for postconviction relief claims that he informed trial counsel that Sorensen's testimony was false, and he offered counsel facts to discredit Sorensen with regard to Sorensen's alleged long-term relationship with Dean and Dean's statements made to Sorensen about Haynes' death. Dean alleges that counsel refused to use the information Dean offered, saying that it was not a good idea to question Sorensen's veracity. Dean asserts that counsel's failure to pursue these lines of questioning made counsel's assistance ineffective and prejudiced Dean's defense such that a different outcome would have occurred had counsel asked Sorensen the questions Dean requested.

Dean's motion for postconviction relief, however, does not specify the alleged falsities in Sorensen's testimony, but instead merely states, as a conclusion of fact, that Sorensen lied regarding

his past relationship with Dean and their conversation. An evidentiary hearing is not required when a postconviction motion alleges only conclusions of fact or law. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

This court has consistently required that a defendant make specific allegations instead of mere conclusions of fact or law in order to receive an evidentiary hearing for postconviction relief. For example, in *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999), the defendant alleged that trial counsel was deficient in allowing comment upon the defendant's invocation of the right to remain silent, but we concluded that the defendant's motion did not state facts to support that conclusion—such as who made the comments, what comments were made, when the comments were made, and how the comments violated his rights. In *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992), the defendant claimed ineffective assistance of counsel because counsel raised only frivolous issues on appeal, but this court determined that the defendant should not receive an evidentiary hearing because the motion merely stated the bald conclusion that his counsel presented frivolous arguments, rather than informing the court what those arguments were, or alleging facts from which the court could determine the frivolity of the issues presented on direct appeal. Finally, in *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989), the defendant alleged that counsel was ineffective in failing to procure witnesses or utilize available evidence in the defendant's favor, but this court concluded that because the defendant did not specify what witnesses could have been procured or evidence adduced, the trial court need not conduct an evidentiary hearing.

As in the cases cited above, Dean did not include in his motion the specific questions that he wanted counsel to ask Sorensen, nor did Dean specifically delineate the evidence he expected to adduce or the matters upon which he alleges Sorensen lied. In particular, Dean did not allege how his counsel's performance was deficient in cross-examining Sorensen or how different questioning or strategy by counsel would have changed the outcome of his original trial. Because Dean did not set forth sufficient facts to support his bald conclusion that trial counsel was ineffective in questioning Sorensen, the

district court did not err in denying Dean an evidentiary hearing on this ground.

(d) Ineffective Processing of Appeal

Dean assigns that the district court erred in failing to grant him an evidentiary hearing on the allegation that counsel was ineffective in processing Dean's appeal. Dean claims that counsel did not raise any of the issues that he wanted to appeal and that Dean did not know the contents of the appeal until it was filed. Dean alleges that he indicated to counsel which issues he wanted to address on appeal, but counsel did not return his calls and filed an appellate brief without Dean's notice or approval. Dean states that he met with counsel once after the conviction and prior to the appeal, but the two did not meet again, despite counsel's promise to do so.

The State cites *State v. Williams*, 217 Neb. 539, 352 N.W.2d 538 (1984), for the proposition that it is counsel's province to select issues to be raised on appeal, while the defendant's role in the appeal is limited to an indication that he or she wishes to file an appeal. In *Williams*, the defendant argued ineffective assistance of counsel because counsel appealed some, but not all, of the issues the defendant requested. The defendant in *Williams* proclaimed 13 errors to be considered on appellate review of his conviction and sentence, 33 errors in his postconviction appeal, and 12 assignments of error on direct appeal. See *id.* This court concluded that counsel "selectively and effectively argued all material questions pertinent to Williams' conviction and sentence." *Id.* at 550, 352 N.W.2d at 544.

Dean, however, did not state in his motion for postconviction relief the errors that he wished to appeal; therefore, the district court lacked the information to evaluate the viability of the errors allegedly not appealed by Dean's counsel. *Williams* establishes that the failure to raise issues suggested by the defendant is not ineffective assistance of counsel per se, but *Williams* does not stand for the proposition that the strategic decisions of appellate counsel are not subject to examination.

In the instant case, however, it is not necessary to conduct this analysis—Dean's motion for postconviction relief does not state the specific assignments of error that he wished to present on

appeal. Without such, Dean presented the district court with a mere conclusion. As stated above, an evidentiary hearing is not required when a postconviction motion alleges only conclusions of fact or law. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). We have already noted our precedent of requiring defendants to set forth specific allegations of fact in order to receive an evidentiary hearing. See, *State v. Smith*, 256 Neb. 705, 592 N.W.2d 143 (1999); *State v. Russell*, 239 Neb. 979, 479 N.W.2d 798 (1992); *State v. Threet*, 231 Neb. 809, 438 N.W.2d 746 (1989). Because Dean did not specifically set forth errors that counsel should have assigned on appeal, his claim of ineffective assistance fails on this ground, and the district court did not err in denying Dean an evidentiary hearing on this issue.

2. Police and Prosecutorial Misconduct

Dean argues that the district court failed to consider his claims of police and prosecutorial misconduct in eliciting the testimony of Keith Williams and Gregory Pool. Williams testified at the earlier trial of Leonard Anderson, Jr., while Pool testified at Dean's trial; Williams, Anderson, and Pool were all present at Haynes' shooting. At Dean's trial, the court received the bill of exceptions from Anderson's trial into evidence. Dean claims that the prosecuting attorney, "in cahoots with the police department," intimidated and coerced Williams and Pool into testifying against Dean. Brief for appellant at 20. Dean presented the affidavits of Williams and Pool with his motion for postconviction relief as evidence that the prosecution allegedly intimidated them into perjuring themselves.

Williams' affidavit stated that his testimony at Anderson's trial was a byproduct of police intimidation and that he "[could] not testify that he ever saw [Dean]" at the scene of Haynes' murder. Williams' affidavit further asserted that his mental capacity at the time of Haynes' shooting was "befogged" due to "a heavy and incessant smoking of marijuana." Pool's affidavit stated that although he testified at Dean's trial that Dean was next to him firing an AK-47 rifle at the time of Haynes' shooting, he actually could not remember the incident due to his intoxication at the time and the darkness of the area. Pool's affidavit asserts that his trial testimony was tainted by coercion and he "could not and

can not testify under oath that he saw [Dean] firing an AK-47 rifle" into Haynes' trailer.

The State claims that contrary to Dean's allegations otherwise, the district court made a determination on the police and prosecutorial misconduct issue in its order:

> The Defendant has not set forth the specific questions that he wanted to have asked of the witness; therefore, he is only stating a conclusion. The questions which Defendant says counsel should have asked of various police officers were in fact asked. The Defendant's counsel effectively cross-examined Sergeants [sic] Sorensen, Williams and Pool.

As opposed to the language in the order above, Dean's motion did not claim that counsel should have asked Williams and Pool specific questions, but that Williams and Pool were coerced into false testimony by the police and prosecutors. However, as explained below, a determination by the district court in this regard is unnecessary.

[10] At the time of trial, Dean could have cross-examined Williams and Pool regarding the information asserted in their affidavits, or this purported issue could have been raised in a posttrial motion or on appeal. Nowhere in his motion for postconviction relief does Dean assert that the affidavits of Williams and Pool provide evidence that Dean could not have known or elicited at the time of trial. A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Because Dean does not allege that he could not have raised this issue at trial or on direct appeal, he again merely states a conclusion of fact, which does not provide a sufficient basis for the granting of an evidentiary hearing. See *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002).

Dean correctly notes that the district court did not specifically address the police and prosecutorial misconduct allegation. We, however, find this error to be harmless. See *State v. Morrow*, 237 Neb. 653, 660, 467 N.W.2d 63, 68 (1991) ("it is harmless error when a correct order is entered, although for an incorrect reason"). We determined above that Dean's request for an evidentiary hearing on the issue of police and prosecutorial misconduct is without merit. Despite the district court's failure to address this

particular issue, it concluded generally that Dean did not make any factual allegations that demonstrate a denial or infringement of his due process rights. Absent a specific allegation by Dean that he did not know of the alleged prosecutorial misconduct at the time of trial or direct appeal, the district court did not clearly err in denying Dean an evidentiary hearing on this ground.

3. District Court's Procedure in Considering Dean's Motion

Dean assigns two errors, consolidated for appeal, claiming that (1) the district court abused its discretion by allowing the State to file a motion to deny Dean an evidentiary hearing prior to determining that Dean was not entitled to postconviction relief and (2) the district court erred by not listing the portions of the record used in reaching its decision.

[11,12] Dean argues that the district court's procedural handling of his postconviction motion denied Dean his rights to file an amended petition, receive an evidentiary hearing, and be represented by counsel. Under the Nebraska Postconviction Act, the district court has discretion to adopt reasonable procedures for determining what the motion and the files and records show, and whether any substantial issues are raised, before granting a full evidentiary hearing. See *State v. Flye*, 201 Neb. 115, 266 N.W.2d 237 (1978). Thus, we examine the district court's procedure in this circumstance under an abuse of discretion standard. A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Hamik*, 262 Neb. 761, 635 N.W.2d 123 (2001).

When a postconviction motion properly alleges an infringement of the defendant's constitutional rights, an evidentiary hearing should still be denied when the records and files affirmatively show that the defendant is entitled to no relief. *State v. Billups, supra*. Section 29-3001 allows for the denial of an evidentiary hearing if the court determines to its satisfaction from the files and records of the case that the prisoner is not entitled to relief. It is not unusual for a court to hold a hearing to determine which files and records the court may

review prior to considering the State's motion to deny a prisoner an evidentiary hearing. The district court's procedures did not unfairly deprive Dean of a substantial right, and we find no abuse of discretion in the manner in which the court conducted the hearing at issue.

Dean further argues that the district court erred in not listing the portions of the files and records used to make its determination to deny Dean relief, citing *State v. Fugate*, 180 Neb. 701, 144 N.W.2d 412 (1966), in support of his argument. In *Fugate*, 180 Neb. at 704, 144 N.W.2d at 414, this court directed:

> [I]n an appeal from an order denying an evidentiary hearing upon a motion filed under the Post Conviction Act, the files and records of the district court which were considered by the district judge in ruling upon the motion shall accompany the transcript filed in this court. The transcript in such a case shall contain a certificate of the district judge identifying the files and records as those which were considered in ruling upon the motion.

At the hearing on the State's motion to deny Dean an evidentiary hearing, the district court received into evidence the files and records of Dean's case. The certified bill of exceptions of the hearing identifies the records as the complete bill of exceptions of Dean's case, from the first hearing through the conclusion of Dean's trial, a copy of the judge's minutes from the first date through the March 16, 2001, hearing, and Dean's motion for postconviction relief and attached affidavits. The district court based its decision to grant the State's motion to deny Dean an evidentiary hearing on a review of the exhibits, i.e., the files and records of the case, admitted at the hearing.

We have before us the evidence adduced at the hearing on the State's motion to deny an evidentiary hearing for our consideration of Dean's appeal. Dean did not object to any of the exhibits received in evidence by the court on March 16, 2001. Dean's claim on appeal is without merit. The district court did not abuse its discretion in its procedure for reviewing the files and records in this case.

Finally, we have reviewed Dean's remaining assignment of error and determine that it is without merit.

VI. CONCLUSION

We, therefore, conclude that the district court did not err in refusing to grant Dean an evidentiary hearing on the allegations in his motion for postconviction relief. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

RICHARD A. BILLINGSLEY, APPELLEE AND CROSS-APPELLANT, V. BFM LIQUOR MANAGEMENT, INC., DOING BUSINESS AS BRANDEIS FOOD MANAGEMENT AND BRANDEIS CATERING, INC., APPELLANTS AND CROSS-APPELLEES.

645 N.W.2d 791

Filed June 14, 2002. No. S-01-171.

1. **Judgments: Res Judicata: Collateral Estoppel.** The applicability of the doctrines of res judicata and collateral estoppel is a question of law.
2. **Statutes.** Statutory interpretation presents a question of law.
3. **Judgments: Appeal and Error.** On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
4. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
5. **Equity: Jurisdiction: Appeal and Error.** An appellate court's review of the trial court's exercise of equity jurisdiction is de novo on the record, with independent conclusions of fact and law.
6. **Judgments: Res Judicata.** Under res judicata, a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
7. **Judgments: Collateral Estoppel.** Under collateral estoppel, when an issue has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
8. **Actions: Res Judicata: Collateral Estoppel.** It is essential that there be a prior action to invoke application of res judicata and collateral estoppel in a subsequent case.
9. **Actions: Res Judicata.** In order to invoke the doctrine of res judicata, there must have been a decision on the merits in the prior action.
10. **Fair Employment Practices: Discrimination: Employer and Employee.** In order for two distinct entities to "collapse" into a single employer for purposes of Nebraska's age discrimination act, the two businesses must have (1) interrelated operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.

11. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law.
12. ____: ____. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of 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.
13. **Directed Verdict: Appeal and Error.** In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict 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.
14. **Fair Employment Practices: Discrimination: Jury Trials: Equity.** In an age discrimination case, when the district court considers the plaintiff's request for equitable relief, the district court cannot reject the jury's findings on whether the plaintiff was the victim of age discrimination, but it nevertheless retains discretion to consider all the circumstances in the case when it determines what equitable relief, if any, may be appropriate.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Jeffrey A. Silver for appellants.

Robert V. Broom, of Broom, Johnson & Clarkson, for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

In his fifth amended petition filed in the district court for Douglas County, Richard A. Billingsley alleged he had been discriminated against in the workplace on the basis of age. Billingsley sought damages, unpaid wages, equitable relief, and attorney fees pursuant to Nebraska's Act Prohibiting Unjust Discrimination in Employment Because of Age (age discrimination act), Neb. Rev. Stat. §§ 48-1001 to 48-1010 (Reissue 1998), and the Nebraska Wage Payment and Collection Act (wage payment act), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 1998). The named defendants were BFM Liquor Management, Inc.,

doing business as Brandeis Food Management, and Brandeis Catering, Inc.

Following trial, the jury awarded Billingsley $59,963.93 in damages on his age discrimination claim and $4,469.88 on his unpaid wage claim. An appeal was taken. Because the district court had not ruled on Billingsley's request for equitable relief, the purported appeal was dismissed for lack of a final, appealable order. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). Thereafter, the district court considered Billingsley's requested equitable relief. The district court denied Billingsley's request for front pay or reinstatement. The district court awarded Billingsley attorney fees and postjudgment interest. BFM Liquor Management, Inc., and Brandeis Catering, Inc., appeal, and Billingsley cross-appeals. We affirm.

II. STATEMENT OF FACTS

This is the second appearance of this case in this court. See *Billingsley, supra*. We repeat the facts recited in *Billingsley* which are necessary to this opinion.

Billingsley was employed by BFM Liquor Management, Inc., which also does business as Brandeis Food Management (BFM), and Brandeis Catering, Inc. (BCI), businesses determined by the district court as a matter of law to be a "common enterprise" under § 48-1002 of the age discrimination act. The record reflects that in 1993 and 1994, BFM employed over 25 people. In those same years, defendants claim BCI employed fewer than 25 people. Billingsley was hired on August 24, 1988, to develop BFM's catering operations on the premises of the Ak-Sar-Ben coliseum in Omaha. Subsequently, an offsite catering company was separately incorporated as BCI, and Billingsley was given additional responsibilities. Billingsley testified that during his tenure with defendants, he never received an oral or written reprimand, and that he had always performed his duties satisfactorily. As defendants' catering operations grew, more people were hired to assist Billingsley.

Tom Wolf was hired in June 1993 to assist Billingsley with the sales of catering engagements. Helmuth Dahlke, Billingsley's supervisor, informed Billingsley of the decision to hire Wolf. Wolf's employment arrangement was such that he was to be paid

a commission on the sales of catering events he arranged. At that time, Wolf was 30 years of age.

In December 1993, Billingsley negotiated an employment agreement by which he would be paid, in addition to his salary, 3 percent of the gross monthly sales of BFM's off-premises catering and 2 percent of the gross monthly sales of BFM's onsite catering. Billingsley claims that he never received any of his commission after this agreement was finalized in January 1994. This employment agreement was in effect at the time of Billingsley's notice of termination of employment on May 23, 1994.

On May 19, 1994, Billingsley attended a management meeting called by Dahlke. At this meeting, Billingsley was given a new organizational chart for BFM's operations at Ak-Sar-Ben, pursuant to which he was informed that he would no longer report to Dahlke and that his supervisor would now be Dave Henningsen. Billingsley testified that Dahlke had a desire to give defendants a "younger image" and had on occasion instructed management to terminate the employment of employees because they were "old" and "useless" and hire employees who were "younger and prettier." Other witnesses who were BFM employees during the same timeframe as Billingsley testified at trial that they were aware of Dahlke's desire to give defendants a "younger image."

On Friday, May 20, 1994, a large catering event took place on the premises of Ak-Sar-Ben, after which the dishes and preparation materials were piled in a hallway at Ak-Sar-Ben and were not cleaned on the evening of that event. Because Billingsley was the supervisor of catering, he was contacted by Henningsen when it was discovered on May 22 that the materials from the May 20 catering event were not properly cleaned up. Billingsley was asked to drive to Ak-Sar-Ben to clean up the mess on May 22. Dan Bice, who worked directly under Billingsley, testified that it was Bice's responsibility to make sure that the materials from the Friday catering event were cleaned in a timely fashion. Bice further testified that it was common practice to wait until the following Monday to clean materials from a large catering event held on Fridays when that Friday event was large and there were other catering events scheduled for that same weekend.

When Billingsley failed to appear at Ak-Sar-Ben on May 22, 1994, Sharon Smith, the then chief executive officer for Douglas County Racing and Douglas Recreation Corporation, which ran the Ak-Sar-Ben property, informed Henningsen and Dahlke that if Billingsley did not care enough to clean up the mess, he was not to be on the premises of Ak-Sar-Ben at all. Dahlke testified that this was the final incident in a process building up to his decision to terminate Billingsley's employment. Billingsley was notified by Dahlke of his termination of employment on May 23; Dahlke said Billingsley's position had been eliminated. Defendants' records, however, reveal that Billingsley was replaced by Wolf, who was younger than 40 years of age.

On March 10, 1995, Billingsley filed a petition in the district court. For his first three causes of action, Billingsley alleged wrongful discharge, breach of contract, and tortious interference with business relations, respectively. For his fourth cause of action, Billingsley sought an accounting for all profits made by BCI. After twice sustaining defendants' demurrer to Billingsley's first three causes of action and twice allowing him to amend his petition, on August 1, the district court sustained defendants' third demurrer to the first three causes of action alleged in Billingsley's third amended petition. Although not evident in the record in *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000), the transcript in the instant appeal shows that the district court dismissed Billingsley's wrongful discharge, breach of contract, and tortious interference claims, each without leave to amend. As of August 1, the only claim remaining in Billingsley's third amended petition was his accounting cause of action.

After hiring new counsel, Billingsley filed a motion seeking leave to file a fourth amended petition on January 30, 1996. The motion was sustained on February 7. In his fourth amended petition, Billingsley added three new causes of action. For his first cause of action, Billingsley alleged, inter alia, that defendants had discriminated against him in employment on the basis of age in violation of the age discrimination act. In his second and third causes of action, Billingsley sought unpaid wages under the wage payment act. Billingsley requested backpay and other damages he had suffered due to defendants' actions. His

petition also contained a prayer for reinstatement or front pay in lieu thereof, attorney fees, and "further relief as the Court may deem just, proper, and equitable." In his fourth amended petition, Billingsley abandoned his separate cause of action for an accounting.

On March 28, 1997, Billingsley moved to file a fifth amended petition. On April 8, the district court sustained Billingsley's motion to amend. The fifth amended petition amended the fourth amended petition by correcting the name of one of the corporate defendants and by correcting allegations relating to Billingsley's bonus agreement with BFM. Otherwise, Billingsley's fourth amended petition remained unchanged.

The fifth amended petition (petition) is the operative petition for purposes of trial and of this appeal. On May 28, 1997, defendants filed an answer in which they denied the allegations contained in Billingsley's petition and affirmatively alleged, inter alia, that due to the district court's order of August 1, 1995, dismissing three causes of action as they had been pled, Billingsley's petition was barred by res judicata and collateral estoppel.

The 4-day jury trial began on August 17, 1998. The record contains approximately 800 pages of testimony from 17 witnesses and approximately 76 exhibits. To the extent they are necessary, further facts and rulings from the trial are incorporated in our analysis below. The parties stipulated prior to trial that the district court would reserve ruling on Billingsley's request for equitable relief until after the jury determined the lawfulness of the discharge and the amount of damages, if any, Billingsley should be awarded with respect to these legal issues.

During the jury instruction conference held near the conclusion of the trial, the district court determined as a matter of law that pursuant to § 48-1002, BFM and BCI were a "common enterprise," sharing employees and employing over 25 people, and that both entities met the statutory definition of an "employer" under the age discrimination act which defines an employer as "any person having in his or her employ twenty-five or more individuals." See § 48-1002(2).

Defendants moved for a directed verdict, claiming, inter alia, that Billingsley had failed to demonstrate that his termination

from employment was based on age discrimination and not some other legitimate reason. The district court denied defendants' motion for directed verdict, and the case was submitted to the jury.

On August 24, 1998, the jury found that defendants had discriminated against Billingsley because of his age and awarded him damages of $59,963.93. The jury also awarded Billingsley $4,469.88 on his claim for unpaid wages. Billingsley filed a motion seeking an order regarding equitable relief and attorney fees. The motion was scheduled for hearing on September 16.

On September 15, 1998, defendants appealed the jury award prior to the district court's having ruled on Billingsley's claims for equitable relief and attorney fees. Billingsley filed a cross-appeal. We dismissed the appeal for lack of jurisdiction. *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000). In *Billingsley*, we concluded that the jury verdict was not a final, appealable order because neither the equitable relief sought by Billingsley nor the attorney fees issue had been determined by the district court.

Following our dismissal of the purported appeal, the district court held a hearing on August 24, 2000, on Billingsley's claims for equitable relief and attorney fees, as well as his request for postjudgment interest. In an order filed December 14, the district court ruled on these claims as follows:

> Based upon the over 4-year gap between Richard Billingsley's termination of employment, and his trial, and based upon the jury's computation of his wage claim and his age claim . . . the Court is persuaded that the verdicts which the jury reached were inclusive not only of Richard Billingsley's legal claims, but those matters which are included within Billingsley's pending request for equitable relief, save the claim for an attorney's fee and post-judgment interest running from the date of the jury's award.

The district court thus denied Billingsley equitable relief of either front pay or reinstatement and set a hearing date on Billingsley's request for attorney fees and postjudgment interest.

On January 5, 2001, the district court held a separate hearing on Billingsley's request for attorney fees and postjudgment interest. In an order filed January 10, the district court awarded

Billingsley attorney fees and postjudgment interest. Judgment was entered.

Defendants appealed the district court's judgment. Billingsley filed a cross-appeal.

III. ASSIGNMENTS OF ERROR

Defendants assign several errors, three of which we discuss. Defendants claim that the district court erred in (1) not finding that Billingsley's claims as set forth in the petition were barred by res judicata and collateral estoppel due to the dismissal of the first three causes of action in Billingsley's third amended petition, (2) concluding that although BCI had fewer than 25 employees, BFM and BCI were to be treated as a common enterprise and thus employers within § 48-1002, and (3) failing to find that Billingsley "failed to sustain his burden of proof because of Defendants' articulation of legitimate nondiscriminatory reasons for [Billingsley's] termination from employment so that no reasonable jury could have returned a verdict for [Billingsley]."

Billingsley assigns two errors on cross-appeal, one of which we discuss. Billingsley claims, restated, that the district court erred in failing to award equitable relief.

IV. STANDARDS OF REVIEW

[1-3] The applicability of the doctrines of res judicata and collateral estoppel is a question of law. *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002); *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). Similarly, statutory interpretation presents a question of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

[4,5] 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. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). An appellate court's review of the trial court's exercise of equity jurisdiction is de novo on the record, with independent

conclusions of fact and law. *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000).

V. ANALYSIS

1. Appeal

(a) Claims Not Barred by Doctrines of Res Judicata and Collateral Estoppel

Defendants argue that the district court erred in not determining that Billingsley's claims under the age discrimination act and under the wage payment act were barred by the doctrines of res judicata and collateral estoppel. There is no merit to this assignment of error.

Defendants specifically assert that on August 1, 1995, when the district court dismissed Billingsley's common-law causes of action for wrongful termination, breach of contract, and tortious interference from his third amended petition without leave to amend such claims, Billingsley's statutory claims for age discrimination and unpaid wages subsequently pled in his fifth amended petition were subsumed within that dismissal and that their assertion was barred by res judicata and collateral estoppel. Because, as detailed below, res judicata and collateral estoppel are limited in their application to subsequent actions, defendants' reliance on these doctrines within the course of the same action is misplaced.

In connection with this assignment of error, defendants contend that when the dismissal order was not vacated by the district court, Billingsley was precluded from subsequently amending his petition to add his statutory claims. In this regard, defendants note that before a district court can enter orders directing the course of a previously dismissed case, it must vacate the dismissal and reinstate the case. See *Murray Constr. Servs. v. Meco-Henne Contracting*, 10 Neb. App. 316, 633 N.W.2d 915 (2001). Defendants' reliance on *Murray Constr. Servs.* is misplaced. The instant appeal involves but one case which was not previously dismissed. Furthermore, the August 1, 1995, dismissal order was limited to three common-law causes of action pled in the third amended petition, which causes of action were not amended by either the fourth or fifth amended

petitions. The fourth amended petition raised statutory causes of action in the pending action for the first time.

In connection with defendants' argument based on res judicata and collateral estoppel, we note that in its August 1, 1995, order, the district court dismissed from Billingsley's third amended petition the three common-law causes of action of wrongful termination, breach of contract, and tortious interference, without leave to amend. The parties agree that the order of August 1 was not vacated. When Billingsley sought and was granted leave to file his fourth amended petition, the petition did not replead the dismissed common-law causes of action, but, rather, added three completely new statutory causes of action: one for age discrimination under §§ 48-1001 to 48-1010 and two for wage payment under §§ 48-1228 to 48-1232. The fifth amended petition repeated the causes of action alleged in the fourth amended petition. Thus, although the common-law wrongful termination, breach of contract, and tortious interference causes of action were dismissed without leave to replead, the district court's order of dismissal did not encompass causes of action subsequently asserted in the same case under statutory provisions involving age discrimination and unpaid wages.

[6,7] Res judicata refers to claim preclusion, while collateral estoppel refers to issue preclusion, two different concepts, although the two terms are often used together. *Hickman v. Southwest Dairy Suppliers, Inc.*, 194 Neb. 17, 230 N.W.2d 99 (1975). We have stated that under res judicata, "a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action." *Woodward v. Andersen*, 261 Neb. 980, 987, 627 N.W.2d 742, 749 (2001). Under collateral estoppel, when an issue has been determined by a final judgment, that issue cannot again be litigated between the same parties in a "future lawsuit." *Id.* at 987-88, 627 N.W.2d at 749.

[8,9] We take this opportunity to state that although it was apparent from the discussion of the facts of our previous opinions, we have not always explicitly referred to the requirement that for res judicata and collateral estoppel to apply, the potential application is restricted to subsequent lawsuits. See, e.g., *City of Kearney v. Johnson*, 222 Neb. 541, 385 N.W.2d 427 (1986); *Hickman, supra*. However, it is essential that there be a

prior action to invoke application of these doctrines in the subsequent case. See *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993) (stating that for application of res judicata and collateral estoppel, successive lawsuits are required). See, also, *Wicker v. Vogel*, 246 Neb. 601, 603, 521 N.W.2d 907, 909 (1994) (stating that res judicata is inapplicable when parties are "involved in but one action"); *State ex rel. Douglas v. Morrow*, 216 Neb. 317, 320, 343 N.W.2d 903, 905 (1984) (collateral estoppel may apply to pending action so long as identical issue was decided in "prior action"). As to res judicata, it is required that there must have been a decision on the merits in the prior action. See *Gruber v. Gruber*, 261 Neb. 914, 626 N.W.2d 582 (2001) (stating that because court's decision that it lacked jurisdiction to enter order was not resolution on merits of claim, res judicata did not apply).

The doctrines of res judicata and collateral estoppel bar the relitigation of certain issues in a subsequent lawsuit. In the instant case, there has been no former lawsuit reaching final judgment as to the statutory age discrimination and wage payment issues tried pursuant to the fifth amended petition. Because there is no prior action, neither res judicata nor collateral estoppel is applicable to this case in the manner proposed by defendants. See, *Wicker v. Vogel, supra*; *In re Application of City of Lincoln, supra*.

We conclude that Billingsley was not precluded by the doctrines of res judicata and collateral estoppel from amending his petition to add his statutory causes of action. Accordingly, there is no merit to this assignment of error.

(b) Defendants Are Common Enterprise for Purposes of "Employer" Under § 48-1002

For their next assignment of error, defendants assert that the district court erred when it determined, as a matter of law, that BFM and BCI were a "common enterprise" which shared employees and employed over 25 people, thus subjecting both BFM and BCI to the age discrimination act. Defendants focus on the fact that in 1993 and 1994, BCI had fewer than 25 employees on its payroll and, standing alone, was not an "employer" within the meaning of § 48-1002. Billingsley worked for BFM and BCI,

and the record shows that, as a matter of law, BFM and BCI were a "common enterprise." Therefore, both defendants were subject to the age discrimination act and there is no merit to this assignment of error.

The issue raised in this assignment of error presents the question of statutory interpretation of whether the employees of technically separate entities may be combined for the purpose of meeting the statutory definition of an "employer" under § 48-1002. Statutory interpretation presents a question of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002). On questions of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Ruzicka v. Ruzicka*, 262 Neb. 824, 635 N.W.2d 528 (2001).

Under the age discrimination act, it is an unlawful employment practice for an employer "[t]o refuse to hire, to discharge, or otherwise to discriminate against any individual with respect to his terms, conditions, or privileges of employment, otherwise lawful, because of such individual's age, when the reasonable demands of the position do not require such an age distinction." § 48-1004(1)(a). The prohibitions under the age discrimination act are "limited to the employment of individuals who are at least forty years of age but less than seventy years of age." § 48-1003. The age discrimination act defines an "employer" governed by the act as "any person having in his or her employ twenty-five or more individuals." § 48-1002(2).

This court has previously stated that when applying the provisions of the Nebraska age discrimination act, it will look to federal decisions interpreting the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 to 634 (1994), for guidance in construing the Nebraska age discrimination act. See *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993) (stating that while federal protection is provided to all individuals who are at least 40 years of age, this court, as general rule, in other respects conforms its reading of Nebraska's age discrimination act to reading of ADEA). An employer is defined under the ADEA as "a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or

more calendar weeks in the current or preceding year." 29 U.S.C. § 630(b).

Under the ADEA, the federal courts have recognized that "in the context of separate corporate entities, a court may calculate the number of employees by reference to the parent's employment rolls if the two distinct entities 'collapse' into a single employer." *Darden v. DaimlerChrysler North American Holding*, 191 F. Supp. 2d 382 (S.D.N.Y. 2002). See, also, Annot., 137 A.L.R. Fed. 551, 567 (1997) ("[c]ourts may consider two ostensibly separate business entities to be a single 'employer' for ADEA purposes if the facts indicate that the two are an 'integrated enterprise' ").

[10] According to the *Darden* opinion, two distinct entities " 'collapse' " into a single employer if the two businesses have "(1) interrelated operations, (2) centralized control of labor relations, (3) common management and (4) common ownership or financial control." 191 F. Supp. 2d at 395. We believe the approach recited in *Darden* is sensible under the Nebraska age discrimination act and adopt the four-part test outlined therein.

In the instant case, the record reflects that both BFM and BCI operated under the control of Alan Baer & Associates. The record further reflects that BFM and BCI shared employees and that they had an economic relationship with respect to these shared employees. Another Alan Baer & Associates business, Strategic Staff Management, would oversee various human resource issues for both businesses. BFM and BCI shared similar management personnel, including Dahlke. Indeed, during the trial, Dahlke testified that he was employed by Alan Baer & Associates and that during the course of his employment, the positions he held with BFM and BCI had "been the same, basically . . . I'm on the board of directors, and I'm probably a vice president or a treasurer or a secretary."

Based upon our review of the record in this case, we conclude that BFM and BCI shared interrelated operations, had centralized control of labor relations, shared a common management, and shared a common ownership or financial control, and therefore, they may be collapsed to make one employer. Accordingly, we conclude that the district court did not err in determining that BFM and BCI were a "common enterprise" and, therefore, were

employers under the age discrimination act. Defendants were subject to the terms of the age discrimination act. We conclude there is no merit to this assignment of error.

(c) District Court Properly Denied Defendants' Motion for Directed Verdict

For their next assignment of error, defendants claim that the district court failed to find that Billingsley "failed to sustain his burden of proof because of Defendants' articulation of legitimate nondiscriminatory reasons for [Billingsley's] termination from employment so that no reasonable jury could have returned a verdict for [Billingsley]." We interpret this assignment to mean that defendants assign as error the district court's denial of their motion for a directed verdict. We conclude that the district court did not err in overruling defendants' motion for a directed verdict, and accordingly, we find this assignment of error to be without merit.

[11-13] 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. *McLain v. Ortmeier*, 259 Neb. 750, 612 N.W.2d 217 (2000); *Nelson v. Lusterstone Surfacing Co.*, 258 Neb. 678, 605 N.W.2d 136 (2000). A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, when an issue should be decided as a matter of law. *McLain*, *supra*; *Lackman v. Rousselle*, 257 Neb. 87, 596 N.W.2d 15 (1999). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of 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. *McLain*, *supra*; *Alexander v. Warehouse*, 253 Neb. 153, 568 N.W.2d 892 (1997). In reviewing the action of a trial court, an appellate court must treat a motion for directed verdict 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. *McLain, supra*; *Lackman, supra*.

Defendants argue that they adduced evidence of legitimate nondiscriminatory reasons as to why Billingsley's employment was terminated and that, therefore, no reasonable jury could have returned a verdict for Billingsley. In cases arising under the age discrimination act, we have held that

> "although the ultimate burden of persuasion by a preponderance of the evidence at all times remains with the plaintiff, the method of proof is for the plaintiff to prove a prima facie case; if the plaintiff succeeds in so doing, the defendant has the burden of articulating some legitimate, nondiscriminatory reason for its action. Should the defendant succeed in so doing, the plaintiff must establish by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."
>
> . . . See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). (As recently clarified in *St. Mary's Honor Center v. Hicks*, [509] U.S. [502], [113] S. Ct. [2742], 125 L. Ed. 2d 407 (1993), *McDonnell Douglas Corp.* allocates the burden of production and the order for the presentation of the evidence; the ultimate burden of persuasion, however, rests on the plaintiff.)

Humphrey v. Nebraska Public Power Dist., 243 Neb. 872, 878, 503 N.W.2d 211, 217 (1993) (quoting *Allen v. AT&T Technologies*, 228 Neb. 503, 423 N.W.2d 424 (1988)).

We have stated that to establish a prima facie case of age discrimination, the plaintiff must establish that (1) he or she was in the protected group, (2) he or she was subjected to an adverse employment action, (3) he or she was qualified for the position, and (4) the person who received the position was outside of the protected group. *Humphrey, supra*. The ultimate issue is whether age was a determining factor in the employer's decision. *Id.*

In *Humphrey*, the plaintiff claimed on appeal that the trial court erred in not directing a verdict in his favor on his claim of

age discrimination. We reviewed the record and determined that the evidence was in dispute and presented an issue as to whether the employer had articulated legitimate, nondiscriminatory reasons for its decisions or whether those reasons were merely pretextual. We concluded that because of the dispute in the record, the trial court did not err in denying the plaintiff's motion for directed verdict. In *Humphrey*, we stated:

> The evidence was not such that reasonable minds could draw but one conclusion . . . . Because it is the prerogative of the jury, as the trier of fact, to resolve conflicts in the evidence and to determine the weight and credibility to be given to testimony of witnesses . . . the evidence clearly presented a submissible issue for the jury. The trial court thus properly denied Humphrey's motion for directed verdict . . . .

243 Neb. at 881-82, 503 N.W.2d at 219.

In the instant case, as in *Humphrey*, there was a conflict in the evidence. Although defendants introduced evidence of a legitimate, nondiscriminatory reason for Billingsley's termination, namely, performance issues, Billingsley introduced evidence from which a jury could determine that those reasons were merely pretextual. Billingsley's evidence included testimony that Dahlke stated an employee should be fired because "he's old. He's useless. He looks bad for the corporate image. . . . Get rid of that old man." Additionally, testimony indicated that Dahlke "wanted an entire new face-lift that would allow a younger look to the entire department" and employment decisions were made in accordance with this stated objective.

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. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001). Our review of the record shows that the evidence in this case created an issue for the jury as to whether defendants had articulated legitimate, nondiscriminatory reasons for their decision to terminate Billingsley or whether those reasons were merely pretextual. As such, we conclude that the district did not err in denying the defendants' motion for directed verdict and submitting the case to the jury.

2. BILLINGSLEY'S CROSS-APPEAL: EQUITABLE CLAIMS

On cross-appeal, Billingsley claims as his first assignment of error that the district court erred in denying him equitable relief on his age discrimination claim. Billingsley sought equitable relief in the form of front pay or reinstatement. We conclude that this assignment of error is without merit.

[14] We noted in *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000), that an age discrimination claimant was entitled to have a jury determine the lawfulness of the employer's conduct and the amount of claimed past damages and, thereafter, to have the district court consider any request for equitable relief. Because in *Billingsley*, the district court had not yet ruled on Billingsley's request for equitable relief prior to the appeal, we dismissed the appeal for lack of a final, appealable order. In setting forth this procedure for handling legal and equitable claims in an age discrimination case, we quoted with approval from *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093 (8th Cir. 1982), in which the U.S. Court of Appeals for the Eighth Circuit stated that in an age discrimination case,

> "[a]fter the jury trial on the foregoing damages issues, the district court should reconsider [the plaintiff's] request for equitable relief . . . .
>
> . . . Although the court below retains its discretion to consider all the circumstances in this case when it determines what equitable relief may be appropriate, it cannot base its decision on its own factual findings that conflict with those expressly made by the jury."

Billingsley v. BFM Liquor Mgmt., 259 Neb. 992, 1001, 613 N.W.2d 478, 485 (2000). Accordingly, in an age discrimination case, when the district court considers the plaintiff's request for equitable relief, the district court cannot reject the jury's findings on whether the plaintiff was the victim of age discrimination, but it nevertheless retains discretion to consider all the circumstances in the case when it determines what equitable relief, if any, may be appropriate.

In the instant case, following this court's dismissal of *Billingsley, supra*, the district court considered Billingsley's request for equitable relief. After a hearing on Billingsley's equitable claims, the district court entered an order in which it

granted Billingsley's request for attorney fees and postjudgment interest, but denied him the relief of reinstatement or front pay. The district court explained its decision as follows:

> Based upon the over 4-year gap between Richard Billingsley's termination of employment, and his trial, and based upon the jury's computation of his wage claim and his age claim . . . the Court is persuaded that the verdicts which the jury reached were inclusive not only of Richard Billingsley's legal claims, but those matters which are included within Billingsley's pending request for equitable relief, save the claim for an attorney's fee and post-judgment interest running from the date of the jury's award.

Although the district court's opinion is somewhat unclear, we interpret this order to be a ruling that "[b]ased upon . . . his trial," Billingsley had not established that he was entitled to the relief of reinstatement or front pay. According to the order, the district court considered the jury's findings that defendants had terminated Billingsley on the basis of his age, and the district court was aware of the damages the jury had awarded Billingsley as a result of this unlawful discrimination. It thus appears that the district court "consider[ed] all the circumstances in this case" and then determined, in its discretion, that under the evidence, no equitable relief in the form of reinstatement or front pay was appropriate. See *Gibson*, 695 F.2d at 1101. Under our de novo standard of review, see *Hornig v. Martel Lift Systems*, 258 Neb. 764, 606 N.W.2d 764 (2000), we cannot say that the district court erred in its decision on Billingsley's claim for equitable relief. Accordingly, we find no merit to this assignment of error in Billingsley's cross-appeal.

3. Remaining Assignments of Error

We have considered defendants' and Billingsley's remaining assignments of error, and we conclude they are without merit.

VI. CONCLUSION

For the reasons stated above, we affirm the decision of the district court.

AFFIRMED.

RAYMOND REISIG, APPELLANT, V. ALLSTATE INSURANCE COMPANY, A CORPORATION, APPELLEE.

645 N.W.2d 544

Filed June 14, 2002. No. S-01-424.

1. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
4. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed.
5. **Records.** Once an adequate request has been made by an appellant, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to properly fulfill the request.
6. **Insurance: Contracts.** Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous.
7. **Insurance: Contracts: Intent: Appeal and Error.** An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made.
8. **Contracts.** A contract must be construed as a whole, and if possible, effect must be given to every part thereof.
9. ____. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
10. **Insurance: Contracts.** The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them.
11. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
12. **Insurance: Contracts.** An ambiguous insurance policy will be construed in favor of the insured.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Reversed and remanded for further proceedings.

Dave Eubanks, of Van Steenberg, Mullin, Pahlke, Smith, Snyder, Petitt & Eubanks, P.C., for appellant.

John M. Burns and James W. Nubel, of Burns Law Firm, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Raymond Reisig filed a declaratory judgment action against Allstate Insurance Company (Allstate), seeking a declaration that the injuries he sustained as a passenger in an uninsured vehicle were covered under the uninsured motorists coverage endorsement (uninsured motorists endorsement) of his Allstate insurance policy. The Kimball County District Court sustained Allstate's motion for summary judgment and dismissed Reisig's declaratory judgment action. Reisig appeals.

FACTUAL BACKGROUND

The evidence presented at the summary judgment hearing, which was not disputed by either party, revealed the following facts: On February 26, 1998, Reisig was a passenger in a 1985 Chevrolet pickup truck driven by its owner, Emigdio Pruneda. As Pruneda was driving southbound on Highway 71, he lost control of the vehicle on an ice-covered portion of the highway approximately 9 miles north of Kimball, Nebraska. The vehicle went off the road and rolled over into the ditch. Reisig claimed he sustained injuries as a result of the accident.

Pruneda and his vehicle were uninsured at the time of the accident. Pruneda had failed to pay the premium on his insurance policy, and as a result, his insurance had been canceled as of January 12, 1998.

Reisig had a "Business Auto" insurance policy issued by Allstate, which was in effect at the time of the accident. Reisig's policy provided automobile liability coverage and contained an uninsured motorists endorsement. Both the insurance policy and the uninsured motorists endorsement listed "Raymond C. Reisig DBA Wild West Auction" as the named insured.

The portion of Reisig's insurance policy providing for automobile liability coverage stated:

SECTION II - LIABILITY COVERAGE

Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

. . . .

1. Who Is An Insured

The following are "insureds":

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow . . . .

Reisig's coverage for uninsured motorists was enumerated on the declarations sheet of the policy. The number "07" appeared next to "UNINSURED MOTORISTS" on the declarations sheet which, according to the policy's "**Description Of Covered Auto Designation Symbols**," signified "Specifically Described 'Autos.' " The "Specifically Described 'Autos' " were those " 'autos' " described in the policy's "**SCHEDULE OF COVERED AUTOS YOU OWN.**" The schedule described six vehicles, none of which were Pruneda's Chevrolet pickup truck.

The uninsured motorists endorsement contained in the policy provided, in pertinent part:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NEBRASKA UNINSURED AND UNDERINSURED MOTORISTS COVERAGE

For a covered "auto" licensed or principally garaged in, or "garage operations" conducted in, Nebraska, this endorsement modifies insurance provided under the following:

BUSINESS AUTO COVERAGE FORM
GARAGE COVERAGE FORM
MOTOR CARRIER COVERAGE FORM
TRUCKERS COVERAGE FORM

With respect to coverage provided by this endorsement, the provisions of the Coverage Form apply unless modified by the endorsement.

. . . .

LIMIT OF INSURANCE

$ $300,000

. . . .

A. Coverage

1. We will pay all sums the "insured" is legally entitled to recover as compensatory damages from the owner or driver of an "uninsured motor vehicle" or "underinsured motor vehicle". The damages must result from "bodily injury" sustained by the "insured" caused by an "accident". The owner's or driver's liability for these damages must result from the ownership, maintenance or use of the "uninsured motor vehicle" or "underinsured motor vehicle".

. . . .

B. Who Is An Insured

1. You.

2. If you are an individual, any "family member".

3. Anyone else "occupying" a covered "auto" or a temporary substitute for a covered "auto". The covered "auto" must be out of service because of its breakdown, repair, servicing, loss or destruction.

4. Anyone for damages he or she is entitled to recover because of "bodily injury" sustained by another "insured".

C. Exclusions

This insurance does not apply to any of the following:

. . . .

3. "Bodily injury" sustained by:

a. You while "occupying" or when struck by any vehicle owned by you that is not a covered "auto" for Underinsured Motorists Coverage under this Coverage Form[.]

On March 26, 1999, Reisig filed a declaratory judgment action against Allstate. Reisig claimed that he incurred $55,000 in damages for medical treatment and $10,000 for lost wages, salary, profits, and time. He also claimed general damages for pain and suffering, permanent disability, and lost earning capacity. Reisig requested a declaration that (1) the vehicle he was in at the time

of the accident was an uninsured vehicle, (2) the uninsured motorists endorsement of his insurance policy provides coverage for the injuries he sustained in the accident, and (3) he sustained special damages of $60,000 and general damages up to the $300,000 policy limit of the uninsured motorists endorsement.

On December 22, 2000, Allstate filed a motion for summary judgment. On January 16, 2001, a hearing was held on the motion. Allstate argued that the entire uninsured motorists endorsement should be interpreted in the context of the phrase "For a covered 'auto,' " which appears in the first sentence of the endorsement. Allstate maintained that, so interpreted, the definition of an insured under the uninsured motorists endorsement was not simply "You," but, rather, "For a covered 'auto' . . . You." Brief for appellee at 3. Allstate asserted there was no discernible difference between this definition of an insured and the definition of an insured in the liability coverage provisions of the policy as "You for any covered 'auto.' " Allstate contended that summary judgment should be granted since Reisig was not occupying a "covered 'auto' " at the time of his accident which, according to Allstate, was required under both the liability coverage provisions and the uninsured motorists endorsement.

On March 12, 2001, the district court granted summary judgment in favor of Allstate. Analyzing Reisig's insurance policy, the court focused on the "limiting language" in the first sentence of the uninsured motorist endorsement, which began with the phrase, "For a covered auto." The court agreed with Allstate that such language was consistent with the "original base policy" which "limits coverage to the insured when in a covered auto." The court concluded that Reisig was not covered under the policy, and thus, he could not recover for his injuries. The court then dismissed Reisig's declaratory judgment action. Reisig appeals.

ASSIGNMENT OF ERROR

Reisig assigns, rephrased, that the district court erred in sustaining Allstate's motion for summary judgment and dismissing his declaratory judgment action.

STANDARD OF REVIEW

[1] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation

to reach its own conclusions independently of the determination made by the lower court. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

[2,3] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). 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.*; *Tighe, supra.*

ANALYSIS

[4,5] Before analyzing Reisig's claims, we first note that a copy of Reisig's insurance policy was not included in the original bill of exceptions for this appeal. It is incumbent on the party appealing to present a record which supports the errors assigned, and absent such a record, the decision of the lower court will be affirmed. *Harders v. Odvody*, 261 Neb. 887, 626 N.W.2d 568 (2001); *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001). However, it is also the rule that once an adequate request has been made by an appellant, the preparation of the bill of exceptions becomes an internal court matter, and it is the duty of the court reporter to properly fulfill the request. *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998); *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996); *State v. Slezak*, 230 Neb. 197, 430 N.W.2d 533 (1988). See, also, Neb. Ct. R. of Prac. 5 (rev. 2001).

Reisig filed with his notice of appeal a "Request for Bill of Exceptions," which asked the court reporter to include the "Hearing on Defendant's Motion for Summary Judgement held on January 16th, 2001, excluding argument of counsel, but including any and all exhibits offered at the time of the hearing on Motion for Summary Judgement, whether or not received into evidence." It was clear from the transcription of the January 16, 2001, hearing that Reisig's insurance policy was included as an attachment to an exhibit offered at the hearing.

Since Reisig was entitled to have all exhibits from the hearing on January 16, 2001, included in the bill of exceptions, we issued an order instructing the court reporter to complete the bill of exceptions. This court has now received the complete bill of exceptions, which includes the insurance policy at issue in this appeal. We thus proceed to address Reisig's assignment of error.

Reisig argues that the district court erred in sustaining Allstate's motion for summary judgment and dismissing his declaratory judgment action. Specifically, he asserts that the district court erred in concluding that the introductory phrase ("For a covered 'auto' ") when read together with the definition of an insured ("You") in the uninsured motorists endorsement was consistent with the "You for any covered 'auto' " definition of an insured in the liability coverage provisions. Reisig contends that the uninsured motorists endorsement simply defines an insured as "You," and thus, since it is undisputed that he is the named insured, his injuries should be covered under the policy. Unlike the district court, Reisig contrasts the definition of an insured under the uninsured motorists endorsement ("You") with the definition of an insured under the liability coverage portion of the policy ("You for any covered 'auto' "). He asserts that the insurance policy provides broader coverage under its uninsured motorists coverage provisions than it does under its liability coverage provisions.

Allstate maintains that the insurance policy limits Reisig's coverage to "any covered 'auto' " for both liability coverage and uninsured motorists coverage. It asserts "[t]he clear language of the commercial policy limited coverage to scheduled autos. As Mr. Reisig was not in a vehicle listed on the schedule at the time of the accident he is not entitled to recover under the commercial policy." Brief for appellee at 1. Allstate relies on the first sentence of the uninsured motorists endorsement which begins with the phrase "For a covered auto." Allstate argues that the "restrictive language obviously limits defendant's risk to listed vehicles and is in keeping with the language in the rest of the policy." Brief for appellee at 3. Allstate concludes that "[t]here can be found no legal difference between the contractual language, 'You for any covered "auto" ' as found in the commercial policy, and 'For a covered "auto" ' 'You.' as found in the endorsement." *Id.*

[6-12] Under Nebraska law, a court interpreting a contract, such as an insurance policy, must first determine, as a matter of law, whether the contract is ambiguous. *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). An appellate court reviewing an insurance policy must construe the policy as any other contract and give effect to the parties' intentions at the time the contract was made. See *id.* The contract must be construed as a whole, and if possible, effect must be given to every part thereof. See *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998). When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Cincinnati Ins. Co., supra.* The language of an insurance policy should be read to avoid ambiguities, if possible, and the language should not be tortured to create them. *Id.* A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001). An ambiguous insurance policy will be construed in favor of the insured. *Id.*

Reisig's insurance policy defines an insured in its liability coverage provisions as "You for any covered 'auto.' " Regarding uninsured motorists coverage, the declarations sheet contains a notation referring to "Specifically Described 'Autos,' " and the uninsured motorists endorsement contains the phrase "For a covered 'auto' " in its first sentence. However, the uninsured motorists endorsement includes a statement at the very top of the first page which reads, in boldfaced, capital letters, "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**" The endorsement then defines an insured as "You." In light of these provisions in the policy, it is not clear whether "You" stands alone or if it is somehow similarly restricted to "a covered 'auto' " as it is under the liability coverage. It is apparent that the definition of an insured as "You" in the uninsured motorists endorsement, when considered in combination with the endorsement's introductory phrase ("For a covered 'auto' "), its boldfaced warning ("**THIS**

ENDORSEMENT CHANGES THE POLICY"), the definition of an insured for purposes of liability coverage ("You for any covered 'auto' "), and the declarations sheet's notation (referring to "Specifically Described 'Autos' "), is a word which "has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." See *Tighe*, 261 Neb. at 999, 628 N.W.2d at 675. For this reason, we determine that the uninsured motorists endorsement is ambiguous. Since an ambiguous insurance policy is construed in favor of the insured, we will construe the language of the insurance policy in favor of Reisig. See *id.*

Allstate asserts that the phrase "For a covered 'auto' " in the first sentence of the uninsured motorists endorsement modifies every term that follows, including the definition of an insured as "You." It argues that the definition of an insured should effectively be read as " 'For a covered "auto" ' . . . 'You.' " Brief for appellee at 3. However, part B, paragraph 3, of the uninsured motorists endorsement also defines an insured as "Anyone else 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' " If the "covered 'auto' " limitation modifies the entire endorsement as Allstate asserts, it would be unnecessary to add the specific "covered 'auto' " limitation to paragraph 3. It would, in effect, make the limitation incorporated within paragraph 3 superfluous.

Similarly, the "**Exclusions**" in part C, paragraph 3a, of the uninsured motorists endorsement would also be rendered superfluous under Allstate's interpretation. Part C, paragraph 3a, excludes uninsured motorists coverage for bodily injuries sustained by "You while 'occupying'. . . any vehicle owned by you that is not a covered 'auto'. . . ." If, as Allstate asserts, the uninsured motorists endorsement provides coverage to the insured "You" only in those instances involving a "covered auto," it would be unnecessary for Allstate to include part C, paragraph 3a, specifically excluding coverage for the insured while in a *noncovered auto* which the insured owns. Construing the contract as a whole and in favor of Reisig, we find Allstate's interpretation of the uninsured motorists endorsement unpersuasive.

This court is not alone in its determination. In *Bushey v. Northern Assurance*, 362 Md. 626, 766 A.2d 598 (2001), the Maryland Court of Appeals was presented with similar arguments

based on an uninsured motorists endorsement identical to the endorsement in Reisig's policy. In *Bushey*, the issue was whether the uninsured motorists endorsement provided coverage for the daughter of the named insured, a "family member" under part B, paragraph 2, who was not riding in a "covered auto" at the time she sustained bodily injury. The insurer in *Bushey* argued, as Allstate does in the present case, that the uninsured motorists endorsement restricted coverage to only those instances involving a "covered auto." In response, the court stated:

> [The insurer's] reading of the policy, under which the entire Endorsement is limited by its introduction to a "covered 'auto' " renders Part B, ¶ 3 redundant. If, regardless of relationship to the named insured, all claimants for [uninsured/underinsured] benefits must have been occupants of a " 'covered auto,' " it becomes totally unnecessary to specify in Part B, ¶ 3 that payment of those benefits for "anyone else," *i.e.*, other than the named insured or a "family" member of the named insured, depended on " 'occupying' a covered 'auto.' " Similarly, it would have been unnecessary to exclude from "[b]odily injury" in Part C, ¶ 3.b an injury sustained by a family member in "any vehicle owned by that family member that is not a covered 'auto,' " if occupying any non-covered auto, in and of itself, would exclude coverage."

Id. at 636, 766 A.2d at 603. The court found that the policy language of the uninsured motorists endorsement unambiguously provided coverage if the daughter fit within the policy's definition of a "family member." The court stated that "[t]he references to covered autos in the general structure of the policy on which [the insurer] relies at best create an ambiguity." *Id.*

In *Stoddard v Citizens Ins. Co. of America*, 249 Mich. App. 457, 643 N.W.2d 265 (2002), the Michigan Court of Appeals interpreted an uninsured motorists endorsement identical to the endorsement in Reisig's policy. As in *Bushey*, the issue in *Stoddard* was whether the uninsured motorists endorsement provided coverage for a "family member" under part B, paragraph 2, who was not riding in a "covered auto" at the time she sustained bodily injury. The appellant in *Stoddard* appealed from the lower court's order, which granted summary disposition in

favor of the insurer based on the finding that "the accident did not involve the vehicle covered under [the insurer's] policy." 249 Mich. App. at 459, 643 N.W.2d at 266.

The insurance policy in *Stoddard* mirrors Reisig's policy in that the same symbol, "07," which signifies "Specifically Described 'Autos,' " appears next to the uninsured motorists category on the declarations sheets of both policies. Even with such exclusions in the policy, the court in *Stoddard* stated, "Reading the definitions and exclusions to the uninsured motorist coverage of the policy, we find that it unambiguously provides coverage in circumstances beyond those involving the covered auto, including the accident at issue." *Id.* at 464, 643 N.W.2d at 269. The court then proceeded to interpret the uninsured motorists endorsement, stating:

> Under the definition of an "insured," the policy specifically limits liability for persons other than the named insured and family members to anyone " 'occupying' a covered 'auto' or a temporary substitute for a covered 'auto.' " If the policy contemplated uninsured motorist liability only when the claim involved the covered auto, as defendant contends, it would be unnecessary to otherwise limit liability for guests to those occupying the covered auto. Defendant's reading of the policy renders part B, ¶ 3 redundant. There would be no reason to distinguish between situations involving the named insured and family members as opposed to other persons. Clearly, the policy was intended to follow the named insured and family members when they were not occupying the covered auto and sustained injury from an uninsured motorist.
>
> Likewise, if the uninsured motorist coverage applied only when the covered auto was involved there would be no need for the "owned vehicle exclusion" in part C, limiting liability in circumstances where the named insured or a family member was not occupying the covered automobile, but was in another *owned* vehicle that was not a covered auto under the policy.

Id. The court concluded that "[e]ven if the terms of the policy were considered ambiguous with regard to the covered auto limitation, the result is the same." *Id.* at 466, 643 N.W.2d at 270.

In addition, as noted previously, the first page of Reisig's uninsured motorists endorsement contains a heading in boldfaced, capital letters, stating, "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**" The heading provides notice that the terms of the uninsured motorists coverage may differ from those in the original insurance policy. This policy language is consistent with Reisig's contention that the definition of an insured in the uninsured motorists endorsement is not the same as the definition of an insured for purposes of liability coverage. See, also, *Estate of Rosato v. Harleysville Mut. Ins.*, 328 Pa. Super. 278, 289 n.3, 476 A.2d 1328, 1334 n.3 (1984) (calling attention to heading's express statement, " 'THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY,' " in determining that uninsured motorists endorsement's definition of "insured" mandated coverage although liability coverage's definition of "insured" did not).

Concluding that the Allstate policy is ambiguous and therefore construing it in favor of Reisig, we determine as a matter of law that Reisig's insurance policy does not limit Reisig's uninsured motorists coverage solely to those instances involving "a covered 'auto.' " The district court thus erred in granting Allstate's motion for summary judgment and dismissing Reisig's appeal.

CONCLUSION

For the foregoing reasons, we reverse the district court's judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V.
BERNARD D. LONG, APPELLANT.
645 N.W.2d 553

Filed June 14, 2002. No. S-01-662.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of

witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.

2. **Records: Rules of the Supreme Court.** The procedure for preparation of a bill of exceptions is regulated by the rules of practice prescribed by the Nebraska Supreme Court.
3. **Effectiveness of Counsel: Proof.** To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense.
4. ____: ____. In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different.
5. **Juries: Discrimination.** An attack on the use of peremptory challenges on grounds under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), must be made prior to the jury's being sworn.
6. **Effectiveness of Counsel: Proof.** The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed.
7. **Juries.** When a timely objection under *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), is made, a trial court is required to inquire into the reasons behind the peremptory strike.
8. **Effectiveness of Counsel: Records: Appeal and Error.** A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question.
9. **Trial: Evidence: Motions to Suppress.** The State may properly argue and introduce evidence relating to a defendant's attempt to suppress evidence or otherwise avoid a fair adjudication of a dispute.
10. **Trial: Rules of Evidence.** Neb. Rev. Stat. § 27-403 (Reissue 1995) permits a trial court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice.
11. **Trial: Rules of Evidence: Appeal and Error.** A trial court must balance the probative value of evidence against the prejudicial factors listed in Neb. Rev. Stat. § 27-403 (Reissue 1995), and an appellate court will uphold the trial court's decision in this regard in the absence of an abuse of discretion.
12. **Trial: Evidence: Testimony.** If a defendant has authorized an attempt of a third person to suppress testimony, evidence of such conduct is admissible against the defendant.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Deborah D. Cunningham for appellant.

Don Stenberg, Attorney General, and Samuel J. Bethune for appellee.

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

WRIGHT, J.

NATURE OF CASE

Bernard D. Long (Long) was convicted of first degree murder and use of a weapon to commit a felony. He was sentenced to life imprisonment and a consecutive sentence of 5 to 10 years' imprisonment. Long appeals.

SCOPE OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

FACTS

On May 2, 2000, Long's brother Roland Long (Roland) was shot by Keith Fox, a member of the South Family Bloods, a gang located primarily in South Omaha. Roland was a suspected member of the 37th Avenue Crips, a rival gang of the South Family Bloods. Long, Terrence Nelson, and Christopher Grant witnessed Roland's shooting. Long testified that after the shooting, he purchased a gun on the street for $100.

On May 3, 2000, Long, Grant, Nelson, and Lenny Moss visited Roland at the hospital. Upon leaving the hospital, the four drove on Saddle Creek Road to Military Avenue. At 72d Street and Military Avenue, they noticed a vehicle next to them which was driven by McHenry Norment, a South Family Bloods gang member. When Norment observed the parties in the Long vehicle, he brandished a semiautomatic handgun. The Long vehicle

then turned at Templeton Drive and continued toward Fort Street and into a Runza restaurant's drive-through exit, proceeding out the entrance.

At that moment, Norment's vehicle was caught in heavy traffic on Fort Street. Long then jumped out of his vehicle and began firing toward Norment's vehicle. He fired 14 shots before he jumped back into the vehicle. Norment died from a gunshot wound to the head.

Claiming that the vehicle had overheated, Nelson stopped at 56th Street and Camden Avenue. The four occupants left the vehicle. Moss ran one way, and the other three ran toward the home of Grant's mother, Tamyra Wilson. Long was carrying the gun but dropped it along the way. It was later discovered in the bushes behind a house located on Fort Street.

The three men told Wilson that their vehicle had broken down. When the police subsequently arrived, the men were arrested. Long was interviewed at the police station and initially denied being at the scene.

The police found two spent shell casings and a semiautomatic handgun on the floor of Norment's vehicle. A gunpowder test showed powder on Norment's hands.

At trial, Moss testified that Long had stated he was going to "get" the South Family gang. Moss thought that when the group left the hospital, they were planning to buy orange clothing so they could blend in with South Family gang members.

Nelson and Grant denied that there was talk of revenge. Nelson said he heard shots from Norment's vehicle before Long got out of his vehicle. Grant stated that he saw Norment fire his gun before Long returned fire.

Long testified that Norment pointed a gun at him and that he felt like he was about to lose his life. He said everything happened quickly, and it seemed as if he fired only six bullets.

Long also stated that he did not get along well with Moss, and on cross-examination, Long admitted to writing a letter to his brother Darnell Long (Darnell) in which he instructed Darnell to call Moss. Long's objection to the introduction of the contents of the letter was overruled. Over the renewed objection of his attorney, Long admitted that he had asked Darnell to get Moss to drink an alcoholic beverage before trial so Moss would not be

able to testify. Long claimed that Moss lied about everything and that Moss was upset with Long because of Long's prior involvement with Moss' girl friend.

The jury found Long guilty of first degree murder and use of a weapon to commit a felony. Long's motion for new trial was overruled, and the district court sentenced him to life imprisonment on the first degree murder charge and 5 to 10 years' imprisonment on the use of a weapon to commit a felony charge, the sentences to be served consecutively. Long timely appealed.

ASSIGNMENTS OF ERROR

Long assigns as error that trial counsel provided ineffective assistance by failing to timely object to the composition of the jury based on *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Long asserts that the district court erred in overruling his motion in limine and in permitting cross-examination of Long concerning a letter written by him. Long also claims there was insufficient evidence to sustain a verdict of guilty beyond a reasonable doubt.

ANALYSIS

Ineffective Assistance of Counsel

Long claims that his trial counsel was ineffective because counsel failed to raise a *Batson* challenge prior to the impaneling of the jury. After the jury was sworn, Long's trial counsel made a *Batson* challenge as to two members of the jury panel. Without conducting an evidentiary hearing, the district court overruled the motion because the jury had been sworn and the panel excused.

Following the jury verdict and in the absence of the trial judge, the State attempted to make a record in the presence of Long, Long's counsel, and the court reporter as to the State's race-neutral reasons for dismissing the two jurors. The State claimed that it had dismissed one of the jurors because the juror's nephew had been shot in the head in a drive-by shooting and the person responsible was released on a technicality. The juror's brother had worked with gangs and was acquainted with defense counsel.

The second juror was stricken because he lived in the Crips' territory, and Long was affiliated with the Crips. The juror was

employed by an organization that worked with gang members. He had had two brothers killed in Kansas City and said he was upset with the prosecution for not notifying him of the trial. He had a brother who was a sheriff's deputy, who he felt was overzealous. This juror also worked for a watchdog organization that observed police actions, and he reported that he had been attacked by a police officer. The State also claimed that this juror sat with his arms crossed during the prosecution's questioning but not when the defense was speaking.

In this court, Long filed a motion to strike this evidence from the record, and we overruled the motion without prejudice. We now conclude that this evidence is not properly a part of the record and that, therefore, it should be stricken from the bill of exceptions.

[2] The procedure for preparation of a bill of exceptions is regulated by the rules of practice prescribed by this court. *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996). Neb. Ct. R. of Prac. 5A(2) (rev. 2000) states in relevant part:

> Upon the request of the court or of any party, either through counsel or pro se, the official court reporter shall make a verbatim record of anything and everything said or done by anyone in the course of trial or *any other proceeding*, including, but not limited to, any pretrial matters; the voir dire examination; opening statements; arguments, including arguments on objections; any motion, comment, or statement made by the court in the presence and hearing of a panel of potential jurors or the trial jury; and any objection to the court's proposed instructions or to instructions tendered by any party, together with the court's rulings thereon, and any posttrial proceeding.

(Emphasis supplied.)

According to Black's Law Dictionary 1221 (7th ed. 1999), a "proceeding" is defined as "1. [t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment." (Emphasis omitted.) What occurred outside the presence of the trial judge was not a proceeding in the course of the trial, and therefore, it should not be included in the bill of exceptions. The fact that it was recorded by a court reporter does not make it a proceeding.

The recording by the court reporter establishes only that the transcription is an accurate recording of what occurred.

The defendant must make a timely *Batson* challenge, or the State may waive the timeliness of the objection. See *State v. Myers*, 258 Neb. 300, 603 N.W.2d 378 (1999). If the State waives the timeliness of the challenge, the parties must make an evidentiary record before the court prior to the time the evidence is presented to the jury.

In *State v. Nelson*, 189 Neb. 144, 201 N.W.2d 248 (1972), we stated that a defendant should not be allowed to speculate on the verdict and then challenge the selection of the panel after the verdict. The same rationale applies to the State. The State cannot refuse to waive the timeliness of Long's *Batson* challenge and then, after the verdict, attempt to establish that it was justified in striking the jurors in question. Therefore, we will not consider the information that was presented after the jury verdict.

[3,4] We next address the claim of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the defendant must show that counsel's performance was deficient and that this deficient performance actually prejudiced his or her defense. *State v. Billups*, 263 Neb. 511, 641 N.W.2d 71 (2002). In order to establish whether a defendant was denied effective assistance of counsel, he or she must ordinarily demonstrate that counsel was deficient; that is, counsel did not perform at least as well as a criminal lawyer with ordinary training and skill in the area. Moreover, the defendant must make a showing that he or she was prejudiced by the actions or inactions of his or her counsel; that is, the defendant must demonstrate with reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

[5] The question is whether Long's trial counsel was deficient in failing to make a *Batson* challenge prior to impaneling the jury. In *Myers*, 258 Neb. at 306, 603 N.W.2d at 385, we stated:

> In *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993), *questioned on other grounds, State v. Pierce*, 248 Neb. 536, 537 N.W.2d 323 (1995), we held that an attack

> on the use of peremptory challenges on *Batson* grounds must be made prior to the jury's being sworn. We reasoned that in Neb. Rev. Stat. § 25-1601.03(4) (Reissue 1995), the Legislature provided that one of the purposes of chapter 25, article 16, is to ensure that no citizen is excluded from jury duty because of discrimination based upon race, color, religion, sex, national origin, or economic status. Neb. Rev. Stat. § 25-1637(1) (Reissue 1995) provides that a motion for relief based on the ground of substantial failure to comply with chapter 25, article 16, must be made before the jury is sworn to try the case. Thus, we concluded that a defendant's objection to the use of peremptory strikes on *Batson* grounds should also be made prior to the swearing in of the jury or before any objections are waived.

In failing to make a timely *Batson* challenge, Long's trial counsel failed to preserve the issue of whether the State used improper peremptory strikes. However, this does not automatically mean that trial counsel was deficient for failing to make a *Batson* challenge prior to the impaneling of the jury. Counsel's reasons for failing to make a *Batson* challenge would need to be examined.

[6] Determining under what circumstances an attorney would be deficient in failing to make such a challenge is difficult. However, such determination becomes unnecessary if Long was not prejudiced by his counsel's failure to make a timely objection. The two prongs of the ineffective assistance of counsel test, deficient performance and prejudice, may be addressed in either order. If it is more appropriate to dispose of an ineffectiveness claim due to the lack of sufficient prejudice, that course should be followed. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

In *Ex Parte Yelder*, 575 So. 2d 137 (Ala. 1991), *cert. denied* 502 U.S. 898, 112 S. Ct. 273, 116 L. Ed. 2d 225, the court determined that prejudice could be presumed when counsel failed to make a *Batson* objection. It reasoned that "[i]f an outcome-determinative test is used, then no black appellant could prove prejudice unless he relied on the very assumption that *Batson* condemns." *Ex Parte Yelder*, 575 So. 2d at 139.

[7] However, in *Davidson v. Gengler*, 852 F. Supp. 782 (W.D. Wis. 1994), the court noted that unlike the other circumstances in which prejudice is presumed, the failure to raise a *Batson*

objection did not suggest such a high probability of prejudice. When a timely *Batson* objection is made, a trial court is required to inquire into the reasons behind the peremptory strike. Assuming prejudice would create the unwarranted presumption that all *Batson* objections have merit. The court stated that a defense lawyer could fail to make a *Batson* challenge knowing that he had automatically secured grounds for a new trial for his client should the trial result in a guilty verdict. The court stated that the inquiry into whether prejudice exists depends upon whether there exists a reasonable probability that the makeup of the jury would have been different.

[8] A claim of ineffective assistance of counsel need not necessarily be dismissed merely because it is made on direct appeal; the determining factor is whether the record is sufficient to adequately review the question. *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). We conclude that the record before us is not sufficient for us to determine whether counsel's performance was deficient or whether Long was prejudiced by counsel's failure to make a *Batson* challenge. For that reason, we decline to address Long's ineffective assistance of counsel claim.

Motion in Limine

Long alleges that the district court abused its discretion in overruling his motion in limine and thereby allowing the State to cross-examine him about the contents of the letter he wrote to his brother. Long had been advised by the court that if he testified and the motion in limine was overruled, he would be cross-examined regarding the contents of the letter. Long's attorney objected to admission of the letter on the bases that it was not relevant and that the probative value was outweighed by the prejudicial value. The motion in limine was overruled. Over objection, the State was permitted to cross-examine Long about the letter. The State never offered the letter as an exhibit; therefore, it is not part of the record. Although the jury requested to see the letter, it was not shown to them.

Long admitted that he wrote the letter to his brother Darnell and that the letter asked Darnell to pick up Moss on the morning of the trial and get him to drink an alcoholic beverage so that

Moss would be unable to testify. Long claimed that he did not want Moss to come to court and "lie on me like he always do."

Long claims the letter is relevant only if he was charged with obstruction of justice or witness tampering. He claims that use of the letter created an inference that he was a bad person and that the resulting prejudice was not harmless.

[9] The State argues that the letter was relevant as to Long's credibility and to show that he was aware of his own guilt. In *State v. DeGroot*, 230 Neb. 101, 430 N.W.2d 290 (1988), the defendant sent a letter to a witness asking the witness to testify falsely about an alibi. The witness testified he would have been lying if he had testified as the defendant had requested. We found no abuse of discretion in the trial court's finding that the evidence was relevant. The State may properly argue and introduce evidence relating to a defendant's attempt to suppress evidence or otherwise avoid a fair adjudication of a dispute. *Id.*

In this case, Long asked his brother to take action so that Moss could not testify against him. The evidence was relevant to show Long's attempt to suppress evidence or otherwise avoid a fair adjudication of his guilt. See *id.*

[10,11] Neb. Rev. Stat. § 27-403 (Reissue 1995) permits the trial court to exclude relevant evidence where its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). However, the fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence that has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Decker, supra.* The trial court must balance the probative value of the evidence against the prejudicial factors listed in § 27-403, and an appellate court will uphold the trial court's decision in this regard in the absence of an abuse of discretion. *State v. Decker, supra.*

[12] Generally, evidence of the attempt of third persons to suppress testimony is inadmissible against a defendant where the effort did not occur in his presence. However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible

against the defendant. *State v. Clausen*, 247 Neb. 309, 527 N.W.2d 609 (1995).

We conclude that the district court did not abuse its discretion in overruling Long's motion in limine and allowing cross-examination of Long concerning the letter.

INSUFFICIENT EVIDENCE

Long asserts that there was insufficient evidence to support a finding of guilt beyond a reasonable doubt. In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Gartner*, 263 Neb. 153, 638 N.W.2d 849 (2002).

Long's assertion that Norment pointed a gun toward the occupants of Long's vehicle when the parties were at 72d Street and Military Avenue is supported by the evidence. However, Long left that threatening situation unharmed, and the State offered ample evidence from which a jury could determine that Long did not act in self-defense.

When Norment's vehicle was stopped in traffic, Long left his vehicle and fired 14 shots. Several witnesses testified that the first shots they heard came from the direction in which Long was standing. Long, Grant, and Nelson were the only witnesses who testified that Norment was the first to fire. There was also testimony that Long wanted revenge for the shooting of his brother Roland.

Whether Long was acting in self-defense was a question of fact for the jury to resolve. An appellate court does not resolve conflicts in the evidence. Accordingly, we find that the evidence was sufficient to sustain the convictions.

CONCLUSION

We decline to address Long's first assignment of error because a sufficient record is not present. Long has failed to show that the remaining assignments of error have merit. We therefore affirm the judgments of conviction and the sentences imposed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OFELIA GAMEZ-LIRA, APPELLANT.

645 N.W.2d 562

Filed June 14, 2002. No. S-01-805.

1. **Postconviction: Constitutional Law: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable.
2. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous.
3. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
4. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
5. **Judgments: Appeal and Error.** Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm.
6. **Postconviction: Appeal and Error.** A motion for postconviction relief is not a substitute for an appeal.
7. ____: ____. A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal, no matter how the issues may be phrased or rephrased.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

James G. Kube, of Stratton, Ptak & Kube, P.C., for appellant.

Don Stenberg, Attorney General, and Jodi M. Fenner for appellee.

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

MCCORMACK, J.

NATURE OF CASE

This case arises from a denial of postconviction relief by the district court for Madison County. Appellant, Ofelia Gamez-Lira, pled guilty to issuing a bad check, a Class IV felony. She

was sentenced to an indeterminate term of incarceration of 1 to 3 years, and she was ordered to pay restitution in the amount of $2,124.15, along with the costs of prosecution. Gamez-Lira filed a motion for postconviction relief alleging that her sentence was unconstitutional. The trial court denied Gamez-Lira's motion. We affirm.

BACKGROUND

Between June 12 and August 12, 2000, Gamez-Lira obtained services or merchandise approximately 31 times by issuing or passing a check knowing that she had no account with the drawee at the time or knowing that she did not have sufficient funds in or credit with the drawee for payment thereof. The original information charged Gamez-Lira with three Class IV felonies. The information was amended to one Class III felony charge of issuing a bad check. Gamez-Lira eventually pled guilty to one count of issuing a bad check, a Class IV felony.

The trial court accepted Gamez-Lira's plea of guilty and scheduled a presentence investigation. The record does not reflect that Gamez-Lira filed a motion to quash, plea in abatement, or demurrer; nor does the record reflect that she filed a direct appeal in this case. Gamez-Lira served 156 days' imprisonment while awaiting sentencing. The trial court sentenced her to an indeterminate term of incarceration of 1 to 3 years, with credit given for time served. Gamez-Lira was ordered to pay restitution in the amount of $2,124.15 within 2 years following her release from incarceration, along with the costs of prosecution.

Gamez-Lira filed a motion for postconviction relief alleging that a sentence of imprisonment was illegal. She noted article I, § 20, of the Nebraska Constitution states that " '[n]o person shall be imprisoned for debt in any civil action on mesne or final process' " and argued that there is no exception for fraud. Therefore, according to Gamez-Lira, the penalty of imprisonment based upon the issuance of a bad check for the payment of a civil debt violated article I, § 20. The trial court denied the motion.

ASSIGNMENTS OF ERROR

Gamez-Lira alleges that the trial court erred in (1) finding that under Neb. Rev. Stat. § 28-611 (Reissue 1995) "incarceration is a constitutional form of punishment in light of the

constitutional language," (2) failing to find that she was being incarcerated unconstitutionally, and (3) denying her motion for postconviction relief.

STANDARD OF REVIEW

[1] In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the U.S. or Nebraska Constitution, causing the judgment against the defendant to be void or voidable. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001).

[2] A defendant requesting postconviction relief must establish the basis for such relief, and the factual findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002).

[3] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Hynek*, 263 Neb. 310, 640 N.W.2d 1 (2002).

[4] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Curtright*, 262 Neb. 975, 637 N.W.2d 599 (2002).

ANALYSIS

[5] Despite Gamez-Lira's failure to file a direct appeal, the trial court concluded that she may proceed under a motion for postconviction relief. We disagree. We do, however, agree with the ultimate decision of the trial court denying Gamez-Lira's motion for postconviction relief. Where the record adequately demonstrates that the decision of a trial court is correct, although such correctness is based on a ground or reason different from that assigned by the trial court, an appellate court will affirm. *State v. Parmar, supra.*

[6] Neb. Rev. Stat. § 29-3001 (Reissue 1995) states that a postconviction action is available to a prisoner on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment of a court void or voidable under the state or federal Constitution. However, a motion for

postconviction relief is not a substitute for an appeal. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000).

[7] A motion for postconviction relief cannot be used to secure review of issues which were known to the defendant and could have been litigated on direct appeal, no matter how the issues may be phrased or rephrased. See, *State v. El-Tabech, supra*; *State v. Lyle*, 258 Neb. 263, 603 N.W.2d 24 (1999). We hold that Gamez-Lira is procedurally barred from raising her assignments of error. Each assigned error was of the type that could have been raised by direct appeal. Because they were not so raised, we determine that Gamez-Lira is barred from raising them at this time on a motion for postconviction relief. See *State v. Brunzo*, 262 Neb. 598, 634 N.W.2d 767 (2001).

CONCLUSION

For the reasons discussed above, which differ from those stated by the trial court, we affirm the holding of the trial court denying Gamez-Lira's motion for postconviction relief. We determine that Gamez-Lira is procedurally barred from raising her assignments of error.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
PHILLIP J. SPADY, APPELLANT.
645 N.W.2d 539

Filed June 14, 2002. No. S-01-970.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court.
2. **Sentences.** Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court.
3. ____. A commutation is a substitution of a lesser or partial punishment.
4. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense.
5. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.

6. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet the constitutional requirements if such can reasonably be done.
7. **Constitutional Law: Statutes: Proof.** The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional.
8. ____: ____: ____. The unconstitutionality of a statute must be clearly established before a court may declare it void.

Appeal from the District Court for Platte County, ROBERT R. STEINKE, Judge, on appeal thereto from the County Court for Platte County, FRANK J. SKORUPA, Judge. Judgment of District Court reversed, and cause remanded with directions.

Mark M. Sipple, of Sipple, Hansen, Emerson & Schumacher, for appellant.

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

Robert B. Creager, of Anderson, Creager & Wittstruck, P.C., for amicus curiae Nebraska Criminal Defense Attorneys Association.

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

WRIGHT, J.

NATURE OF CASE

Phillip J. Spady filed a motion to set aside his conviction pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2000). The Platte County Court held that the statute is unconstitutional and denied the motion. Spady appealed to the Platte County District Court, which affirmed the county court's determination. Spady appeals. The issue presented is whether § 29-2264 is in violation of Neb. Const. art. II, § 1, the separation of powers clause.

SCOPE OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

FACTS

Spady was convicted in the Platte County Court of violating a protection order, a Class II misdemeanor, and he was sentenced to

6 months' probation, which he successfully completed. Pursuant to § 29-2264, Spady petitioned for an order setting aside the conviction. Following a hearing, the court determined that § 29-2264 is unconstitutional and dismissed Spady's petition. The court found that the statute purported to grant a commutation power to the judiciary, in violation of the Nebraska Constitution.

Spady appealed to the Platte County District Court, which entered an order finding that § 29-2264 is unconstitutional for the reason that the statute constitutes a pardon or a "partial pardon." The court stated that if the petition were to be granted, the conviction would be nullified and all civil disabilities and disqualifications imposed against Spady as a result of the conviction, other than certain exceptions set forth in § 29-2264(5), would be removed. The district court affirmed the county court's order dismissing Spady's petition.

ASSIGNMENTS OF ERROR

Spady assigns four errors relating to the constitutionality of § 29-2264. He asserts that the district court erred in dismissing his petition, in finding § 29-2264 unconstitutional, in finding that the terms and provisions of § 29-2264 result in the grant of a pardon, and in making any finding based on what it considered a " 'partial pardon.' "

ANALYSIS

Whether a statute is constitutional is a question of law, and this court is obligated to reach a conclusion independent of the decision reached by the trial court. *State v. Kubin, supra.*

Section 29-2264 provides:

> (1) Whenever any person is placed on probation by a court and satisfactorily completes the conditions of his or her probation for the entire period or is discharged from probation prior to the termination of the period of probation, the sentencing court shall issue an order releasing the offender from probation, and such order shall in all felony cases restore the offender's civil rights.
>
> (2) Whenever any person is convicted of a misdemeanor or felony and is placed on probation by the court or is sentenced to a fine only, he or she may, after satisfactory fulfillment of the conditions of probation for the entire period

> or after discharge from probation prior to the termination of the period of probation and after payment of any fine, petition the sentencing court to set aside the conviction.
>
> . . . .
>
> (4) The court may grant the offender's petition and issue an order setting aside the conviction when in the opinion of the court the order will be in the best interest of the offender and consistent with the public welfare. The order shall:
>
> (a) Nullify the conviction; and
>
> (b) Remove all civil disabilities and disqualifications imposed as a result of the conviction.

In determining that § 29-2264 is unconstitutional, both the county court and the district court relied on *State v. Philipps*, 246 Neb. 610, 521 N.W.2d 913 (1994), in which we held that Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) violated the separation of powers clause of the Nebraska Constitution. Section 29-2308.01 provided that a court which imposed a sentence for a criminal offense could reduce the sentence within 120 days after the sentence was imposed, when probation was revoked, or when the court received a mandate from an appellate court. We stated: "[A] sentencing court which chooses to substitute a milder punishment for the sentence it had originally imposed does the very thing which defines an act of commutation." *Philipps*, 246 Neb. at 616, 521 N.W.2d at 917. The statute was held unconstitutional and unenforceable because it purported to grant commutation power to the judiciary, in violation of Neb. Const. art. IV, § 13, which entrusts such power to the Board of Pardons. The statute gave the courts the power to change a sentence after it had been imposed, which in effect was a commutation.

[2,3] In this case, the county court found that § 29-2264 purported to grant a commutation power, in violation of the Nebraska Constitution. "Commutation of punishment is substitution of a milder punishment known to the law for the one inflicted by the court." *Lincoln v. Sigler*, 183 Neb. 347, 349, 160 N.W.2d 87, 88 (1968). A commutation is "a substitution of a lesser or partial punishment." *Lupo v. Zerbst*, 92 F.2d 362, 364 (5th Cir. 1937), *cert. denied* 303 U.S. 646, 58 S. Ct. 645, 82 L. Ed. 1108 (1938). See, also, *Hagelberger v. United States*, 445 F.2d 279 (5th Cir. 1971), *cert. denied* 405 U.S. 925, 92 S. Ct.

971, 30 L. Ed. 2d 797 (1972); *Rawls v. United States*, 331 F.2d 21 (8th Cir. 1964). We conclude that § 29-2264 is not a commutation statute because it does not substitute a milder punishment.

The district court held that § 29-2264 constituted a pardon or, "at the very least, a partial pardon" and that the statute violated the separation of powers clause of the Nebraska Constitution. Neb. Const. art. II, § 1, provides for three distinct "departments" of government: legislative, executive, and judicial. "[N]o person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." *Id.* Neb. Const. art. IV, § 13, provides that the Board of Pardons, which is composed of members of the executive branch, "shall have power to remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment." See, also, Neb. Rev. Stat. § 83-1,126 (Reissue 1999).

In *Campion v. Gillan*, 79 Neb. 364, 371-72, 112 N.W. 585, 588 (1907), quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 8 L. Ed. 640 (1833), we defined a pardon as " 'an act of grace, proceeding from the power intrusted [sic] with the execution of the laws, which exempts the individual on whom it is bestowed from the punishment the law inflicts for a crime he has committed.' " It is a declaration on record by the chief magistrate of a state or county that a person named is relieved from the legal consequences of a specific crime. See *Biddle v. Perovich*, 274 U.S. 480, 47 S. Ct. 664, 71 L. Ed. 1161 (1927). A pardon is also defined as "[t]he act or an instance of officially nullifying punishment or other legal consequences of a crime." Black's Law Dictionary 1137 (7th ed. 1999).

Pursuant to § 29-2264(4), if a court sets aside a conviction, it is required to nullify the conviction and remove all civil disabilities imposed as a result. This is a power expressly delegated to the Board of Pardons. See Neb. Const. art. IV, § 13. However, the statute also exempts certain civil disabilities from restoration. Section 29-2264(5) provides:

> The setting aside of a conviction in accordance with the Nebraska Probation Administration Act shall not:

(a) Require the reinstatement of any office, employment, or position which was previously held and lost or forfeited as a result of the conviction;

(b) Preclude proof of a plea of guilty whenever such plea is relevant to the determination of an issue involving the rights or liabilities of someone other than the offender;

(c) Preclude proof of the conviction as evidence of the commission of the misdemeanor or felony whenever the fact of its commission is relevant for the purpose of impeaching the offender as a witness, except that the order setting aside the conviction may be introduced in evidence;

(d) Preclude use of the conviction for the purpose of determining sentence on any subsequent conviction of a criminal offense;

(e) Preclude the proof of the conviction as evidence of the commission of the misdemeanor or felony in the event an offender is charged with a subsequent offense and the penalty provided by law is increased if the prior conviction is proved;

(f) Preclude the proof of the conviction to determine whether an offender is eligible to have a subsequent conviction set aside in accordance with the Nebraska Probation Administration Act; or

(g) Preclude use of the conviction as evidence of commission of the misdemeanor or felony for purposes of determining whether an application filed or a license issued under sections 71-1901 to 71-1905 or 71-1908 to 71-1917 or a certificate issued under sections 79-806 to 79-816 should be denied, suspended, or revoked.

[4] In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002). Section 29-2264 does not act as a pardon. The party is not exempted from the punishment imposed for the crime. Section 29-2264 may be applied only in limited circumstances. For example, a conviction cannot be set aside unless the person has been placed on probation or is sentenced to a fine only. An order setting aside a

conviction may be introduced in later court proceedings against a defendant. The existence of the conviction may be used to impeach the defendant as a witness. The conviction may be used to determine sentence enhancement with regard to a subsequent conviction and may be used to determine whether the defendant is eligible to have a subsequent conviction set aside. The conviction may also be used to determine whether the defendant is eligible for a foster care license or a teaching certificate. Thus, § 29-2264 does not nullify all of the legal consequences of the crime committed because certain civil disabilities enumerated above are not restored, as occurs when a pardon is granted.

Whether § 29-2264 is in effect a pardon and therefore unconstitutional is a question of law. Accordingly, we are obligated to reach that conclusion independent of the decision reached by the court below. See *State v. Kubin*, 263 Neb. 58, 638 N.W.2d 236 (2002).

[5-8] In our analysis, we are governed by certain legal principles. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *State v. Bainbridge*, 249 Neb. 260, 543 N.W.2d 154 (1996). A penal statute must be construed so as to meet the constitutional requirements if such can reasonably be done. *Id.* The burden of establishing a statute's unconstitutionality is on the party claiming it to be unconstitutional. *Id.* The unconstitutionality of a statute must be clearly established before a court may declare it void. *Id.*

We conclude that § 29-2264 does not result in the granting of a pardon. Nor does it allow a court to grant a "partial pardon." The court is permitted to set aside convictions, but certain civil disabilities are exempted from restoration. Thus, § 29-2264 does not infringe upon the power expressly delegated to the Board of Pardons and does not violate the separation of powers clause of the Nebraska Constitution.

CONCLUSION

For the reasons set forth herein, we conclude that § 29-2264 is constitutional and is not in violation of article II, § 1, of the Nebraska Constitution. Therefore, the judgment of the district court which affirmed the dismissal by the county court is

reversed, and the cause is remanded to the district court with directions to remand to the county court for further proceedings.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROLINE GREER BROCKMAN, APPELLEE, V. TODD DEAN BROCKMAN, APPELLANT.

646 N.W.2d 594

Filed June 21, 2002. No. S-00-1082.

1. **Child Support: Appeal and Error.** The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the trial court will be affirmed in the absence of an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Support: Appeal and Error.** In child support cases, where the credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Rules of the Supreme Court: Child Support.** Under the Nebraska Child Support Guidelines, paragraph D, 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.
5. ____: ____. Earning capacity may be used as a basis for an initial determination of child support under the Nebraska Child Support Guidelines where there is some evidence that the parent is capable of realizing such capacity through reasonable effort.
6. **Legislature: Alimony: Child Support.** The Legislature has long given specific statutory authorization for a court, in an appropriate case, to require sufficient security to be given for the payment of alimony and child support awards.
7. **Child Support.** Reasonable security for payment of child support under Neb. Rev. Stat. § 42-371(6) (Cum. Supp. 2000) should be invoked only when extraordinary circumstances require it.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Michael Gallner for appellant.

Caroline Greer Brockman, pro se.

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

GERRARD, J.

NATURE OF CASE

Todd Dean Brockman appeals from the order of the district court dissolving his marriage to Caroline Greer Brockman and ordering him to pay child support. The primary issue presented in this appeal is whether the district court erred in ordering Todd to set aside part of a lump-sum workers' compensation settlement as security for his child support obligation.

BACKGROUND

Todd and Caroline were married on November 7, 1987, and had three children, who were 12, 11, and 7 years old, respectively, at the time of trial. Todd and Caroline separated in May 1998, and Caroline filed a petition for legal separation on June 8. Eventually, Todd filed a cross-petition for dissolution of marriage, which was joined by Caroline. The case went to trial on March 22, 2000.

CAROLINE'S INCOME

Caroline testified at trial that she has multiple sclerosis, which affects her ability to secure employment and prevents her from working. Caroline stated that it had "been a long time" since she had been employed full time. Caroline testified that she and the children each received $94 per month from Social Security due to Todd's disability and received aid to dependent children payments of $62 per month. Caroline stated that she and the children received $418 per month in food stamps. Caroline testified that she had applied for disability benefits, but, at the time of trial, her eligibility for benefits was the subject of an appeal. Caroline stated that sometimes her family helped her make up the difference between her income and expenses.

TODD'S INCOME

Todd testified that he had received workers' compensation benefits for a 1993 back injury. Todd was found by the Iowa Workers' Compensation Commission to have a 25-percent permanent whole body disability. The record contains a contested

case settlement in which Todd settled his workers' compensation case for a lump-sum payment of $130,000. After the payment of attorney fees and outstanding medical expenses, Todd was to receive $63,665.33. The record also contains checks, drawn on the trust account of Todd's attorney, which show disbursal of the lump-sum award. After Todd's attorney fees and medical bills were paid, Todd received a check in the amount of $62,618.71. The settlement released Todd's employer from all future liability for Todd's work-related injury, including liability for future medical expenses.

Todd also testified that he received, before child support was deducted, $713 per month in Social Security benefits. The record also contains pay stubs for a job with Anderson Drywall, Inc., which Todd held between February and September or October 1999. Todd earned $10 per hour as regular wages and $15 per hour for overtime. While Todd's hours varied during his employment, Todd averaged between 30 and 40 hours per week and often worked overtime. Todd testified that he left this job because he reaggravated his back injury in October 1999. Todd's final paycheck was dated September 9, 1999—8 days after the date on the $62,618.71 check to Todd from his workers' compensation settlement.

The record indicates that on September 30, 1999, Todd had approximately $38,000 remaining from his workers' compensation settlement. Todd testified that he had spent approximately $24,000 in 1 month on medical and other expenses. Todd testified that he was not working based on medical instructions, that he was still seeing doctors, that there was no surgery that could help his condition, and that his medication cost approximately $200 per month. No independent evidence was presented to substantiate Todd's testimony in this regard, or to account for the $24,000 that had been spent in September 1999. When cross-examined on that issue, Todd testified that the money was expended because "I had other people I owed money to that supported me."

District Court Judgment

After trial, the district court entered an ex parte order on May 17, 2000, which prohibited Todd from disposing of his assets. The entry of a final decree of dissolution was delayed for some time, as Todd discharged his counsel and refused to approve the

proposed decree. Finally, the district court entered a final decree of dissolution on September 14, 2000.

The district court ordered Todd to pay child support to Caroline in the amount of $541.31 per month. The district court's calculation of Todd's child support obligation is based on a gross income for Todd of $1,733.33 per month, or $400 per week, and a gross income for Caroline of $183 per month. The district court further stated that

> [Todd] was injured in a work-related accident which was recently settled. The settlement is in payment for benefits calculated at 2,085 weeks in the future. Given [Todd]'s children's ages, he has a child support obligation that will run for 622 weeks in the future. [Todd]'s lump sum settlement is subject to the payment of child support, to the extent of 30% of the award.

The district court ordered that

> [Todd] shall put the sum of $19,085.61 from the net proceeds of [Todd]'s worker's [sic] compensation claim in a Certificate of Deposit with the children as beneficiary to fund his obligation to pay child support. If [Todd] fails to may [sic] his child support payments then [Caroline] can invade the Certificate of Deposit to make the child support payments; This Document will act as sufficient authority to enable the bank to give the money directly to Caroline Brockman. If [Todd] does make the child support payments then at the last child's majority [Todd] would be awarded the money plus the interest.

ASSIGNMENTS OF ERROR

Todd assigns that the district court erred in (1) including Todd's workers' compensation award as child support, (2) requiring Todd to hold his workers' compensation award in trust to secure his child support obligations, and (3) calculating the amount of child support to be paid in that it found Caroline's earning capacity to be zero and included Todd's workers' compensation award in its calculation.

STANDARD OF REVIEW

[1-3] The standard of review of an appellate court in child support cases is de novo on the record, and the decision of the

trial court will be affirmed in the absence of an abuse of discretion. *Heesacker v. Heesacker*, 262 Neb. 179, 629 N.W.2d 558 (2001). A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Crawford v. Crawford*, 263 Neb. 37, 638 N.W.2d 505 (2002). In child support cases, where the 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. See *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994).

ANALYSIS

Consideration of Lump-Sum Award

Todd's first assignment of error is that the district court erred in "including [Todd]'s workers [sic] compensation award as child support." Todd's arguments supporting this assignment of error are not entirely clear. However, those arguments, as best we can interpret them, are without merit.

Todd first contends that the district court erred in that it "both deviated from the child support guidelines and attempted to apply them in the same case." Brief for appellant at 15. There is no basis in the record for Todd's claim that the district court deviated from the child support guidelines. The child support order entered by the district court is consistent with the amount prescribed by table 1 of the Nebraska Child Support Guidelines (Guidelines), and there is no indication in the court's findings that a deviation from the Guidelines was considered. See *Brooks v. Brooks*, 261 Neb. 289, 622 N.W.2d 670 (2001) (reason for deviation shall be contained in findings of decree and worksheet 5 of Guidelines should be filed in court file).

Todd also argues that the district court's order erroneously treated his workers' compensation award as income. However, it is well established that a workers' compensation award, to the extent that it compensates for lost earning capacity, may be considered as income under the Guidelines. See, generally, *Pawlusiak*

v. Pawlusiak, ante p. 1, 645 N.W.2d 773 (2002); *Becker v. Becker*, 6 Neb. App. 277, 573 N.W.2d 485 (1997). See, also, *In re Marriage of Swan*, 526 N.W.2d 320 (Iowa 1995).

Moreover, Todd's argument is premised on a misunderstanding of the district court's order. The district court did not determine that Todd's workers' compensation award was to be treated as income; instead, the district court simply determined that the award was available to satisfy Todd's child support obligation. The calculations made by the district court are not consistent with basing Todd's income on either his workers' compensation award or his Social Security benefits; rather, it is evident that the district court determined Todd's earning capacity based on his earnings from Anderson Drywall. While it would have been preferable had the district court specifically stated the basis for its income calculations on the record, a determination of Todd's earning capacity based on his Anderson Drywall earnings is the only conclusion consistent with the evidence.

The district court determined Todd's gross income, for child support purposes, to be $1,733.33, which is equal to a weekly gross income of $400 annualized and divided by 12. See Guidelines, paragraph D (explaining formula for determining monthly income). The apparent basis for this determination is Todd's earnings at Anderson Drywall, where Todd was paid $10 per hour and often worked 40 or more hours per week.

[4,5] Under the Guidelines, paragraph D, 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. *Wagner v. Wagner*, 262 Neb. 924, 636 N.W.2d 879 (2001). Earning capacity may be used as a basis for an initial determination of child support under the Guidelines where there is some evidence that the parent is capable of realizing such capacity through reasonable effort. See *State v. Porter*, 259 Neb. 366, 610 N.W.2d 23 (2000).

In this case, Todd's pay stubs from Anderson Drywall provide evidence that Todd is capable of earning $400 per week in gross income. While Todd testified that he was no longer working because of injury, the district court was not required to credit this testimony, particularly where no evidence was presented to corroborate this claim. In any event, Todd has not assigned error

relating to the basis on which the district court actually determined his earning capacity. See *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001) (error must be assigned and argued to be considered by appellate court), *modified* 262 Neb. 663, 641 N.W.2d 624. The district court's determination of Todd's income is supported by the record and does not constitute an abuse of discretion. Consequently, Todd's assignment of error is without merit.

Security for Child Support Obligation

[6,7] As noted above, the district court ordered Todd to set aside part of his workers' compensation award as security for his child support obligation. Todd argues that this was error. The Legislature has long given specific statutory authorization for a court, in an appropriate case, to require sufficient security to be given for the payment of alimony and child support awards. See *Lacey v. Lacey*, 215 Neb. 162, 337 N.W.2d 740 (1983). Neb. Rev. Stat. § 42-371(6) (Cum. Supp. 2000) provides with reference to child support payments that "[t]he court may in any case, upon application or its own motion, after notice and hearing, order a person required to make payments to post sufficient security, bond, or other guarantee with the clerk to insure payment of both current and any delinquent amounts." However, reasonable security for payment of child support under § 42-371(6) should be invoked only when extraordinary circumstances require it. See, *Klinginsmith v. Wichmann*, 252 Neb. 889, 567 N.W.2d 172 (1997); *Lacey, supra*; *Muller v. Muller*, 3 Neb. App. 159, 524 N.W.2d 78 (1994).

In this case, Todd was given notice and hearing on this issue well prior to the entry of the decree. Caroline filed a motion prior to trial seeking to have Todd post security for his child support obligation pursuant to § 42-371.

Based on the evidence presented at trial, we conclude that the district court's order was not an abuse of discretion. The record reflects that Todd ceased employment after settling his workers' compensation case and had spent approximately $24,000 within 1 month of receiving the settlement proceeds. The remaining proceeds of the workers' compensation settlement were the only funds available to secure Todd's child support obligation. Given

the possibility, supported by the record, that Todd would exhaust the settlement proceeds and then be unwilling or unable to pay his child support, we conclude that the district court did not abuse its discretion in ordering Todd to set aside a portion of the settlement proceeds as security for his child support obligation. Compare *Casselman v. Casselman*, 204 Neb. 565, 284 N.W.2d 7 (1979) (order requiring security proper where much of defendant's security could be lost through foreclosure proceedings). Todd's assignment of error is without merit.

Calculation of Child Support

Todd assigns that the district court erred in that it found "[Caroline]'s earning capacity to be zero and included [Todd]'s compensation award in its calculation." As the facts set forth above make clear, neither of the factual premises of this assignment of error is correct. The district court's calculation of child support was based on income for Caroline determined to be $183 per month, and not zero as Todd suggests. Furthermore, as set forth above, the district court did not base its calculation of child support on Todd's workers' compensation award.

In support of this assignment of error, Todd offers several brief arguments, not all of which are within the scope of his assignment of error. To the extent that Todd's arguments extend beyond his assignment of error, we do not consider them. See *Harris v. Harris*, 261 Neb. 75, 621 N.W.2d 491 (2001) (errors argued but not assigned will not be considered on appeal).

Todd contends that Caroline's income should have included food stamps and disability payments. First, food stamps are means-tested public assistance benefits that are excluded from income pursuant to paragraph D of the Guidelines. See, *Hartman v. Hartman*, 261 Neb. 359, 622 N.W.2d 871 (2001); *Riggs v. Riggs*, 261 Neb. 344, 622 N.W.2d 861 (2001). Thus, the district court did not err by excluding food stamps from Caroline's income.

Second, Todd argues that it was inequitable to count his disability benefits as income while not counting Caroline's. As noted above, the district court did not base its estimate of Todd's earning capacity on his Social Security benefits. Moreover, the record does not reflect that Caroline was receiving—or entitled

to receive—disability benefits; to the contrary, the record indicates that Caroline was not receiving disability benefits and that her eligibility for such benefits was in controversy. The district court did not err by not considering Caroline's potential to obtain disability benefits. That future contingency is left to be determined, if and when appropriate, in a subsequent proceeding to modify child support.

CONCLUSION

For the foregoing reasons, Todd's assignments of error are without merit. We, therefore, affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JEFFREY D. LEANNA, APPELLANT.
646 N.W.2d 263

Filed June 21, 2002. No. S-00-1260.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Reversed and remanded for further proceedings.

Thomas J. Garvey for appellant.

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

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

WRIGHT, J.

This appeal arises from the denial of a motion to set aside a conviction pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2000). The Sarpy County District Court denied the motion, finding that § 29-2264 is unconstitutional as a violation of Neb. Const. art. II, § 1. Jeffrey D. Leanna appeals.

Leanna filed an application to set aside a conviction on October 16, 2000, after he completed all terms and conditions of probation

related to a 1997 conviction for burglary, a Class III felony. The district court entered an order denying the motion to set aside, finding that it did not have authority to grant the motion.

The issues raised in this appeal are identical to those in *State v. Spady, ante* p. 99, 645 N.W.2d 539 (2002). It is therefore unnecessary to restate the analysis in this opinion.

In *Spady*, we concluded that § 29-2264 is constitutional and is not in violation of article II, § 1. For the reasons set forth in *Spady*, the judgment of the district court which denied Leanna's motion to set aside the conviction is reversed, and the cause is remanded to the district court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

KELLY M. HOGAN, APPELLANT, V. GARDEN COUNTY, NEBRASKA, A NEBRASKA POLITICAL SUBDIVISION, APPELLEE.

646 N.W.2d 257

Filed June 21, 2002. No. S-01-079.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Final Orders: Appeal and Error.** Although the denial of a motion for summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just.
4. **Summary Judgment.** The primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.

5. **Summary Judgment: Proof.** Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate such party's entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.
6. **Summary Judgment.** If a genuine issue of fact exists, summary judgment may not properly be entered. The foregoing presupposes that an evidentiary proceeding is conducted on the motion for summary judgment.
7. **Trial: Records: Waiver.** All evidentiary proceedings require the presence of a court reporter who shall make a verbatim record of the proceedings, and such recording may not be waived by the court or the parties.
8. **Summary Judgment: Evidence.** In connection with a motion for summary judgment, the proponent of the evidence must mark and offer the exhibit into evidence.
9. **Summary Judgment: Records: Appeal and Error.** The only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment.

Appeal from the District Court for Garden County: PAUL D. EMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Kelly M. Hogan, pro se.

Philip E. Pierce, of Pierce Law Office, for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

Kelly M. Hogan appeals the decision of the district court for Garden County overruling his motion for partial summary judgment; granting the motion for summary judgment filed by Garden County, Nebraska; and dismissing Hogan's petition with prejudice. No hearing or other evidentiary proceeding was conducted on the cross-motions for summary judgment, and there is no bill of exceptions which, in the proper course, would record the evidence offered, received, and available to the trial court for consideration. Because there was no evidence to support the decision of the district court and material allegations in the parties' pleadings were controverted, the record on appeal does not support the order granting the county's motion for summary judgment. Accordingly, we affirm that portion of the district

court's order which overruled Hogan's motion for partial summary judgment, and we reverse that portion of the district court's order that granted the county's motion for summary judgment and remand the cause for further proceedings.

STATEMENT OF FACTS

Issues related to the instant appeal were previously before the appellate courts. See, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997); *Hynes v. Hogan*, 4 Neb. App. 866, 553 N.W.2d 162 (1996). In November 1994, Hogan was elected to the office of Garden County Attorney. On March 21, 1995, Hogan's opponent in the election, Eugene J. Hynes, filed a complaint for Hogan's removal from office, alleging that Hogan resided outside of Garden County, in violation of Neb. Rev. Stat. § 23-1201.01 (Supp. 1993), and that therefore, Hogan was guilty of official misconduct and his office should be declared vacant. Following trial, the district court found Hogan in violation of § 23-1201.01 and determined his actions constituted official misconduct. Thereupon, the district court declared the office of Garden County Attorney to be vacant. The Nebraska Court of Appeals reversed the district court's judgment removing Hogan from office, and upon further review, this court affirmed in relevant part the decision of the Court of Appeals. See, *Hynes v. Hogan*, 251 Neb. 404, 558 N.W.2d 35 (1997); *Hynes v. Hogan*, 4 Neb. App. 866, 553 N.W.2d 162 (1996).

On January 3, 1997, Hogan reassumed the position of Garden County Attorney and continued in that position until November 16, 1998, when he resigned. On November 20, Hogan filed the instant action against the county in the Garden County District Court. In his petition, Hogan alleged, inter alia, that as Garden County Attorney, he was entitled to a specified salary and to benefits for each of the years 1995 through 1998; that he had performed all of the conditions and requirements of his employment; that the county ceased paying him his salary and benefits during the period of time when he was removed from office; and that he was entitled to receive from the county his unpaid salary and benefits. On May 5, 1999, the county filed its "Answer and Affirmative Defense and Setoff," in which it, inter alia, denied each of the above allegations.

On September 27, 1999, the county moved for summary judgment, seeking judgment in its favor and the dismissal of Hogan's petition. On October 20, Hogan filed a motion for partial summary judgment, seeking an order that the county was liable for his unpaid salary and benefits. It is undisputed that no hearing or other evidentiary proceeding was actually held on the cross-motions for summary judgment. It is also undisputed that neither party formally offered evidence. Evidently, the parties submitted written arguments in the form of briefs to the district court. In their briefs on appeal, the parties refer to affidavits attached to the county's motion for summary judgment. The parties posit that these affidavits form the basis for the district court's decision. There is no bill of exceptions with respect to the consideration and disposition of the cross-motions for summary judgment.

In an order filed December 20, 2000, the district court overruled Hogan's motion for partial summary judgment, granted the county's motion for summary judgment, and dismissed Hogan's petition with prejudice. Hogan appeals.

ASSIGNMENT OF ERROR

On appeal, Hogan assigns seven errors which can be restated as one. Hogan claims, restated, that the district court erred in overruling his motion for partial summary judgment and granting the county's motion for summary judgment and dismissing the petition with prejudice.

STANDARDS OF REVIEW

[1-3] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). 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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). Although the denial of a motion for

summary judgment, standing alone, is not a final, appealable order, when adverse parties have each moved for summary judgment and the trial court has sustained one of the motions, the reviewing court obtains jurisdiction over both motions and may determine the controversy which is the subject of those motions or make an order specifying the facts which appear without substantial controversy and direct further proceedings as it deems just. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

ANALYSIS

[4-6] With respect to our evaluation of the correctness of the district court's rulings, we are confronted in this appeal with the fundamental problem that no hearing or other evidentiary proceeding was conducted on the cross-motions for summary judgment and that there is no bill of exceptions with respect to the district court's determinations of these motions. This court has stated that the primary purpose of the summary judgment procedure is to pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and delay of trial, those cases where there exists no genuine issue as to any material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law. *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000); *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985). Since the party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists, that party must therefore produce enough evidence to demonstrate such party's entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Id.* If a genuine issue of fact exists, summary judgment may not properly be entered. *Id.* The foregoing presupposes that an evidentiary proceeding is conducted on the motion for summary judgment.

[7] In *Gerdes v. Klindt's, Inc.*, 247 Neb. 138, 141, 525 N.W.2d 219, 221 (1995), this court stated that "all evidentiary proceedings shall require the presence of a court reporter who shall make

a verbatim record of the proceedings, and such recording may not be waived by the court or the parties." Indeed, Neb. Ct. R. of Official Ct. Rptrs. 3 (rev. 2000) 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 Neb. Ct. R. of Prac. 5." Neb. Ct. R. of Prac. 5A(1) (rev. 2000) 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."

[8] In connection with a motion for summary judgment, we have recently repeated the requirement that the proponent of evidence must mark and offer the exhibit into evidence. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). "Unless the [evidence] is marked, offered, and accepted, it does not become part of the record and cannot be considered by the trial court as evidence in the case." *Id.* at 520-21, 641 N.W.2d at 37. Where the nature of the proceeding requires evidence, the making of an evidentiary record by means of a court reporter in the trial court cannot be waived. *Gerdes, supra.*

As summarized above, no hearing or other evidentiary proceeding was held on the parties' respective summary judgment motions, and there is no bill of exceptions which in the proper course would memorialize the evidence offered, received, and considered by the district court. Although reference is made to affidavits in support of the county's summary judgment motion, the parties concede that the affidavits were not offered or received into evidence by the district court. Due to the failure of the parties to offer the evidence on the record, the district court had no evidence before it when it considered the parties' summary judgment motions. See, *Altaffer, supra*; *Gerdes, supra.*

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001). Because no evidence was offered by

the parties or received by the district court, there was no evidence upon which the district court could render its decision.

[9] In order to receive consideration on appeal, any affidavits or other evidence used on a motion for summary judgment must have been offered in evidence in the trial court and preserved in and made a part of the bill of exceptions. *Altaffer, supra*; *Rath v. Selection Research, Inc.*, 246 Neb. 340, 519 N.W.2d 503 (1994); *Keystone Ranch Co. v. Central Neb. Pub. Power & Irr. Dist.*, 237 Neb. 188, 465 N.W.2d 472 (1991). In *Sindelar v. Hanel Oil, Inc.*, 254 Neb. 975, 581 N.W.2d 405 (1998), we stated that the only issue which will be considered on appeal of a summary judgment, absent the bill of exceptions, is the sufficiency of the pleadings to support the judgment. Our consideration of this appeal is therefore limited to an examination of the pleadings; if they are sufficient to support the judgment, we will not reverse the district court's decision. See, *id.*; *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984).

In Hogan's petition seeking the payment of salary and benefits, he alleged, inter alia, that as Garden County Attorney, he was entitled to a specified salary and to benefits for each of the years 1995 through 1998; that he had performed all of the conditions and requirements of his employment; that the county ceased paying him his salary and benefits during the period of time when he was removed from office; and that he was entitled to receive from the county his unpaid salary and benefits. For relief, Hogan sought, inter alia, his unpaid salary and employment benefits. In its answer, the county denied these allegations which are allegations pertaining to material facts. Accordingly, based upon the pleadings, there exist genuine issues of material facts.

In view of the existence of genuine issues of material facts, the district court properly overruled Hogan's motion for partial summary judgment. The district court erred, however, in granting the county's motion for summary judgment. See, *City State Bank v. Holstine*, 260 Neb. 578, 618 N.W.2d 704 (2000); *Moore v. American Charter Fed. Sav. & Loan Assn.*, 219 Neb. 793, 366 N.W.2d 436 (1985). The portion of the district court's order granting the motion for summary judgment by the county is reversed, and the cause is remanded for further proceedings.

CONCLUSION

In the instant case, there was no evidence offered or admitted into evidence upon which the district court could render its decision on the parties' cross-motions for summary judgment. Based upon the pleadings, genuine issues of material facts exist, thereby precluding summary judgment for either party. Accordingly, we affirm that portion of the district court's judgment which overruled Hogan's motion for partial summary judgment, and we reverse that portion of the district court's order which granted the county's motion for summary judgment and dismissed the petition with prejudice. The cause is remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

PENN CAL, L.L.C., AND MICHAEL HUXEN, INDIVIDUALLY, APPELLEES, V. PENN CAL DAIRY, A TEXAS PARTNERSHIP, AND JIM HUFFMAN, INDIVIDUALLY, APPELLEES, AND GLEN SIMONTON, INDIVIDUALLY, APPELLANT.

646 N.W.2d 601

Filed June 21, 2002. No. S-01-226.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Courts: Contempt.** The district courts of this state have the inherent power to enforce compliance with court orders and judgments through contempt proceedings.
3. **Courts: Contempt: Foreign Judgments: Debtors and Creditors.** Given the district court's inherent power to punish individuals for contempt of its orders, a Nebraska district court has the inherent power to punish a judgment debtor for his contempt of a foreign judgment which had been properly registered under the Nebraska Uniform Enforcement of Foreign Judgments Act, Neb. Rev. Stat. § 25-1587.01 et seq. (Reissue 1995) in the district court.

Appeal from the District Court for Red Willow County: JOHN J. BATTERSHELL, Judge. Reversed and remanded for further proceedings.

Maurice A. Green, of Green Law Offices, P.C., for appellant.

G. Peter Burger, of Burger & Bennett, P.C., for appellee Jim Huffman.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, Glen Simonton, obtained a judgment against appellee Jim Huffman in the Erath County District Court, 266th Judicial District, Erath County, Texas (Texas judgment). Pursuant to the Nebraska Uniform Enforcement of Foreign Judgments Act (UEFJA), Neb. Rev. Stat. §§ 25-1587.01 to 25-1587.09 (Reissue 1995), Simonton registered the Texas judgment in Nebraska, in the Red Willow County District Court. Thereafter, Simonton moved the district court for an order finding Huffman in contempt of court due to his failure to comply with the Texas judgment. Following a show cause hearing on Simonton's contempt motion, the district court concluded that under the UEFJA, failure to comply with the terms of a registered foreign judgment was not subject to its contempt power, because the judgment had not been issued by that district court in the first instance. The district court dismissed the contempt proceedings. Simonton appeals. We reverse the district court's order and remand the cause for further proceedings.

STATEMENT OF FACTS

The relevant facts are not in dispute. Penn Cal, L.L.C., and Michael Huxen sued Penn Cal Dairy, Huffman, and Simonton in the Erath County District Court, 266th Judicial District, Erath County, Texas. The nature and course of the Texas proceedings are not in the record before this court. However, according to the Texas judgment, Simonton became a judgment creditor of Huffman. On June 4, 1999, the district court for Erath County, Texas, issued the Texas judgment, which provided, inter alia, as follows:

> JIM HUFFMAN is ordered to execute that certain unsecured promissory note, attached to the **"Mutual Release, Compromise and Settlement Agreement"** as Exhibit "A" which note is dated October 1, 1998, in the original principle sum

> of $353,000.00, payable to PENN-CAL, L.L.C., a Texas Limited Liability Company/MICHAEL HUXEN/GLEN SIMONTON. JIM HUFFMAN is ORDERED to deliver said note to Plaintiff, MICHAEL HUXEN . . . no later than ten (10) days from the date of this judgment.

On October 13, 2000, Simonton filed an authenticated copy of the Texas judgment with the district court for Red Willow County, Nebraska, in accordance with § 25-1587.03, which provides as follows:

> A copy of any foreign judgment authenticated in accordance with the act of Congress or the statutes of this state may be filed on or after January 1, 1994, in the office of the clerk of any court of this state having jurisdiction of such action. The clerk shall treat the foreign judgment in the same manner as a judgment of a court of this state. A judgment so filed has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner.

Huffman filed no objection or other response to the filing of the authenticated foreign judgment.

On December 7, 2000, Simonton filed a motion for citation to issue, seeking an order "commanding [Huffman] to appear in Court and show cause, if any he may have, why he should not be held in contempt of Court by failing to obey the [June 4, 1999] Order." On the same date, the district court entered its show cause order and ordered Huffman to appear in court on January 3, 2001. Huffman filed an "answer" to the motion on December 28, 2000, in which he alleged, inter alia, that the district court did not have "subject matter jurisdiction to try proceedings alleging contempt of the [order contained in the Texas judgment]."

On January 3, 2001, Huffman and Simonton appeared before the Red Willow County District Court on Simonton's contempt motion and Huffman's "answer" thereto. Before addressing the merits of the motion, the district court indicated that it wished to address certain legal issues and directed the parties to submit briefs on the issue of whether the district court had the authority to enforce a foreign judgment registered under the UEFJA through contempt proceedings.

After receiving the parties' briefs, the district court entered an order on February 6, 2001, in which it determined that Simonton had duly filed an authenticated copy of the Texas judgment with the district court, that 30 days had passed with no objection, and that therefore, the registration of the judgment was "final." With respect to the issue of whether the district court could enforce compliance with the Texas judgment through contempt proceedings, the district court stated:

> [T]he effect of registration of a foreign judgment, although it makes the judgment the same as and subject to the same conditions as a domestic judgment . . . does not make the judgment subject to the contempt of court powers of this Court because the judgment was not issued by this Court, because although the order becomes domesticated, it is still not an order of this Court.

The district court further stated that "only the tribunal whose order has been violated or proceeding interfered with has the power to punish contempt." The district court concluded that it did not have the authority to issue a citation for contempt against Huffman. Accordingly, the district court found that the December 7, 2000, show cause order was improvidently granted and ordered the matter dismissed. Simonton appeals.

ASSIGNMENT OF ERROR

On appeal, Simonton assigns one error. Simonton claims, restated, that the district court erred in dismissing the contempt proceedings against Huffman based upon its conclusion that under the UEFJA, it was unable to use its contempt power to enforce an authenticated and registered foreign judgment.

STANDARD OF REVIEW

[1] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

ANALYSIS

Section 25-1587.03 provides that an authenticated copy of a foreign judgment, filed in a district court of this state, "has the

same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating, or staying as a judgment of a court of this state and may be enforced or satisfied in like manner." The UEFJA is silent as to the specific issue of whether the orders contained in a registered foreign judgment may be enforced through contempt proceedings conducted by the court in which the judgment is registered. We note, however, that courts in other jurisdictions have concluded, albeit without discussion, that foreign judgments registered in their states pursuant to their versions of the UEFJA may be enforced through contempt proceedings. See, e.g., *Behr v. Behr*, No. C8-95-428, 1995 WL 497337 (Minn. App. Aug. 22, 1995) (concluding trial court did not abuse discretion in using civil contempt to enforce registered foreign judgment); *Wilder v. Wilder*, 93 Misc. 2d 247, 402 N.Y.S.2d 559 (1978) (determining contempt authority available remedy to enforce registered foreign judgments).

[2] It is well settled that the district courts of this state have the inherent power to enforce compliance with court orders and judgments through contempt proceedings. We have stated:

> [C]ourts have the inherent power to do those things reasonably necessary for the administration of justice in the exercise of their jurisdiction [and] courts are charged with the duty of guarding their proceedings against everything which interferes with the orderly administration of justice, and . . . the power to punish for violation of its orders or judgments is inherent in every court having common-law jurisdiction. . . . [T]he power to punish for contempt is incident to every judicial tribune, derived from its very constitution, without any expressed statutory aid and inherent in all courts of record.

(Citations omitted.) *State v. Davidson*, 260 Neb. 417, 429, 618 N.W.2d 418, 428 (2000). See, also, *Tyler v. Heywood*, 258 Neb. 901, 906, 607 N.W.2d 186, 190 (2000) (noting "longstanding and well-established rule" of inherent power of district courts to punish for contempt).

Pursuant to § 25-1587.03, the Texas judgment, when duly authenticated and filed in a district court in this state, is to be treated "in the same manner as a judgment of a court of this state . . . and may be enforced or satisfied in like manner." Hoffman

does not challenge the authentication or the manner of filing of the Texas judgment in the Red Willow County District Court. Pursuant to the UEFJA, the Texas judgment is to be treated in the same manner as if it were initially a judgment of this state.

[3] Given the district court's inherent power to punish individuals for contempt of its orders, see *State v. Davidson, supra*, and *Tyler v. Heywood, supra*, the Red Willow County District Court had the inherent power to punish Huffman for his contempt of the Texas judgment which had been properly registered under the UEFJA in the Red Willow County District Court. Based on our interpretation of the UEFJA, the district court erred as a matter of law in concluding that it did not have the authority under the UEFJA to enforce the order contained in the Texas judgment through contempt proceedings and in dismissing the contempt proceedings.

CONCLUSION

Under the UEFJA, the district court has the authority to enforce the order contained in the Texas judgment registered under the UEFJA through its contempt power. Its conclusion to the contrary was error as a matter of law. We reverse the district court's February 6, 2001, order dismissing the contempt proceedings and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ARMEDA MALONE AND STEPHEN KRANTZ, APPELLEES, V. AMERICAN BUSINESS INFORMATION, INC., APPELLANT.

647 N.W.2d 569

Filed June 21, 2002. No. S-01-227.

1. **Directed Verdict: Evidence: Appeal and Error.** When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law.
2. **Jury Instructions.** Whether the jury instructions given by a trial court are correct is a question of law.

3. **Directed Verdict: Evidence.** A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law.
4. **Directed Verdict.** The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence.
5. **Employer and Employee: Contracts: Wages.** Under either an at-will employment relationship or a contractual arrangement that allows employer modification at will, an employer can alter the terms of compensation, provided the employer has given notice of the alteration to the employee and the employee thereafter continues his or her employment.
6. **Employer and Employee: Wages.** Even in an at-will employment relationship, the employer cannot unilaterally alter the amount of compensation for work that has already been rendered or for commissions that have already accrued.
7. **Contracts: Appeal and Error.** Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision.
8. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
9. **Jury Instructions: Proof: Appeal and Error.** To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction.
10. **Jury Instructions: Appeal and Error.** On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation.

Appeal from the District Court for Douglas County: SANDRA L. DOUGHERTY, Judge. Affirmed.

Patrick M. Flood, of Hotz, Weaver, Flood & Breitkreutz, for appellant.

Michael P. Dowd, of Dowd & Dowd, for appellees.

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

GERRARD, J.

Appellees, Armeda Malone and Stephen Krantz, filed suit against their former employer, American Business Information, Inc. (ABI), now known as Info USA, Inc., to recover commissions owed pursuant to the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. § 48-1228 et seq. (Reissue

1998). A jury awarded Malone and Krantz their requested amounts of commission, and the district court entered judgment pursuant to the jury verdicts. ABI now appeals.

I. FACTUAL BACKGROUND

Malone and Krantz began working for ABI as national account managers in 1998. Joseph Szczepaniak, president of ABI's consumer CD-ROM division, induced Malone to leave her previous employment by offering a more favorable commission agreement, despite a lower base salary at ABI. Similarly, ABI recruited Krantz with an offer of a lucrative commission agreement.

Upon joining ABI, Malone and Krantz signed identical 1998 sales commission plans (1998 Commission Plan). Both Malone and Krantz testified that ABI's tiered commission structure depended upon the net quantities shipped from ABI to distributors, based on the distributors' point of sale (POS) reports or direct sales. The 1998 Commission Plan provided, in pertinent part:

Annual Paid Revenue	Commission %
0 - $800,000	2%
$800,000 - $1,200,000	8%
over $1,200,000	15%

1. All commissions are based on paid sales only.

2. All commissions are paid on a quarterly basis and are calculated on cumulative paid year-to-date sales as of the end of each quarter.

3. All earned commissions will be paid at the end of the following month.

4. Commissions are based on performance and any disputes will be settled by senior management.

5. Commission and bonus plans are subject to change at management's discretion.

6. For team commissions or bonuses, the assigned team members are subject to change.

Malone and Krantz testified that ABI did not advise them that it could retroactively modify the commission agreement without notice; Malone and Krantz each understood that the plan only allowed for prospective change following notice.

For the first two quarters of 1998, Malone and Krantz reported directly to Marci Vitous, ABI's director of retail sales. William Hippen, vice president of retail sales, supervised Vitous. Vitous wrote Hippen a letter dated March 9, 1998, requesting confirmation that "commissions for the tier 1 group, including myself, would be paid based on the data collected from the distributors' POS reports." Hippen replied via e-mail: "Yes, this is correct." ABI accordingly paid commissions for the first quarter of 1998 to Malone and Krantz with no underpayment. Szczepaniak, the president of Malone and Krantz' division, signed each commission report.

In accordance with this method of calculation, Hippen sent an e-mail to a potential sales representative during the second quarter of 1998, describing how ABI calculated commissions: "[A]ll commissions in the retail channel are paid on net 'sell-in' at distribution and/or direct. Distribution 'sell-in' information is derived from POS reports provided by each distributor."

Hippen testified that at the end of the second quarter, Malone's and Krantz' calculated commissions included reserves. Hippen incorporated reserves into the commission calculations by estimating that a number of products would be returned and stated that he implemented reserves so the employees receiving commissions would not be overpaid and have to repay ABI if the products were returned. Malone testified that she was not informed until September 1998 that reserves would be withheld from her commissions.

ABI's CD-ROM division, in which Malone and Krantz worked, underwent management changes in 1998: Vitous and Hippen left the division; Steven Malone became director of sales, replacing Vitous and Hippen; and Steven Malone reported to Bruce Lowry, who became vice president of the consumer products division, replacing Szczepaniak.

Malone and Krantz accepted and cashed their second quarter commission checks. Malone testified that in September 1998, she received a memorandum and second quarter commission calculations from Lowry and discovered that her second quarter commission included reserves. After receiving Lowry's memorandum in September, Malone and Krantz made inquiries with Steven Malone, their direct supervisor, about reconciling their

second-quarter commissions and paying their third-quarter commissions; they did not receive commission calculation sheets for the third or fourth quarter of 1998.

Steven Malone testified that he initially compiled the third-quarter commission numbers based on POS reports; however, upon presenting these figures to Lowry, Steven Malone testified that Lowry told him "you got to learn how to fuck these people." Lowry denied making that statement. Steven Malone testified that after finding that the commission figures were unacceptable to Lowry, he "bumped the level of reserves" held against the national account managers, utilizing several variables, some of which he found "ridiculous."

Steven Malone reassured Malone and Krantz in November 1998 that the underpayment of their second-quarter commissions and their third-quarter commissions were forthcoming, but Malone and Krantz did not receive these commissions within 30 days of the end of the quarter as required by the 1998 Commission Plan. Around December 14, 1998, Lowry advised Steven Malone that ABI would pay commissions due from the third and fourth quarters of 1998; on December 15, Lowry informed Steven Malone that the commissions would not be approved and that a new model to determine commissions would be implemented.

On December 15, 1998, Steven Malone informed Malone that commissions were going to be changed, and Malone objected to a retroactive change to the commission plan. On December 16, Malone sent a letter to the executive chairman of Info USA, formerly known as ABI, demanding her third-quarter commission. Krantz sent a similar e-mail to the executive chairman and other ABI management on December 17, demanding payment of his third-quarter commissions.

Internal auditor Julie Engel testified that Steven Malone asked her around January 1999 to recalculate commissions based on paid sales, i.e., cash ABI actually received from its sales. Engel recalculated commissions of all national account managers, including Malone and Krantz, for all four quarters of 1998. Lowry sent Krantz a letter on December 23, 1998, claiming that Krantz owed ABI $15,197.73 after the recalculation of commissions for the third quarter.

Malone and Krantz no longer work for ABI. They both claim that ABI owes unpaid commissions from 1998, and each calculated their respective amounts based on POS reports provided by ABI. Krantz adduced evidence that ABI owed him $108,802 in unpaid commissions. Malone presented evidence that ABI owed her $75,350 in unpaid commissions.

II. PROCEDURAL BACKGROUND

Malone and Krantz filed an amended petition against ABI to recover damages owed under the Nebraska Wage Payment and Collection Act, § 48-1228 et seq. Malone and Krantz alleged that ABI failed and refused to pay commissions earned in 1998, in violation of the contractual 1998 Commission Plan. Malone and Krantz prayed for, inter alia, the commissions for 1998 to which they are entitled and reasonable attorney fees in an amount not less than 25 percent of the total recovery.

At trial, ABI moved for a directed verdict at the close of Malone and Krantz' case in chief, and again at the close of its own case; the district court overruled both motions. The jury found in favor of Malone for the sum of $75,350, and in favor of Krantz for the sum of $108,802. The district court entered judgment accordingly and awarded Malone and Krantz attorney fees pursuant to § 48-1231. ABI now appeals.

III. ASSIGNMENTS OF ERROR

ABI assigns, restated, that the district court erred (1) in failing to grant ABI's motion for a directed verdict, (2) in instructing the jury that the 1998 Commission Plan was ambiguous as a matter of law, and (3) in failing to instruct the jury on what constitutes an unenforceable promise.

IV. STANDARD OF REVIEW

[1] When a motion for a directed verdict made at the close of all the evidence is overruled by the trial court, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can draw but one conclusion from the evidence, and the issues should be decided as a matter of law. *Steele v. Sedlacek*, 261 Neb. 794, 626 N.W.2d 224 (2001), *modified* 262 Neb. 1, 626 N.W.2d 224.

[2] Whether the jury instructions given by a trial court are correct is a question of law. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002).

V. ANALYSIS

1. DIRECTED VERDICT

ABI assigns, first, that the district court erred in failing to grant a directed verdict in favor of ABI. ABI argues that the 1998 Commission Plan upon which Malone and Krantz base their claims cannot be interpreted to provide an enforceable contractual right and that Malone and Krantz did not present evidence upon which a jury could award reasonably certain damages.

[3,4] A directed verdict is proper at the close of all the evidence only where reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001), *modified* 262 Neb. 663, 641 N.W.2d 624. The party against whom a motion for directed verdict is made is entitled to all reasonable inferences deducible from the evidence. *Suburban Air Freight v. Aust*, 262 Neb. 908, 636 N.W.2d 629 (2001). Even if all reasonable inferences from the evidence are resolved in favor of Malone and Krantz, ABI argues that the district court should have entered a directed verdict because its management could, as a matter of law, change the commission plan at its discretion—retroactively and without notice.

ABI claims that paragraphs 4 and 5 of the 1998 Commission Plan clearly and unambiguously reserve to ABI the right to resolve all disputes concerning commissions and the right to change, alter, or repeal the 1998 Commission Plan. In *Feola v. Valmont Industries, Inc.*, 208 Neb. 527, 304 N.W.2d 377 (1981), this court upheld the trial court's decision that an employee was not entitled to a bonus after termination of employment based on its interpretation of the bonus plan and management's discretion. ABI claims that based on *Feola*, the 1998 Commission Plan at issue provides for a discretionary and gratuitous bonus for which there is no contractual right of recovery.

The employee in *Feola, supra*, was lawfully terminated and placed on a severance pay plan prior to the scheduled receipt

of his yearly bonus. Although the bonus plan in *Feola* contained language allowing for the discretion of the employer's board of directors in paying bonuses and this court concluded that the board had discretion to deny the employee's bonus, *Feola* does not control the instant case. The plan in *Feola* unambiguously provided that a terminated employee under a severance pay plan would not be entitled to receive a bonus. Therefore, notwithstanding this court's discussion of the board's discretion to dispense bonuses, the employee would not have received a bonus whether or not the board had discretion. See *id.*

ABI cites cases from other jurisdictions in support of its position. In *Parrish v. General Motors Corporation*, 137 So. 2d 255 (Fla. App. 1962), cited with approval in *Feola, supra*, an employee brought suit against a former employer to collect a bonus allegedly due to him under a bonus plan. Under the plan, management had discretion to determine bonus amounts and modify or suspend the plan. The *Parrish* court concluded that the plan at issue "[partook] of gratuity while lacking essential elements of contractual obligation. . . . [A]n employee [under the plan] is at all times charged with knowledge that a bonus award may be granted or withheld . . . at the discretion of the employer." 137 So. 2d at 258. See, also, *Mosow v. National Lock Co.*, 119 Ill. App. 2d 232, 255 N.E.2d 500 (1970) (concluding that contingent compensation plan at issue reserved determination of compensation to management's discretion); *Automatic Sprinkler Corp. v. Anderson*, 243 Ga. 867, 869, 257 S.E.2d 283, 285 (1979) (concluding that because compensation plan stated that " 'award of any direct incentive compensation is entirely within the discretion of the corporation,' " contract was unambiguous and employee had no absolute right to deferred incentive compensation); *Goodpaster v. Pfizer, Inc.*, 35 Wash. App. 199, 665 P.2d 414 (1983) (stating that employer's promise to pay bonus was illusory and finding no evidence that promise to pay bonus was definite and certain).

Malone and Krantz argue, however, that the 1998 Commission Plan does not constitute a discretionary and gratuitous bonus plan, but instead bases accrued sales commissions upon individual sales performance. Malone and Krantz assert that the 1998

Commission Plan constituted a contract that could not be (1) altered without notice or (2) retroactively altered.

Although Malone and Krantz acknowledge that an employer may change an original compensation agreement, they argue that an employer cannot retroactively modify commission agreements to deny accrued commissions. See, e.g., *Nichols v. Waterfield Financial Corp.*, 62 Ohio App. 3d 717, 719, 577 N.E.2d 422, 423 (1989) (stating that "the terms and conditions of an at-will contract can be *prospectively* changed without consideration" (emphasis supplied)). Malone and Krantz are correct in their assertion.

[5,6] Under either an at-will employment relationship or a contractual arrangement that allows employer modification at will, an employer can alter the terms of compensation, provided the employer has given notice of the alteration to the employee and the employee thereafter continues his or her employment. However, even if there is an at-will employment relationship, the employer cannot unilaterally alter the amount of compensation for work that has already been rendered or for commissions that have already accrued. See 27 Am. Jur. 2d *Employment Relationship* § 54 (1996). Simply put, an employer cannot modify a written commission agreement retroactively or without notice to its employees. See, *Martin v. Golden Corral Corp.*, 601 So. 2d 1316 (Fla. App. 1992) (reversing and remanding summary judgment to determine if employee had notice and acceptance of modification to at-will employment contract); *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986) (stating that employee must have knowledge and notice of proposed modification when employer modifies at-will employment agreement). See, also, 27 Am. Jur. 2d, *supra*, §§ 23, 26, and 54.

We conclude that the district court did not err in refusing to direct a verdict in favor of ABI. Authority cited by ABI concerning gratuitous bonuses and illusory promises enforceable at management's discretion does not apply to the 1998 Commission Plan. The 1998 Commission Plan granted compensation based on individual sales performance, not mere gratuity. Further, unlike the cases cited by ABI, elements of contractual formation are present under the 1998 Commission Plan: ABI offered its commission plan to entice Malone and Krantz to

work for ABI, and Malone and Krantz accepted that plan as part of their employment.

Although ABI management retained some discretion with regard to the 1998 Commission Plan, that discretion (with respect to accrued commissions) may not be exercised retroactively, without notice to the employees. A directed verdict would not be appropriate in this case and cannot be entered as a matter of law.

ABI also claims that Malone's and Krantz' estimations of their commissions due resulted in a jury award of speculative damages. We disagree. Malone and Krantz offered sufficient evidence as to the amounts ABI owed them and evidence that they both disputed the reserves excluded from their second quarter commissions. Thus, the district court did not err in refusing to grant ABI a directed verdict.

2. Jury Instructions

(a) Instruction on Ambiguity of Commission Plan

ABI assigns, second, that the district court erred by instructing the jury that the 1998 Commission Plan was ambiguous as a matter of law. In instructions Nos. 2 and 7, the district court instructed the jury that the 1998 Commission Plan was ambiguous; ABI specifically objected to these instructions. In its brief, ABI relies on its arguments that the 1998 Commission Plan is unambiguous, as discussed above.

[7,8] Whether a document is ambiguous is a question of law, and an appellate court considering such a question is obligated to reach a conclusion independent of the trial court's decision. *Sack Bros. v. Tri-Valley Co-op*, 260 Neb. 312, 616 N.W.2d 786 (2000). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001).

We conclude that several portions of the 1998 Commission Plan are ambiguous. The jury heard evidence that definition of the terms "paid sales" in paragraph 1, upon which commissions were to be based, meant POS reports to some ABI employees and money received from actual sales to other ABI employees. Commissions based on "performance" and disputes resolved by "senior management" in paragraph 4, and "subject to change at

management's discretion" in paragraph 5, are also ambiguous, as revealed by conflicting evidence adduced at trial. Additionally, the 1998 Commission Plan ambiguously states in paragraph 1 that "commissions are based on paid sales only" and in paragraph 4 that "commissions are based on performance."

Whether the jury instructions given by a trial court are correct is a question of law. *Springer v. Bohling*, 263 Neb. 802, 643 N.W.2d 386 (2002). We conclude that based on our interpretation of the law with regard to the 1998 Commission Plan and our determination of the plan's ambiguity, the district court did not err in (1) instructing the jury that the plan was ambiguous as a matter of law and (2) allowing the jury to resolve the ambiguities from the evidence adduced at trial.

(b) Failure to Instruct on Unenforceable Promise

Finally, ABI assigns that the district court erred in failing to include ABI's requested jury instruction, which read: "An agreement that depends upon the wish, will, or pleasure of one of the parties is illusory and does not constitute an enforceable promise." While certainly a unique argument, ABI is apparently claiming that this principle of law, set forth in *Johnson Lakes Dev. v. Central Neb. Pub. Power*, 254 Neb. 418, 576 N.W.2d 806 (1998), would have permitted the trier of fact to conclude that the 1998 Commission Plan could not be enforced to allow Malone and Krantz to claim any specific amounts.

[9,10] To establish reversible error from a court's failure to give a requested jury instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction was warranted by the evidence, and (3) the appellant was prejudiced by the court's failure to give the requested instruction. *Springer, supra.* On appellate review, jury instructions must be read together; they must be read conjunctively, rather than separately in isolation. *Morris v. Rochester Midland Corp.*, 259 Neb. 870, 612 N.W.2d 921 (2000).

The district court instructed the jury that Malone and Krantz had the burden of proof and that all parties to a lawsuit are entitled to the same fair and impartial consideration, be they individual or corporation. The court further instructed that having found the plan to be ambiguous, the jury must consider both parties'

interpretations and constructions of the 1998 Commission Plan. Thus, the jury could have found in favor of ABI's interpretation of the 1998 Commission Plan. The jury did not accept ABI's interpretation. However, no prejudice against ABI occurred in the court's failure to include ABI's proposed instruction. We, therefore, conclude that the district court did not err in failing to instruct the jury with regard to unenforceable illusory promises.

VI. CONCLUSION

For the reasons stated above, we affirm the judgment of the district court.

AFFIRMED.

EDWARD SHIRLEY, APPELLANT, V. BEVERLY NETH, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

646 N.W.2d 587

Filed June 21, 2002. No. S-01-404.

1. **Judgments: Statutes: Appeal and Error.** When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below.
2. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader.
3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally. If, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled.
4. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
5. **Demurrer: Pleadings: Motor Vehicles: Appeal and Error.** A demurrer is a permissible responsive pleading to a petition filed pursuant to Neb. Rev. Stat. § 60-503 (Reissue 1998).

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Jeffrey A. Silver for appellant.

Don Stenberg, Attorney General, and Jodi M. Fenner for appellee.

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

MILLER-LERMAN, J.

I. NATURE OF CASE

Edward Shirley filed a petition under Neb. Rev. Stat. § 60-503 (Reissue 1998) in the district court for Douglas County in which he alleged in his first count that the suspension of his driver's license by Beverly Neth, director of the Department of Motor Vehicles, State of Nebraska, was improper and in his second count that the Motor Vehicle Safety Responsibility Act, Neb. Rev. Stat. § 60-501 et seq. (Reissue 1998), violated constitutional due process guarantees. The district court sustained the general demurrer of Neth and dismissed the petition. Shirley appeals. We affirm the sustaining of the demurrer as to the second count of Shirley's petition, but reverse, and remand for further proceedings with respect to the first count.

II. STATEMENT OF FACTS

Shirley was involved in an automobile accident on November 22, 1998. Because Shirley was an uninsured motorist, he was notified by the Department of Motor Vehicles (hereinafter Department) on March 26, 1999, that his license would be suspended effective April 15 unless he complied with the Motor Vehicle Safety Responsibility Act (hereinafter Act) by one of the methods prescribed therein. Shirley satisfied the requirements of the Act by depositing with the Department a bond in the amount of $1,002.

On December 7, 2000, the Department notified Shirley that the bond was no longer required because 2 years had passed since the accident. In order to receive a refund of the bond amount, Shirley signed an affidavit on December 19 in which he swore, inter alia, that no action had been instituted against him for any claim arising out of the accident. However, contrary to the statements in the affidavit and prior to the Department's

issuing the scheduled refund, the Douglas County Small Claims Court notified the Department of an unsatisfied judgment against Shirley arising out of the November 22, 1998, accident. On December 18, the day before Shirley signed the affidavit, the Department suspended Shirley's driver's license. The suspension was effective until the judgment was satisfied.

On December 22, 2000, Shirley filed a petition in district court pursuant to § 60-503, appealing the suspension. Shirley alleged in the first count that the suspension was unconstitutional in an unspecified manner, was not supported by evidence, was arbitrary and capricious, and was contrary to law. In the second count, he alleged that the Act was unconstitutional on its face because it violated the due process clauses of the U.S. and Nebraska Constitutions. Neth demurred to Shirley's petition. The district court sustained the demurrer and dismissed Shirley's petition. Shirley appeals.

III. ASSIGNMENTS OF ERROR

Shirley asserts, restated, that the district court erred in sustaining the demurrer and dismissing his petition because (1) the district court could not consider a demurrer to a case brought under the Act and (2) his petition stated a cause of action.

IV. STANDARDS OF REVIEW

[1] When an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent, correct conclusion irrespective of the determination made by the court below. *Salkin v. Jacobsen*, 263 Neb. 521, 641 N.W.2d 356 (2002).

[2] In reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept the conclusions of the pleader. *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002).

[3] In determining whether a cause of action has been stated, the petition is to be construed liberally. If, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Id.*

[4] Whether a petition states a cause of action is a question of law, regarding which an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Id.*

V. ANALYSIS

1. Demurrer as Proper Pleading

On appeal, Shirley asserts that a demurrer is not a proper pleading in response to a petition filed pursuant to § 60-503 and that as a consequence, the district court erred in considering Neth's demurrer to his petition. The thrust of Shirley's argument is that an action brought under § 60-503 is akin to an appeal, to which a demurrer is inappropriate. We reject Shirley's claim and conclude that a demurrer is allowed as a responsive pleading to a petition filed under § 60-503.

Section 60-503(1) provides:

> Any person aggrieved by an order or act of the department under the Motor Vehicle Safety Responsibility Act may, within thirty days after notice thereof, file a petition in the district court of the county where the aggrieved person resides, but in the event the aggrieved person is a nonresident, then such petition shall be filed in the district court of Lancaster County for a review thereof. The filing of such petition shall suspend the order or act pending a final determination of the review. The license or registration of any person claiming to be aggrieved shall not be restored to such person in the event the final judgment of a court finds against such person until the full time of revocation as fixed by the department shall have elapsed. The court shall summarily *hear the petition as a case in equity* without a jury and *may make any appropriate order or decree.*

(Emphasis supplied.)

Although § 60-503 provides that the district court shall summarily hear the petition, as a matter of statutory interpretation, we conclude that the explicit provision in § 60-503 that a petition filed pursuant to that section is to be heard "as a case in equity" and the further provision that the court "may make any appropriate order or decree," taken together, indicate that a case brought under § 60-503 is not a summary proceeding. A case brought "in equity" presupposes a civil action. See Neb. Rev.

Stat. § 25-101 (Reissue 1995). In considering the process under § 60-503, we have stated that a petitioner proceeding under § 60-503 is "afforded an opportunity to present evidence and cross-examine witnesses at the hearing held in the district court." *Wollenburg v. Conrad*, 246 Neb. 666, 671, 522 N.W.2d 408, 412 (1994). Because an action brought on by a petition under § 60-503 is to be heard as a case in equity, including the opportunity to present evidence and to cross-examine witnesses, the process to be followed under § 60-503 is that applicable to civil actions.

Neb. Rev. Stat. § 25-803 (Reissue 1995) provides that in civil actions, including cases in equity, "[t]he only pleadings allowed are (1) the petition by the plaintiff; (2) the answer or demurrer by the defendant; (3) the demurrer or reply by the plaintiff; and (4) the demurrer to the reply by the defendant." We further note that Neb. Rev. Stat. § 25-806 (Reissue 1995) provides:

> The defendant may demur to the petition only when it appears on its face (1) that the court has no jurisdiction of the person of the defendant or the subject of the action; (2) that the plaintiff has not legal capacity to sue; (3) that there is another action pending between the same parties for the same cause; (4) that there is a defect of parties, plaintiff or defendant; (5) that several causes of action are improperly joined; or (6) that the petition does not state facts sufficient to constitute a cause of action.

Taking §§ 25-803 and 25-806 together, it is clear that a demurrer is a proper responsive pleading to a civil action, including one brought "as a case in equity" under § 60-503, and that the grounds for a demurrer listed in § 25-806 may be raised against a petition filed pursuant to § 60-503.

[5] Because petitions filed pursuant to § 60-503 are to be heard as civil cases in equity and because the challenges that may be raised by demurrer may be raised against a petition filed pursuant to § 60-503, we conclude that a demurrer is a permissible responsive pleading to a petition filed pursuant to § 60-503. We therefore conclude that the district court did not err in considering the demurrer filed by Neth, and we reject Shirley's first assignment of error.

2. Demurrer in Present Case

Shirley next asserts that even if a demurrer is a proper pleading to challenge a petition filed under § 60-503, the demurrer in this case should not have been sustained because his petition did not fail to allege facts stating a cause of action. Shirley fashioned his petition as containing two counts, and we will consider each count separately in reviewing whether the district court properly sustained Neth's demurrer as to that count.

(a) First Count

In his first count, Shirley alleged that the suspension of December 18, 2000, was "(a) in violation of constitutional provision; (b) unsupported by competent, material, and substantial evidence in view of the entire record as made on review; (c) arbitrary and capricious; or (d) contrary to law and should be reversed by the Court." Shirley's allegation in the first count that the suspension of his driver's license by the Department was "in violation of constitutional provision" is apparently intended to be a challenge to the Act as applied to Shirley, not a facial challenge to the Act itself. Neth demurred to this count, and the district court sustained the demurrer.

On appeal, Shirley claims that the allegations contained in the first count of his petition were adequate to state a cause of action and that the demurrer was improperly sustained. Neth argues that the allegations in the petition as to the first count were inadequate, and in any event, taking the petition as a whole, including reference to the exhibits attached thereto, it is clear that the Department did nothing legally inappropriate and that Shirley's first count cannot succeed on the merits. Neth claims the district court did not err in sustaining her demurrer. We agree with Shirley's contention that the district court erred in sustaining the demurrer as to Shirley's first count.

Neth demurred to Shirley's petition pursuant to § 25-806(6), claiming that the petition failed to state facts sufficient to constitute a cause of action. As used in § 25-806(6), a statement of facts sufficient to constitute a cause of action means a narrative of events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Spradlin v. Dairyland Ins. Co.*, 263 Neb. 688, 641 N.W.2d 634 (2002). In determining

whether a cause of action has been stated, the petition is to be construed liberally. If, as so construed, the petition states a cause of action, a demurrer based on the failure to state a cause of action must be overruled. *Id.*

To form the basis for a case brought pursuant to § 60-503, a plaintiff must claim to have been "aggrieved by an order or act" of the Department under the Act. See § 60-503(1). When the plaintiff has sufficiently pled a narrative of events, acts, or things done or omitted claiming that he or she was aggrieved by the Department, pursuant to § 60-503, the plaintiff is ordinarily "afforded an opportunity to present evidence and cross-examine witnesses at the hearing held in the district court," *Wollenburg v. Conrad*, 246 Neb. 666, 671, 522 N.W.2d 408, 412 (1994), and is entitled to an evaluation of the evidence by the district court of the order or action of the Department.

To summarize, in his petition, Shirley alleged historical facts surrounding the bond he was required to deposit, the anticipated refund, and the fact that on December 18, 2000, the Department suspended his driver's license and privilege to operate a motor vehicle in the State of Nebraska purportedly due to an unsatisfied judgment. He also alleged that such suspension was "(a) in violation of constitutional provision; (b) unsupported by competent, material, and substantial evidence in view of the entire record as made on review; (c) arbitrary and capricious; or (d) contrary to law." Shirley's allegations in his first count are sufficient to state a cause of action under § 60-503.

In support of her contention that the demurrer to the first count was properly sustained, Neth directs our attention to the petition to which Shirley attached a copy of the December 18, 2000, suspension in which the Department declares that it has received a certified copy of a transcript of judgment filed against Shirley from the small claims court for Douglas County. See *Tilt-Up Concrete v. Star City/Federal*, 261 Neb. 64, 621 N.W.2d 502 (2001) (demurrer reaches exhibit filed with petition and made part thereof, so that court can consider such exhibit in determining whether petition states cause of action). Neth argues that because the Department had received a certified copy of an unsatisfied judgment against Shirley, it was required to suspend Shirley's license under § 60-517 and the allegation in

the first count of Shirley's petition under § 60-503 will ultimately fail. However, statements made by the Department are not alone sufficient to negate Shirley's allegations that such statements are unsupported by evidence, that the manner in which the suspension was imposed was arbitrary and capricious, and that the process by which the suspension was implemented was otherwise improper.

The demurrer was not properly sustained as to the first count because, as a matter of law, it contained allegations which, if found to be true, would support the granting of relief under § 60-503. We therefore reverse the granting of the demurrer and dismissal as to the first count and remand the cause to the district court for further proceedings with respect to the first count of Shirley's petition.

(b) Second Count

In his second count, Shirley alleged that the December 18, 2000, suspension was improper "because the statutory framework upon which it is based, to-wit, [the Act,] is void as contrary to the due process clauses of the Nebraska and United States Constitution[s,] and is therefore unconstitutional in whole or in part." We conclude that in his second count, Shirley failed to state a cause of action upon which relief could be granted and that, therefore, the district court properly sustained Neth's demurrer as to the second count.

In his second count, Shirley challenged the validity of the suspension on the basis that the Act was unconstitutional on its face because of due process concerns. This court considered due process challenges to the Act in *Wollenburg v. Conrad*, 246 Neb. 666, 522 N.W.2d 408 (1994); *Clayton v. Nebraska Dept. of Motor Vehicles*, 247 Neb. 49, 524 N.W.2d 562 (1994); and *Russell v. State*, 247 Neb. 885, 531 N.W.2d 212 (1995). In *Clayton*, we stated that "the Act complies with the notice and hearing requirements of the federal and state Constitutions. Accordingly, [plaintiff]'s argument that the Act is unconstitutional on its face is without merit." 247 Neb. at 52, 524 N.W.2d at 565. Because we have previously rejected arguments that the Act is unconstitutional on its face because of due process concerns, Shirley failed to state a cause of action upon which relief could be granted in his second

count. We therefore conclude that the district court properly sustained Neth's demurrer to the second count and properly dismissed the second count. Our conclusions regarding the facial challenge to the Act asserted in the second count do not apply to the first count, which appears to include a constitutional challenge to the Act as applied to Shirley.

VI. CONCLUSION

We conclude that a demurrer is a proper responsive pleading to a petition filed pursuant to § 60-503 and that the district court properly sustained Neth's demurrer to the second count of Shirley's petition. We therefore affirm the district court's order sustaining the demurrer as to the second count and dismissing the second count. We conclude, however, that the first count is adequately pled and that the district court erred in sustaining Neth's demurrer to the first count of Shirley's petition. We therefore reverse the district court's order of dismissal as to the first count and remand the cause for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ROBERT L. GARZA, APPELLANT, V. MICHAEL KENNEY, WARDEN OF THE NEBRASKA STATE PENITENTIARY, APPELLEE.

646 N.W.2d 579

Filed June 21, 2002. No. S-01-412.

1. **Actions: Habeas Corpus: Collateral Attack: Appeal and Error.** As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void?
2. **Judgments: Appeal and Error.** To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below.

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

Bryan E. Smith, Jr., of Hascall, Jungers & Garvey, for appellant, and, on brief, Robert L. Garza, pro se.

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

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

STEPHAN, J.

Robert L. Garza filed a petition for writ of habeas corpus alleging that his conviction for kidnapping was void because a material element of the crime was neither charged in the information nor determined by the jury, thus depriving the trial court of jurisdiction to impose his sentence. The district court for Lancaster County sustained the State's motion to quash and dismissed Garza's petition for failure to state a claim for habeas corpus. Garza perfected this timely appeal.

FACTS

On April 7, 1983, the State filed an information charging Garza with, inter alia, kidnapping, in violation of Neb. Rev. Stat. § 28-313 (Reissue 1995). On February 17, 1984, Garza was convicted by jury of the kidnapping charge and subsequently sentenced to life imprisonment.

On February 1, 2001, Garza filed a pro se verified petition for writ of habeas corpus in the district court for Lancaster County. In his petition, Garza alleged that the factual issue set forth in § 28-313(3), i.e., whether the victim of a kidnapping was voluntarily released unharmed prior to trial, is an essential element of the crime of kidnapping. He alleged that because the State did not include this element in the information, the district court lacked subject matter jurisdiction to hear the case and impose a sentence and that his conviction was therefore void. Garza also alleged that his conviction was void because his due process rights were violated when this issue was determined by a judge rather than a jury during sentencing.

After receiving Garza's petition, the district court issued an order requiring the State to show cause why a writ of habeas corpus should not issue. The State responded by filing a motion

to quash the petition and argued that Garza had not alleged an appropriate basis for relief. After a brief hearing, the district court sustained the motion to quash and dismissed the petition.

Garza timely appealed from this order and filed a petition to bypass review in the Nebraska Court of Appeals, which we granted.

ASSIGNMENT OF ERROR

Garza assigns, restated and consolidated, that the district court erred in failing to void his conviction through a writ of habeas corpus because the fact issue set forth in § 28-313(3) must be included in the information and submitted to the jury before the trial court acquires the power to impose sentence.

STANDARD OF REVIEW

[1] As only a void judgment is subject to attack in a habeas corpus action, an appellate court is limited in such a case to reviewing a question of law, namely, is the judgment in question void? *Glantz v. Hopkins*, 261 Neb. 495, 624 N.W.2d 9 (2001); *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

[2] To the extent questions of law are involved, an appellate court is obligated to reach conclusions independent of the decisions reached by the court below. *Glantz, supra*; *State v. Portsche*, 258 Neb. 926, 606 N.W.2d 794 (2000).

ANALYSIS

In *Rehbein v. Clarke*, 257 Neb. 406, 409-10, 598 N.W.2d 39, 43 (1999), we stated:

> Habeas corpus is a special civil proceeding providing a summary remedy to persons illegally detained. See *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944). A writ of habeas corpus is a remedy which is constitutionally available in a proceeding to challenge and test the legality of a person's detention, imprisonment, or custodial deprivation of liberty. See *Flora v. Escudero*, 247 Neb. 260, 526 N.W.2d 643 (1995).
>
> A writ of habeas corpus in this state is quite limited in comparison to those of federal courts, which allow a writ of habeas corpus to a prisoner when he is in custody in violation of the federal Constitution, law, or treaties of the United

States. *Case v. State*, 177 Neb. 404, 129 N.W.2d 107 (1964), *vacated on other grounds* 381 U.S. 336, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965). It is established that where a judgment is attacked in a way other than a proceeding in the original action to have the judgment vacated, reversed, or modified, or a proceeding in equity to prevent its enforcement, the attack is considered a "collateral attack." *Mayfield v. Hartmann*, 221 Neb. 122, 375 N.W.2d 146 (1985). An action for habeas corpus is an example of such a collateral attack. *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

Only a void judgment may be collaterally attacked. *Mayfield v. Hartmann, supra*. Where the court has jurisdiction of the parties and the subject matter, its judgment is not subject to collateral attack. *Id.* A writ of habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose. *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990).

Garza assigns as error that his conviction is void because the factual issue outlined in § 28-313(3) is "a material element of the crime . . . which must be included in the charging information and submitted to the jury before the trial court acquires the power to impose sentence." This argument is without merit.

Section 28-313 provides:

(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:

(a) Hold him for ransom or reward; or

(b) Use him as a shield or hostage; or

(c) Terrorize him or a third person; or

(d) Commit a felony; or

(e) Interfere with the performance of any government or political function.

(2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.

(3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without

> having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

In *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981), we considered and expressly rejected the argument that § 28-313(3) is an element of the crime of kidnapping. We noted that § 28-313(3) contained various mitigating factors to be considered by the court at sentencing and that these factors therefore need not be charged in the information nor submitted to the jury. We have reaffirmed this holding on three subsequent occasions. See, *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002) (*Becerra III*); *State v. Becerra*, 253 Neb. 653, 573 N.W.2d 397 (1998); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

Garza also relies upon *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), to support his argument that the jury must determine the factual issues outlined in § 28-313(3) before the court acquires the power to impose sentence. Recently, in *Becerra III*, we noted that *Apprendi* held that other than a prior conviction, any fact that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt. We then wrote that

> [u]nder § 28-313, any factual finding about whether the person kidnapped was voluntarily released affects whether the defendant will receive a lesser penalty instead of an increased penalty. *Apprendi* made clear that it was concerned only with cases involving an increase in penalty beyond the statutory maximum and does not apply to the mitigating factors in § 28-313.

Becerra III, 263 Neb. at 759, 642 N.W.2d at 148.

It is clear from the record that the district court which imposed Garza's sentence had jurisdiction of the offense and of Garza's person and that the sentence was within the power of the court to impose. The conviction was thus not void, and it is therefore not subject to collateral attack through our state habeas corpus remedy.

CONCLUSION

The district court's dismissal of Garza's petition for a writ of habeas corpus is affirmed.

AFFIRMED.

JAMES THOMAS HALL, APPELLANT, V. STATE OF NEBRASKA, APPELLEE. STATE OF NEBRASKA, APPELLEE, V. JAMES T. HALL, ALSO KNOWN AS THOMAS DUANE STRAWDER, APPELLANT.

646 N.W.2d 572

Filed June 21, 2002. Nos. S-01-414, S-01-620, S-01-621, S-01-871.

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. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
4. **Postconviction: Judgments: Appeal and Error.** Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling.
5. **Declaratory Judgments.** An action for declaratory judgment does not lie where another equally serviceable remedy is available. One who has failed to pursue a full, adequate, and exclusive statutory remedy is not afforded an additional remedy under the Uniform Declaratory Judgments Act.
6. **Constitutional Law: Criminal Law: Statutes: Collateral Attack: Declaratory Judgments.** A criminal defendant cannot collaterally attack the constitutionality of statutes relevant to his or her criminal prosecution by declaratory judgment.
7. **Postconviction.** The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity.
8. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal.
9. **Postconviction.** Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief.
10. ____. After a first motion for postconviction relief has been judicially determined, any subsequent motion for postconviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for postconviction relief.
11. **Postconviction: Appeal and Error.** An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion.

Appeals from the District Courts for Lancaster and Hall Counties: BERNARD J. MCGINN and TERESA K. LUTHER, Judges. Affirmed.

James Thomas Hall, pro se.

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

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

MILLER-LERMAN, J.

NATURE OF CASE

James Thomas Hall, also known as Thomas Duane Strawder, appeals from district court orders in four separate cases. The four cases were consolidated before this court. In three declaratory judgment actions, cases Nos. S-01-414, S-01-620, and S-01-621, Hall appeals the granting of the State's motions for summary judgment by the district court for Lancaster County. In case No. S-01-871, Hall appeals the order denying his motion for postconviction relief entered by the district court for Hall County. In the three declaratory judgment actions and in the postconviction action, Hall raised issues regarding the constitutionality of the Nebraska homicide statutes. We affirm the orders of the district court for Lancaster County granting the State's motions for summary judgment in cases Nos. S-01-414, S-01-620, and S-01-621, and we affirm the order of the district court for Hall County denying Hall's motion for postconviction relief in case No. S-01-871.

STATEMENT OF FACTS

Background: Prior Proceedings Involving Hall.

In 1991, Hall was charged with first degree murder and other counts in connection with the shooting death of George D. Allan on January 2, 1991. Pursuant to a plea agreement, on July 16, Hall pled guilty to second degree murder and use of a weapon to commit a felony, and the other charges against Hall were dismissed. On September 5, Hall was sentenced to life imprisonment on the second degree murder charge and 20 years' imprisonment on the weapons charge, the sentences to run consecutively. Hall's

sentences were affirmed on appeal by this court. *State v. Hall*, 242 Neb. 92, 492 N.W.2d 884 (1992).

In 1993, Hall filed a motion for postconviction relief, which was denied by the district court for Hall County. The appeal of the denial of postconviction relief was dismissed by this court. *State v. Hall*, 245 Neb. xx (No. S-93-989, May 16, 1994). Hall filed a second motion for postconviction relief in 1995 on the basis that the information to which he pled guilty did not include "malice" as a material element of the crime. The second motion was denied by the district court on the ground of procedural default because the error could have been brought to the court's attention either on direct appeal or in the first postconviction action. On appeal, this court ruled that the error in the information was plain error resulting in an unconstitutional conviction. This court reversed the order of the district court denying Hall's motion for postconviction relief, set aside Hall's convictions for second degree murder and use of a weapon to commit a felony, and remanded the cause with directions to the district court to grant a new trial. *State v. Hall*, 249 Neb. 376, 543 N.W.2d 462 (1996), *overruled on other grounds, State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

Following remand, on May 20, 1996, Hall was again charged with first degree murder and use of a weapon to commit a felony. Upon Hall's motion, the district court for Hall County dismissed the weapons charge on the basis that the charge was barred by the statute of limitations. This court dismissed the State's appeal from the dismissal of the weapons charge on the basis that it lacked jurisdiction because the district court's order dismissing the weapons count did not constitute a final order. *State v. Hall*, 252 Neb. 885, 566 N.W.2d 121 (1997).

On November 12, 1997, Hall pled guilty to second degree murder and was sentenced on December 18 to life imprisonment. Hall appealed from the conviction alleging excessive sentence and no credit for time served. This court summarily affirmed Hall's conviction and sentence on May 20, 1998. *State v. Hall*, 254 Neb. xix (No. S-98-068, May 20, 1998).

On July 24, 1998, Hall filed a motion for postconviction relief related to the 1997 conviction. In the motion, Hall asserted, inter alia, that appellate counsel was ineffective for failing to appeal

the constitutionality of Nebraska's second degree murder statute. A hearing was held May 23, 2000. On July 13, the district court for Hall County overruled the postconviction motion. Hall filed a notice of appeal on September 15. This court entered an order dismissing the appeal on November 22 because the appeal had not been timely filed. *State v. Hall*, 260 Neb. xxiv (case No. S-00-1048, Nov. 22, 2000).

Declaratory Judgment Actions: Cases Nos. S-01-414, S-01-620, and S-01-621.

On August 17 and 20, 1999, Hall filed three petitions for declaratory judgment in the district court for Lancaster County. These three petitions initiated the actions that are the subjects of the appeals in cases Nos. S-01-414, S-01-620, and S-01-621. In case No. S-01-414, Hall sought a declaration that Neb. Rev. Stat. § 28-305 (Reissue 1995) regarding manslaughter was unconstitutional; in case No. S-01-620, Hall sought a declaration that Neb. Rev. Stat. § 28-304 (Reissue 1995) regarding murder in the second degree was unconstitutional; and in case No. S-01-621, Hall sought a declaration that Neb. Rev. Stat. § 28-303(1) (Reissue 1995) regarding murder in the first degree was unconstitutional. Hall filed amended petitions in the three actions on December 6, 2000. Hall asserted in the petitions that the homicide statutes were unconstitutionally vague and overbroad.

On January 24, 2001, the State filed motions for summary judgment in the three declaratory judgment actions. A hearing on the motions was held February 28. On March 20, the district court granted the three motions for summary judgment filed by the State.

With respect to case No. S-01-621, in which Hall challenged the first degree murder statute, § 28-303(1), the district court concluded that Hall had waived his opportunity to present the constitutional question he was attempting to raise in this declaratory action by having pled guilty to second degree murder after being charged with first degree murder. The district court further concluded in all three cases Nos. S-01-414, S-01-620, and S-01-621 that no present case or controversy existed between the parties regarding the statutes at issue and

concluded that the Uniform Declaratory Judgments Act applied only where there were actual controversies and justiciable issues presented. The district court further found that, to the extent Hall's challenges related to his conviction for second degree murder, (1) the procedural safeguards which inure to a criminal prosecution represented an " 'equally serviceable remedy' " by which he could have pursued the issues raised; (2) "res judicata" barred litigation of a point which the parties could have brought forward in the criminal proceeding; and (3) Hall had either waived the issues or had the issues resolved against him in his criminal action which was affirmed on appeal or in his postconviction proceeding. Finally, the district court concluded that the legal question Hall attempted to raise in all three actions had been resolved in a manner contrary to Hall's theory of relief by *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

In the orders entered March 20, 2001, the district court entered judgment in favor of the State and dismissed all three declaratory judgment actions. In cases Nos. S-01-414, S-01-620, and S-01-621, Hall appeals the orders granting the State's motions for summary judgment.

Current Postconviction Action: Case No. S-01-871.

On July 5, 2001, Hall filed a motion for postconviction relief in the district court for Hall County related to his conviction for second degree murder in 1997. In his postconviction motion, Hall claimed: (1) the amended information cited the wrong statute number, (2) the district court failed to allow a credit for time served, (3) the homicide statutes were unconstitutional in various respects, and (4) his trial counsel had been ineffective in various respects. Hall sought as relief, inter alia, declarations that §§ 28-303(1), 28-304, and 28-305(1) were unconstitutional.

On July 10, 2001, the district court for Hall County denied Hall's motion for postconviction relief without hearing. The district court concluded that the motion stated no legitimate grounds for relief and raised no new issues that could not have been raised on direct appeal or in the postconviction motion filed July 24, 1998. In case No. S-01-871, Hall appeals the denial of his motion for postconviction relief.

ASSIGNMENTS OF ERROR

Hall's assignments of error in these pro se appeals are not clearly and succinctly stated. However, in cases Nos. S-01-414, S-01-620, and S-01-621, Hall appears to generally assert that the district court for Lancaster County erred by failing to grant the declaratory relief requested. In case No. S-01-871, Hall generally asserts that the district court for Hall County erred in denying his motion for postconviction relief.

STANDARDS 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. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

[3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

[4] Whether a claim raised in a postconviction proceeding is procedurally barred is a question of law. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002).

ANALYSIS

Cases Nos. S-01-414, S-01-620, and S-01-621: Declaratory Judgment Actions Regarding Constitutionality of §§ 25-303(1), 28-304, and 28-305(1).

In cases Nos. S-01-414, S-01-620, and S-01-621, Hall appeals orders of the district court for Lancaster County dated March 20, 2001, which denied him declaratory relief. In these declaratory judgment actions, Hall made facial challenges to the constitutionality of Nebraska's homicide statutes. In case No. S-01-414, Hall filed a petition seeking a declaratory judgment

that § 28-305(1) was unconstitutionally vague and overbroad. Section 28-305(1) provides that "[a] person commits manslaughter if he kills another without malice, either upon a sudden quarrel, or causes the death of another unintentionally while in the commission of an unlawful act." In case No. S-01-620, Hall filed a petition seeking a declaratory judgment that § 28-304 was unconstitutionally vague and overbroad. Section 28-304(1) provides that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." In case No. S-01-621, Hall filed a petition seeking a declaratory judgment that § 28-303(1) was unconstitutionally vague and overbroad. Section 28-303 provides that "[a] person commits murder in the first degree if he kills another person (1) purposely and with deliberate and premeditated malice . . . ."

The district court granted the State's motions for summary judgment and dismissed the declaratory judgment actions on the bases that (1) there existed no case or controversy between Hall and the State with respect to § 28-305(1), (2) an equally serviceable remedy had been provided in the form of the procedural safeguards which inure to a criminal prosecution, (3) the issue Hall asserted in this declaratory judgment action was barred by "res judicata," (4) the claim made by Hall had been waived or resolved against him in the direct appeal of his criminal action and in his postconviction proceedings, and (5) the legal question raised by Hall had already been resolved contrary to his theory of relief in *State v. Burlison*, 255 Neb. 190, 583 N.W.2d 31 (1998).

[5] Although we have held that a declaratory judgment action attacking the constitutionality of a statute or seeking relief from an invalid act or an abuse of authority by an officer or agent is not a suit against the state and is therefore not prohibited by principles governing sovereign immunity, we have nevertheless consistently held that an action for declaratory judgment does not lie where another equally serviceable remedy is available. *Northwall v. State*, 263 Neb. 1, 637 N.W.2d 890 (2002). One who has failed to pursue a full, adequate, and exclusive statutory remedy is not afforded an additional remedy under the Uniform Declaratory Judgments Act. *Id.*

Hall pled guilty and was convicted of second degree murder after being charged with first degree murder. That conviction has been affirmed on appeal, and a subsequent motion for postconviction relief addressing this conviction has been denied. Hall now makes facial challenges to the constitutionality of the homicide statutes in these declaratory judgment actions. This issue could have been raised by conventional forms of remedy within the criminal prosecution. In a criminal prosecution, a defendant can bring a constitutional challenge to the facial validity of the statute under which he or she is charged by filing a motion to quash or a demurrer. See *State v. Kanarick*, 257 Neb. 358, 598 N.W.2d 430 (1999). In the event the defendant's counsel fails to make such a challenge, the defendant can allege ineffective assistance of counsel either on direct appeal or in an action for postconviction relief.

[6] Hall had the opportunity to challenge the constitutionality of §§ 28-303(1), 28-304, and 28-305(1) in the criminal proceedings, but instead entered a guilty plea. A criminal defendant cannot collaterally attack the constitutionality of statutes relevant to his or her criminal prosecution by declaratory judgment. Equally serviceable remedies existed for Hall within the context of his criminal prosecution, and Hall either failed to pursue those remedies or those procedures resulted in decisions contrary to the positions he wishes to assert in these declaratory judgment actions. Because other equally serviceable remedies had been available to Hall, his actions filed under the Uniform Declaratory Judgment Act were not proper. For this reason, the State was entitled to judgment as a matter of law in these declaratory judgment actions. In view of our ruling, we need not consider the other bases stated by the district court. We affirm the orders of the district court for Lancaster County granting the State's motions for summary judgment.

Case No. S-01-871: Postconviction Action.

In case No. S-01-871, Hall appeals the order of the district court for Hall County denying his motion for postconviction relief without hearing on the bases that (1) no new issues were raised in the motion that could not have been raised on direct appeal or in his prior postconviction motion and (2) the motion

stated no legitimate grounds for relief. In this postconviction action, Hall sought relief from his 1997 conviction for second degree murder. Hall generally asserts that the district court erred in denying the motion.

[7-9] The need for finality in the criminal process requires that a defendant bring all claims for relief at the first opportunity. *State v. Parmar*, 263 Neb. 213, 639 N.W.2d 105 (2002). A motion for postconviction relief cannot be used to secure review of issues which were or could have been litigated on direct appeal. *State v. Al-Zubaidy*, 263 Neb. 595, 641 N.W.2d 362 (2002). Postconviction proceedings are not a tool whereby a defendant can continue to bring successive motions for relief. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999).

[10,11] After a first motion for postconviction relief has been judicially determined, any subsequent motion for postconviction relief from the same conviction and sentence may be dismissed by the district court, unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time of filing a prior motion for postconviction relief. *Parmar, supra*. An appellate court will not entertain a successive motion for postconviction relief unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the movant filed the prior motion. *Id.*

In the motion for postconviction relief filed by Hall on July 5, 2001, Hall raised the following issues: (1) The amended information filed in November 1997 cited the wrong statute number, (2) the district court failed to allow a credit for time served, (3) certain homicide statutes were not constitutional, and (4) trial counsel was ineffective in various respects. All the issues raised by Hall in the July 5, 2001, postconviction motion were issues that were or could have been raised either in his direct appeal or in the prior motion for postconviction relief filed July 24, 1998. The July 5, 2001, motion did not affirmatively show on its face that the basis relied upon for relief was not available at the time Hall filed for postconviction relief on July 24, 1998. We therefore affirm the order of the district court for Hall County denying Hall's motion for postconviction relief.

CONCLUSION

In cases Nos. S-01-414, S-01-620, and S-01-621, we conclude that Hall could not bring declaratory judgment actions to challenge the constitutionality of the homicide statutes when equally serviceable remedies existed for Hall to bring such challenges in his criminal prosecution, and we therefore affirm the orders of the district court for Lancaster County granting the State's motions for summary judgment. In case No. S-01-871, we conclude that the postconviction relief requested in Hall's motion filed July 5, 2001, was procedurally barred, and we therefore affirm the order of the district court for Hall County which denied Hall's motion for postconviction relief.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V.
JESSE E. NARCISSE, APPELLANT.
646 N.W.2d 583

Filed June 21, 2002. No. S-01-520.

1. **Postconviction: Proof: Appeal and Error.** A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Constitutional Law: Effectiveness of Counsel: Conflict of Interest.** When a defendant raises no objection to a conflict of interest at trial, he or she must demonstrate (1) that his or her lawyer actively represented conflicting interests and (2) that the actual conflict of interest adversely affected the lawyer's performance.
3. **Effectiveness of Counsel: Conflict of Interest: Proof.** A conflict of interest must be shown to have resulted in conduct on the part of counsel which was detrimental to the defense.
4. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

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

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

WRIGHT, J.

NATURE OF CASE

Following an evidentiary hearing, the district court denied Jesse E. Narcisse's motion for postconviction relief. Narcisse appeals.

SCOPE OF REVIEW

[1] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002).

FACTS

In 1987, Narcisse was charged with one count of first degree sexual assault and one count of first degree false imprisonment. He was also charged with two counts of being a habitual criminal. Narcisse was convicted on all counts on February 26, 1988. His convictions were affirmed in *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989).

In 1997, the district court denied Narcisse's request for postconviction relief without an evidentiary hearing. The Nebraska Court of Appeals affirmed, and we granted Narcisse's petition for further review. We concluded that Narcisse's motion for postconviction relief contained sufficient facts to entitle him to an evidentiary hearing. Therefore, we reversed the decision of the Court of Appeals and remanded the cause with directions to remand the cause to the district court for an evidentiary hearing. See *State v. Narcisse*, 260 Neb. 55, 615 N.W.2d 110 (2000).

This matter is now before us on Narcisse's appeal from the denial of his motion for postconviction relief following an evidentiary hearing in the district court. At the evidentiary hearing, the issue presented was whether Narcisse's counsel had actively represented clients with conflicting interests during Narcisse's trial and subsequent appeal and, if so, whether the conflict of interest adversely affected the adequacy of Narcisse's counsel's performance.

The alleged conflict of interest related to the murder of Denise Stawkowski, who was found shot to death in Lancaster County on February 19, 1988. Herman Buckman and Goldie Fisher were arrested in connection with the death. On February 21, Miles Johnston, Jr., who represented Narcisse, was appointed to represent Buckman.

While awaiting trial, Narcisse was housed in the Lancaster County jail and worked as a trustee in the kitchen. There, he came into contact with Fisher, who had previously been Narcisse's girl friend. Allegedly, prior to Narcisse's trial, Fisher told him details about Stawkowski's murder. Fisher and Narcisse gave conflicting recorded statements to Det. Robert Marker, Jr., of the Lancaster County Sheriff's Department. Narcisse reported that Fisher said Stawkowski was shot by a third party, and not by Buckman. Narcisse knew Buckman from previous incarcerations.

On April 12, 1988, more than 1 month after Narcisse was convicted, Buckman was charged with murder. Attached to the information was a list of potential witnesses, which included Narcisse. Johnston then spoke with a deputy county attorney, who said that the State did not plan to call Narcisse as a witness because the information he had given was not believed to be accurate. Narcisse was not deposed and did not testify at Buckman's trial.

Narcisse was convicted on February 26, 1988, after a 4-day trial. Johnston conferred with Buckman four times between February 21 and 26. Before Narcisse was sentenced, Johnston met with Buckman an additional 14 times.

The district court found that although Johnston was appointed to represent Buckman and met with him on February 21, 1988, the day before commencement of Narcisse's trial, Johnston did not become aware of the possible involvement of Narcisse in Buckman's trial until after Narcisse had been convicted. The court found no evidence that Johnston's representation of Buckman adversely affected Johnston's representation of Narcisse. The evidence established that the State did not intend to use Narcisse as a witness in the Buckman trial and that there was no conflict between the two cases and their defendants.

The district court noted that Johnston had neglected to communicate with Narcisse after his sentencing, but there was no

evidence to support a conclusion that there was any relationship between that neglect and Johnston's representation of Buckman. The court denied Narcisse's request for postconviction relief.

ASSIGNMENT OF ERROR

Narcisse assigns as error that the district court erred in denying his motion for postconviction relief.

ANALYSIS

In support of his assignment of error, Narcisse claims he met the burden to demonstrate a conflict of interest which adversely affected counsel's performance. Narcisse alleges that the evidence established Johnston's deficient performance and that Johnston failed to convey a plea offer to him because of a conflict of interest that resulted in prejudice to Narcisse.

[2,3] A defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Becerra*, 263 Neb. 753, 642 N.W.2d 143 (2002). When a defendant raises no objection to a conflict of interest at trial, he or she must demonstrate "(1) that his or her lawyer actively represented conflicting interests and (2) that the actual conflict of interest adversely affected the lawyer's performance." See *State v. Fletcher*, 253 Neb. 1029, 1032, 573 N.W.2d 752, 755 (1998). A conflict of interest must be shown to have resulted in conduct on the part of counsel which was detrimental to the defense. See *id.*

At the evidentiary hearing, Johnston testified that he first met with Buckman on February 21, 1988. He was appointed to represent Buckman 3 days before the start of Narcisse's jury trial. Johnston did not discuss his representation of Narcisse with Buckman because Johnston had no idea Narcisse and Buckman knew each other or had any connection with each other.

Johnston said he first became aware that Narcisse was listed as a witness in the Buckman case when the information was filed against Buckman on April 12, 1988. His motion for fees indicated that he researched attorney-client privilege on April 4. He was told that the State did not believe Narcisse's information was accurate and that it did not intend to use the information or call Narcisse as a witness. Narcisse's statement to authorities

did not agree with the timeline that the authorities had already determined was factual.

Johnston testified that he believed a plea offer was made in Narcisse's case a few days prior to trial. He discussed the offer with Narcisse before the trial, and Narcisse declined to accept it. He encouraged Narcisse to accept the offer because Narcisse's only defense was that the sexual contact was voluntary. He believed that he encouraged Narcisse to testify during the trial, but Narcisse refused. Narcisse was not called as a witness at Buckman's trial, and his testimony was never offered. Johnston said he never discussed Narcisse's willingness to testify with prosecutors in the Buckman case.

Narcisse testified at the evidentiary hearing that he did not know about the plea offer until after the trial and sentencing and that he did not know the specifics of the offer. He said that when he asked Johnston his reasons for waiting until after sentencing to discuss the offer, Johnston said: " 'This will teach you to testify against my client.' " Johnston testified that he did not know the origin of that quote. Narcisse also claimed that he wanted to testify during trial but that Johnston advised against it. Narcisse claimed that if he had known Johnston was representing Buckman, he would have asked for another attorney because of the conflict of interest.

Detective Marker testified that as one of the lead detectives investigating the homicide of Stawkowski, he interviewed Narcisse on February 22, 1988. Detective Marker said the information from Narcisse did not match other information obtained during the investigation, including information obtained directly from Fisher.

[4] On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Williams*, 253 Neb. 111, 568 N.W.2d 246 (1997), *cert. denied* 522 U.S. 992, 118 S. Ct. 555, 139 L. Ed. 2d 397. The district court found that the statements given to Detective Marker by Fisher and Narcisse corroborated Johnston's testimony that the State did not call Narcisse as a witness in the Buckman case due to inconsistencies in Narcisse's statement. The evidence also supported Johnston's statement concerning the dates and times on which he met with Buckman.

The court found that Narcisse was not deposed and did not testify at Buckman's trial. The court found that it was not until early April 1988, after Narcisse had been convicted, that Johnston became aware of the potential of Narcisse's being called to testify in the Buckman case.

The district court heard Narcisse and Johnston testify concerning the allegation that Johnston did not inform Narcisse of the plea offer until after he had been convicted. It found no support for Narcisse's claim that the failure to notify him of the plea offer was in retaliation for Narcisse's testifying against Buckman. The fee application submitted by Johnston showed that he had talked to Narcisse about the plea on February 12, 1988, which was prior to trial.

The district court found no evidence that Narcisse's case was affected, adversely or otherwise, by Johnston's representation of Buckman and that there was no conflict between the two cases and their defendants. Johnston apparently did not communicate with Narcisse after his sentencing, but the district court found no evidence to suggest that the failure was related to Johnston's representation of Buckman.

We find no error in the findings of fact made by the district court. Narcisse has failed to establish a basis for postconviction relief. He has not met his burden to show that any conflict of interest existed in Johnston's representation of Buckman and Narcisse or that the representation of the two defendants adversely affected Narcisse's case. The findings of the district court are not clearly erroneous, and the court correctly denied postconviction relief.

CONCLUSION

Finding no error in its denial of postconviction relief, we affirm the judgment of the district court.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V.
JOHN M. ROE, APPELLEE.
646 N.W.2d 264

Filed June 28, 2002. No. S-00-1130.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Don Stenberg, Attorney General, and William L. Howland for appellant.

Robert Wm. Chapin, Jr., for appellee.

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

WRIGHT, J.

This appeal arises from an order granting a petition to set aside a conviction pursuant to Neb. Rev. Stat. § 29-2264 (Cum. Supp. 2000). The Lancaster County District Court granted the petition, finding that § 29-2264 does not violate Neb. Const. art. II, § 1. The State appeals.

John M. Roe filed a petition to set aside his conviction on May 30, 2000, at which time he had completed all terms and conditions of probation related to a 1989 conviction for felony possession of a controlled substance. The State filed an answer raising the issue of the constitutionality of § 29-2264. At the hearing on Roe's petition, the State argued that § 29-2264 "is an unconstitutional delegation of the executive pardon power to the judiciary." The district court found the State's argument to be without merit and issued an order setting aside Roe's conviction.

The issues raised in this appeal are identical to those in *State v. Spady, ante* p. 99, 645 N.W.2d 539 (2002), and *State v. Leanna, ante* p. 114, 646 N.W.2d 263 (2002). In *Spady*, we concluded that § 29-2264 is constitutional and is not in violation of article II, § 1. For the reasons set forth in *Spady*, the judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION NO. C-1889 OF GCC LICENSE CORPORATION (WESTERN WIRELESS). STATE OF NEBRASKA, PUBLIC SERVICE COMMISSION, APPELLEE, V. ARLINGTON TELEPHONE COMPANY ET AL., INTERVENORS-APPELLANTS, AND ARAPAHOE TELEPHONE COMPANY ET AL., INTERVENORS-APPELLEES.

647 N.W.2d 45

Filed June 28, 2002. No. S-01-343.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Statutes: Judgments: Appeal and Error.** Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.
4. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
5. **Public Service Commission: Words and Phrases.** Neb. Rev. Stat. §§ 75-110 (Reissue 1996), 86-1406 (Reissue 1999), and 84-901 (Reissue 1999) do not require the Nebraska Public Service Commission to engage in rulemaking to define the term "public interest" in a federal statute.
6. **Due Process: Property.** The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections.
7. **Due Process: Notice.** If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case.
8. **Telecommunications: Due Process.** Exclusive eligible telecommunications carrier status is not a protected interest entitling incumbent rural telephone carriers to procedural due process under federal law.
9. **Administrative Law: Public Policy.** Courts must give substantial deference to a regulatory agency's judgment about how best to serve the public interest.
10. **Statutes: Public Policy: Words and Phrases.** The words "public interest" in a federal regulatory statute take meaning from the purposes of the regulatory legislation.
11. **Public Service Commission: Appeal and Error.** The appellate courts review a decision of the Public Service Commission for errors appearing on the record.
12. ____: ____. Determinations by the Public Service Commission are matters peculiarly within its expertise and involve a breadth of judgment and policy determination that should not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
13. **Moot Question: Words and Phrases.** A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally

cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

Appeal from the Nebraska Public Service Commission. Affirmed.

Kelly R. Dahl and John W. McMullen, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, L.L.P., for appellants.

Steven G. Seglin, of Crosby Guenzel, L.L.P., and Mark J. Ayotte and Philip R. Schenkenberg, of Briggs and Morgan, P.A., for appellant GCC License Corporation (Western Wireless).

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

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

CONNOLLY, J.

GCC License Corporation is a wholly owned subsidiary of Western Wireless Corporation, doing business in Nebraska as Cellular One (Western Wireless). It was designated by the Nebraska Public Service Commission (PSC) as an eligible telecommunications carrier (ETC) under 47 U.S.C. § 214(e)(2) (Supp. V 1999), part of the federal Telecommunications Act of 1996. Designation as an ETC makes a company eligible for state and federal funding to ensure that all consumers have access to affordable telephone service, a concept that is generally referred to as "universal service." See, e.g., *Alenco Communications, Inc. v. F.C.C.*, 201 F.3d 608 (5th Cir. 2000). The appellants are rural Nebraska telephone companies who intervened in the PSC action to contest the designation of Western Wireless as an ETC.

The appellants contend that to receive ETC designation, Western Wireless had to prove that the designation would be in the public interest under 47 U.S.C. § 214(e). They argue that the PSC was required to engage in rulemaking to define the term "public interest." They also argue that even if rulemaking is not required, the PSC adopted the wrong test to define the public

interest and that the designation of Western Wireless as an ETC was not supported by the evidence. They further argue that the PSC, by certifying Western Wireless' ETC status to the Federal Communications Commission (FCC) after an appeal was filed, violated a stay provision in Neb. Rev Stat. § 75-134(3) (Cum. Supp. 2000).

We determine that rulemaking was not required and that Western Wireless met its burden of proof that it was eligible for ETC designation. We affirm.

BACKGROUND

Application Proceedings

In August 1998, Western Wireless applied for designation as an ETC in multiple service areas, and the appellants intervened. A hearing was held on the application in October 1999. All parties provided evidence regarding the definition of public interest and whether designation of Western Wireless as an ETC was in the public interest.

Gene DeJordy, an attorney and Western Wireless' representative on a rural task force established by the "Federal-State Universal Service Joint Board," testified for Western Wireless as follows: He stated that the federal Telecommunications Act of 1996 and the Nebraska Telecommunications Universal Service Fund Act established a mechanism to achieve a competitive universal service market by bringing the benefits of competition to rural areas. The acts allow incumbent local exchange carriers, as well as competitive carriers, to enter universal service market areas by seeking ETC status. He testified that Western Wireless was capable of offering universal service to rural customers if it was given ETC status. Western Wireless met all of the criteria for ETC designation, including the ability to offer required supported services, such as access to required emergency services.

Western Wireless planned to implement a universal service offering through the use of wireless local loop technology. Using this system, customers would use a wireless system for their home telephone that would be compatible for use with computers and fax machines. DeJordy explained that wireless loop technology has a more powerful output than a handheld wireless telephone and that the quality of service with a wireless

loop system was equal to, or better than, a landline system. He conceded that terrain could cause a signal to be unavailable to a handheld cellular telephone in certain areas, but indicated that the stronger signal of the wireless loop system would generally prevent that problem. He also stated that a signal could be optimized at a location by using antennas. Additional cellular sites would be constructed to make service available to all areas if necessary. He conceded that the wireless loop service would not likely be installed in hospitals because the antenna would have to be placed outside instead of inside where it could affect medical devices.

DeJordy further testified that Western Wireless would offer the services at a fixed monthly rate similar to what was offered by the incumbent telephone companies. Western Wireless would also provide an expanded local calling area. According to DeJordy, some customers would likely keep their service with the incumbent local carrier, but would use Western Wireless' services as a second telephone line instead of seeking two lines with the incumbent carrier.

DeJordy testified that designation of Western Wireless as an ETC was in the public interest by providing rural customers with a choice between service providers. Western Wireless would provide a new and innovative service with some extra features such as 24-hour customer service, some mobility of the telephone, and expanded local calling areas. Western Wireless did not provide an economic study regarding the impact a second ETC would have on incumbent rural telephone carriers.

Cynthia Bittinger, the secretary-treasurer for a local exchange carrier, testified on behalf of the appellants. She testified as follows: Western Wireless had not provided enough information to show that it would support the services necessary for ETC designation and had not disclosed the prices and terms under which it would offer services. Designation of Western Wireless as an ETC was not in the public interest because it would jeopardize the ability of incumbent rural carriers to provide basic and advanced services to their customers due to lost revenues. She suggested that costs to consumers would rise because of the possibility that a universal service surcharge paid by customers would need to be increased to

support multiple ETC's in rural areas. Bittinger expressed doubt that the economy of rural areas could support two ETC's, especially if the fund had to be adjusted for consumers who carried lines with both carriers. She knew of customers who had experienced dead spots in her area where they were unable to receive a signal when using conventional mobile cellular services provided by Western Wireless.

Steven Watkins, a consultant and attorney, testified for the appellants as follows: Western Wireless had failed to provide sufficient detail regarding the terms and conditions under which it would offer or provide universal service in a manner that would satisfy the conditions necessary for ETC designation. Designation of Western Wireless was not in the public interest because if the funds available were diluted due to multiple ETC's, all the carriers might be prevented from upgrading services in high cost areas and rural customers might be subjected to higher rates. He believed that Western Wireless did not have the capacity to serve all the customers in an area as a carrier of last resort. On cross-examination, he stated his disagreement with existing federal rules and admitted that he believed it would never be in the public interest to designate an additional ETC in a rural telephone company area.

Donald Macke, an economist and the executive director of the Nebraska Rural Development Commission, reviewed Western Wireless' application for ETC designation and wrote a detailed report of his findings. Based on standards used to determine whether to assist development projects, Macke testified that it was not in the public interest to designate Western Wireless as an ETC because the ability of rural markets to support a single provider was in question and they could not support multiple providers.

Barbara Wilcox, the director of product and market issues for U S West Communications, Inc., testified that Western Wireless' services might not be affordable to all customers. She testified that Western Wireless should be required to file a business plan and present details regarding the costs of their services before ETC designation could be granted. She admitted that U S West Communications did not file a business plan when it was designated as an ETC.

PSC FINDINGS

In November 2000, the PSC granted Western Wireless' application for ETC designation. In its order, the PSC stated that it must be shown by clear and convincing evidence that designation of a second ETC in a rural area is in the public interest. The PSC found that the purpose of the public interest requirement of 47 U.S.C. § 214(e) was not to protect rural telecommunications companies from competition but to ensure that rural areas receive the same benefits as urban areas. The PSC determined that the public interest requirement is centered on a threshold issue of whether a proposed application has defined its service area reasonably enough to prevent " 'cherry picking' " of desirable customers by incoming ETC's. The PSC determined that the designated service area was large enough to prevent cherry-picking. The PSC then determined that Western Wireless also offered additional benefits to the public interest such as an expanded calling area and mobility.

The PSC found the report written by Macke to be unpersuasive. The PSC found that the report suggested that it should consider the ability of Western Wireless to provide high quality voice, video, and data services as part of the public interest test and suggested that comparisons of capability should be made with existing rural telecommunications providers. The PSC found that there was no basis in law for these suggestions. The PSC also made note of an admission in the report that Macke lacked the expertise to evaluate the capabilities of wireless technology.

The PSC determined that Western Wireless had provided sufficient and credible evidence that it was willing and capable to provide the services required by federal law. The PSC determined that federal law did not require that the services should already be offered and was more concerned with whether the carrier was willing to provide them. Because the PSC determined that Western Wireless was willing to offer the required services and that designation of Western Wireless as an ETC was in the public interest, it granted the application.

The appellants moved for reconsideration. In their motion, the appellants stated that in a posthearing brief, they (1) "suggested that adopting standards to define the 'public interest' might require a rulemaking prior to proceeding with the Application";

(2) alleged that the PSC had inappropriately adopted a new public interest standard; (3) alleged that rulemaking was required; (4) alleged that they were denied due process; and (5) alleged that the PSC applied the wrong criteria to determine the definition of public interest. After a hearing, the motion for reconsideration was denied.

The appellants filed a notice of appeal on March 19, 2001. On March 29, the PSC certified to the FCC that Western Wireless had been designated as an ETC. The PSC informed the FCC that a notice of appeal had been filed and that the appellants were contending that the notice of appeal held the order granting ETC status in abeyance under Nebraska law. The PSC informed the FCC that oral arguments would be held regarding the effect of the notice of appeal and that the PSC would inform the FCC of any additional findings on the subject. The PSC informed the FCC that if the designation as an ETC was not modified or held in abeyance by the Nebraska courts, that Western Wireless would be eligible to receive federal universal service funding.

On April 12, 2001, the appellants filed a motion for emergency relief and to compel compliance with § 75-134(3), arguing that under § 75-134, the order of the PSC was held in abeyance while the appeal was pending. The appellants requested that this court order the PSC and Western Wireless to honor the stay imposed by § 75-134. Western Wireless responded that the PSC stated in its order that the order constituted a certificate of ETC designation and that § 75-134 does not hold in abeyance an order authorizing the issuance of a certificate. This court overruled the motion.

ASSIGNMENTS OF ERROR

The appellants assign, consolidated and rephrased, that the PSC erred by (1) adopting a public interest test without complying with rulemaking provisions of the Administrative Procedure Act, (2) depriving them of due process by conducting a hearing before determining public interest criteria, (3) applying the wrong standards to define the term public interest, (4) determining that Western Wireless had met its burden of proof for ETC designation, (5) altering their service areas, and (6) implementing its order after an appeal was filed.

STANDARD OF REVIEW

[1] The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999).

[2] When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[3] Statutory interpretation presents a question of law. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002).

ANALYSIS

RULEMAKING

The appellants contend that the PSC was required to engage in rulemaking under the Administrative Procedure Act to determine the definition of "public interest" found in 47 U.S.C. § 214(e), which provides:

> **Provision of universal service**
>
> **(1) Eligible telecommunications carriers**
>
> A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—
>
> (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title . . . and
>
> (B) advertise the availability of such services and the charges therefor using media of general distribution.
>
> **(2) Designation of eligible telecommunications carriers**
>
> A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications

> carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

Section 214(6) provides authority for the FCC to designate an ETC using identical criteria when an area does not fall under the jurisdiction of a state commission.

Neb. Rev. Stat. § 75-110 (Reissue 1996), pertaining to the PSC, provides:

> The Public Service Commission shall adopt and promulgate rules and regulations for the government of its proceedings, including rules of procedure for notice and hearing. The commission shall adopt and promulgate rules and regulations which the commission deems necessary to regulate persons within the commission's jurisdiction. The commission shall not take any action affecting persons subject to the commission's jurisdiction unless such action is taken pursuant to a rule, regulation, or statute.

The Nebraska Telecommunications Universal Service Fund Act provides: "The commission shall determine the standards and procedures reasonably necessary, adopt and promulgate rules and regulations as reasonably required, and enter into such contracts with other agencies or private organizations or entities as may be reasonably necessary to efficiently develop, implement, and operate the fund." Neb. Rev. Stat. § 86-1406 (Reissue 1999).

[4] In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002); *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002).

Here, the PSC was required to determine the meaning of the term "public interest" as used in 47 U.S.C. § 214(6). Section 75-110 requires the PSC to promulgate rules only for the government of its proceedings, including rules of procedure for notice and hearing and rules which the commission considers necessary to regulate persons within its jurisdiction. We read nothing in § 75-110 that requires the PSC to engage in rulemaking when defining terms in a federal statute unless the PSC first considers that such action is necessary. Indeed, § 75-110 allows the PSC to take any action pursuant to a statute. Likewise, nothing in § 86-1406 requires the PSC to engage in rulemaking to interpret federal law in conjunction with the administration of the Nebraska Telecommunications Universal Service Fund.

The appellants argue, however, that the definition of a "rule" in Neb. Rev. Stat. § 84-901 (Reissue 1999) requires the PSC to engage in rulemaking. They also point to an instance in another context in which the PSC engaged in rulemaking to define the "public interest." Section 84-901 defines a rule or regulation in part as:

> (2) Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure.

[5] Although § 84-901 states that a rule may include a standard designed to interpret law, it provides a definition only of the term "rule" and does not create any affirmative duties for the PSC to engage in rulemaking when interpreting a federal statute. That the PSC is allowed to engage in rulemaking when it considers it to be necessary and that a rule is allowed to encompass interpretation of law does not impose any affirmative rulemaking requirement. Here, the PSC did not consider it necessary to engage in rulemaking to interpret the meaning of the term "public interest." The PSC was not required to engage in rulemaking to reach that determination. The appellants' assignment of error is without merit.

DUE PROCESS

The appellants next contend that they were denied due process because the PSC announced a rule regarding public interest without first notifying them regarding what that rule was.

[6,7] The first step in a due process analysis is to identify a property or liberty interest entitled to due process protections. *Marshall v. Wimes*, 261 Neb. 846, 626 N.W.2d 229 (2001). If a significant property interest is shown, due process requires notice and an opportunity to be heard that is appropriate to the nature of the case. See *Prime Realty Dev. v. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999).

The Washington Court of Appeals recently held that ETC status is not a protected interest that entitles incumbent telephone companies to procedural due process under federal law. *WITA v. WUTC*, 110 Wash. App. 498, 41 P.3d 1212 (2002). The Washington Court of Appeals noted that the language of 47 U.S.C. § 214 does not protect incumbent telephone carriers from competition. Rather, the customers' interests, instead of the competitors' interests, control an agency's decision under the act. Thus, the court reasoned, an incumbent carrier did not have a constitutionally protected interest in the designation of another carrier as an ETC.

We agree with the reasoning of the Washington Court of Appeals. Section 214(e)(2) gives a state commission discretion to designate more than one ETC in a rural service area. *Id.* The Telecommunications Act does not mention protecting the private interests of incumbent rural carriers, who are often exclusive ETC's simply by default as the sole service provider operating in a particular area. *Id.*

[8] Because exclusive ETC status is not a protected interest entitling incumbent rural carriers to procedural due process under federal law, the appellants' due process claim is without merit. We need not reach the second step in the analysis. See *id.*

APPLICATION OF PUBLIC INTEREST TEST

The appellants contend that the PSC applied the wrong factors to determine the definition of public interest. The appellants contend that the PSC should have considered the effect of a second

ETC on incumbent telephone carriers and whether the service area could support more than one ETC.

[9,10] It has been stated that "[c]ourts must give substantial deference to a regulatory agency's judgment about how best to serve the public interest." *WITA*, 110 Wash. App. at 516, 41 P.3d at 1221, citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 101 S. Ct. 1266, 67 L. Ed. 2d 521 (1981). The U.S. Supreme Court has consistently stated that the words "public interest" in a federal regulatory statute take meaning from the purposes of the regulatory legislation. *NAACP v. FPC*, 425 U.S. 662, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976).

The policy of Congress in creating a public interest requirement was to favor competition. See, e.g., *Alenco Communications, Inc v. F.C.C.*, 201 F.3d 608 (5th Cir. 2000); *WITA, supra*. Indeed, as one court has noted, the preamble to the Telecommunications Act states that it is " '[a]n act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.' " *In re GCC License Corp.*, 623 N.W.2d 474, 480 (S.D. 2001), quoting Pub. Law 104-104, 110 Stat. 56 (1996).

When considering whether it was in the public interest to designate Western Wireless as an ETC in Wyoming, the FCC, acting in the absence of a state commission, noted that an important goal of 47 U.S.C. § 214 is to open local telecommunications markets to competition. *In the Matter of Federal-State Joint Board on Universal Service*, 16 F.C.C.R. 48 (2000). The FCC stated that competition benefits consumers in rural and high cost areas by increasing customer choice, innovative services, and new technologies. The FCC rejected the argument that rural areas are not capable of sustaining competition for universal service support. In particular, the FCC stated:

> We do not believe that it is self-evident that rural telephone companies cannot survive competition from wireless providers. Specifically, we find no merit to the contention that designation of an additional ETC in areas served by rural telephone companies will necessarily create incentives to reduce investment in infrastructure, raise

> rates, or reduce service quality to consumers in rural areas. To the contrary, we believe that competition may provide incentives to the incumbent to implement new operating efficiencies, lower prices, and offer better service to its customers.

16 F.C.C.R. at 57. The FCC, however, did not rule out considering evidence that a particular area could not sustain two ETC's.

The FCC also allowed additional factors to be taken into consideration such as whether consumers would be harmed, whether they would be adequately served should the incumbent telephone company relinquish its ETC designation, and additional benefits to consumers. *Id.* The FCC designated Western Wireless as an ETC in Wyoming, noting that it had demonstrated a commitment and ability to provide services that minimized the risk that it might not satisfy its obligations as an ETC after designation. In reaching this determination, the FCC considered that Western Wireless already provided services in 17 states and that it was not convinced that incumbent carriers would relinquish their ETC status or withdraw service if Western Wireless was designated as an ETC. The FCC further noted that as an ETC, Western Wireless would have a statutory duty to offer service to every customer within the service area. The FCC also noted additional benefits to consumers through designating Western Wireless as an ETC, such as providing a larger local calling area. *Id.*

Here, the PSC defined "public interest" in a manner that is consistent with the Telecommunications Act and considered the purpose of the act of furthering competition. The PSC also considered whether the service area was large enough to prevent harm to consumers by " 'cherry picking' " and whether Western Wireless would make additional benefits available to consumers such as mobility and an expanded local calling area. Thus, the PSC applied a definition of "public interest" that mirrors the definition applied by the FCC. In its order, and particularly in its order denying the motion for reconsideration, the PSC made clear that it considered and rejected the argument of the appellants that the rural areas in question could not support more than one ETC. Accordingly, we find no error in the PSC's definition of "public interest."

BURDEN OF PROOF

The appellants argue that Western Wireless failed to meet its burden of proof because it showed that it was willing to provide only required services and did not present specific evidence to show that it could do so if it became a carrier of last resort.

[11,12] This court reviews a decision of the PSC for errors appearing on the record. *Nebraska Pub. Serv. Comm. v. Nebraska Pub. Power Dist.*, 256 Neb. 479, 590 N.W.2d 840 (1999). Determinations by the PSC are matters peculiarly within its expertise and involve a breadth of judgment and policy determination that should not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable. See *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

Section 214(e) requires a carrier seeking ETC status to demonstrate that it will "offer" services required under 47 U.S.C. 254(c) (Supp. V 1999). It has been held in another case involving Western Wireless that 47 U.S.C. § 214(e) requires applicants for ETC designation to show only that they are capable of offering or providing the required services. See *In re GCC License Corp.*, 623 N.W.2d 474 (S.D. 2001). The South Dakota Supreme Court stated that under 47 U.S.C. § 214(e), a carrier designated as an ETC is eligible to receive universal service support, but ETC status does not make federal funding automatic. Thus, if a carrier wishes to receive subsidies, it must follow through on its intentions. *Id.*

Here, Western Wireless presented evidence that it was willing and able to provide all the services required by federal law. Although the appellants presented evidence to the contrary, the PSC was convinced that Western Wireless could offer the required services and that its ETC designation would be in the public interest. We determine that there was no error in the PSC's determination of this issue. Accordingly, we determine that this assignment of error is without merit.

ALTERATION OF SERVICE AREAS

The appellants contend that the PSC unlawfully altered their service areas. The PSC was not asked to order, and did not order, a change in the appellants' service areas. Instead, the PSC

designated Western Wireless as an ETC in each of the appellants' study areas. We have reviewed this assignment of error and find it to be without merit.

AUTOMATIC STAY

The appellants contend that the PSC violated the stay provision in § 75-134(3). They argue that under § 75-134, the order of the PSC was held in abeyance while the appeal was pending.

[13] A case becomes moot when the issues initially presented in the litigation cease to exist, when the litigants lack a legally cognizable interest in the outcome of litigation, or when the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Eastroads v. Omaha Zoning Bd. of Appeals*, 261 Neb. 969, 628 N.W.2d 677 (2001).

This court has previously denied a motion for emergency relief filed by the appellants regarding this issue, and we now affirm the decision of the PSC. We determine that the issue is moot, and we do not address it.

CONCLUSION

We determine that the PSC was not required to engage in rulemaking to define the words "public interest" in 47 U.S.C. § 214(e). We also determine that the appellants were not denied due process when the PSC adopted and applied a definition of "public interest." We determine that the PSC did not err in the manner in which it defined "public interest" and in determining that Western Wireless met its burden of proof to show that it should be designated as an ETC. Finally, we determine that the PSC did not alter the appellants' service areas and that any issue regarding a stay is moot. Accordingly, we affirm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WYMAN R. MATHER, APPELLANT.

646 N.W.2d 605

Filed June 28, 2002. No. S-01-738.

1. **Statutes: Appeal and Error.** Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Rules of Evidence: Appeal and Error.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion.
3. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
4. **Double Jeopardy.** The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.
5. **Criminal Law: Statutes.** Whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has defined the allowable unit of prosecution.
6. **Criminal Law: Photographs: Minors.** A person who generates differing and multiple prohibited visual depictions or causes a child to engage in the creation of such visual depictions commits multiple offenses of Neb. Rev. Stat. § 28-1463.03(1) or (3) (Reissue 1995), even though each such differing visual depiction involves the same subject captured in a narrow timeframe.
7. **Trial: Evidence: Proof.** Proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence.
8. **Trial: Evidence.** Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis.
9. **Trial: Evidence: Appeal and Error.** A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

Julie E. Bear, Deputy Cass County Public Defender, of Reinsch & Slattery, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MILLER-LERMAN, J.

NATURE OF CASE

On April 5, 2001, Wyman R. Mather was convicted by a jury in the district court for Cass County of 18 counts of visual depiction of sexually explicit conduct which has a child as one of its participants in violation of Neb. Rev. Stat. § 28-1463.03 (Reissue 1995) of the Child Pornography Prevention Act. Mather was sentenced on each of the 18 counts to imprisonment for a term of 3 to 5 years, and the district court ordered that the sentences run concurrently. Mather appeals his convictions and sentences.

On appeal, Mather claims that, if guilty, his conduct amounted to one continuing offense rather than 18 separate counts, that certain evidence was erroneously admitted, and that his sentences are excessive. We conclude that based on the statutory language, and because each of the 18 differing photographs represented a separate violation under either § 28-1463.03(1) or (3), Mather's convictions on 18 counts were not error; that the district court did not err in its evidentiary ruling; and that the sentences are not excessive. Accordingly, we affirm.

STATEMENT OF FACTS

Mather is a photographer who had a studio in his home in Weeping Water, Nebraska. In September or October 1999, T.P. made an appointment to get her high school senior photographs taken by Mather. At the time, T.P., who was born May 25, 1982, was 17 years old. T.P. arrived at the studio in the afternoon, and shortly after her arrival she and Mather left the studio to take photographs outdoors. Photographs were taken at various locations within Weeping Water, including at a ballpark, near a church, and by a lake.

At some point, Mather told T.P. that he had taken nude photographs of women for their husbands and that he thought nude photography was beautiful. Mather asked T.P. whether she wanted to take some nude photographs, and T.P. said, "Okay." While they were near the lake, Mather took two photographs of T.P. in which she had unzipped her jeans. Mather then drove T.P. to an area approximately 5 miles west of Weeping Water,

described by T.P. as "a place out in the country with a barn and little creek." T.P. testified the location was within Cass County. At this location, Mather took 16 additional photographs of T.P. in which she was completely or near completely nude and in which her breasts and/or her genitals were displayed. Throughout the session, Mather told T.P. she was beautiful and directed her on how to pose, including placing his hands on her breasts and her genital area in order to demonstrate how she should place her hands for the photographs. Each of the 18 photographs depicts a different pose.

Mather and T.P. then returned to Mather's studio where he took senior photographs of T.P. wearing her prom dress. When he had completed taking the senior photographs, Mather told T.P. they would be ready in 2 to 3 weeks. T.P. returned to Mather's studio when the photographs were ready and picked up the senior photographs. Mather showed T.P. the nude photographs; however, he told her she could not have the nude photographs until she turned 18.

T.P. returned to the studio in June 2000, after she had turned 18, and attempted to get the nude photographs, but Mather claimed he would need time to locate the photographs. Officers in the Cass County sheriff's office subsequently obtained a search warrant for Mather's house and studio where they found, inter alia, the 18 photographs that are the subject of the charges in this case.

On July 25, 2000, the State filed an 18-count information in the district court charging that Mather did

> knowingly make, publish, direct, create, provide, or in any other manner generate visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers or did knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

The language in the information tracked § 28-1463.03(1) and (3). Each count specified 1 of the 18 photographs.

Following a trial held April 3 through 5, 2001, a jury found Mather guilty of all 18 counts. On June 5, the district court sentenced Mather to imprisonment for 3 to 5 years on each of the

18 counts and ordered that the sentences be served concurrently. Mather appeals his convictions and sentences.

ASSIGNMENTS OF ERROR

Mather asserts the district court erred in (1) determining that the State properly charged him with 18 separate counts rather than 1 count when the alleged facts involved one continuous act resulting in multiple photographs featuring the same subject and taken at the same time and location, (2) admitting the photographs into evidence without proper foundation as to the chain of custody and the location where the photographs were taken, and (3) imposing excessive sentences.

STANDARDS OF REVIEW

[1] Interpretation of a statute presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *State v. Rhea*, 262 Neb. 886, 636 N.W.2d 364 (2001).

[2] In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the rules when judicial discretion is a factor involved in determining admissibility. Where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court, the admissibility of evidence is reviewed for an abuse of discretion. *State v. Roeder*, 262 Neb. 951, 636 N.W.2d 870 (2001).

[3] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001).

ANALYSIS

Multiple Counts.

Mather was charged under § 28-1463.03(1) and (3). Subsection (1) provides, "It shall be unlawful for a person to knowingly make, publish, direct, create, provide, or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." Subsection

(3) provides, "It shall be unlawful for a person to knowingly employ, force, authorize, induce, or otherwise cause a child to engage in any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." For purposes of the Child Pornography Prevention Act, a "visual depiction" is defined as a "live performance or photographic representation." Neb. Rev. Stat. § 28-1463.02(6) (Reissue 1995).

Mather asserts generally that the conduct complained of, if established by the evidence, amounted to one count. He specifically argues that the conduct complained of was a continuing offense and that the district court erred in determining that the State properly charged him with 18 separate counts of visual depiction of sexually explicit conduct which has a child as one of its participants under § 28-1463.03(1) and (3). Mather argues that the facts of this case support only one count because, although the State based its charges on 18 separate and different photographs, all 18 photographs were taken of the same subject on the same day as part of one ongoing or continuous act. Mather also argues that being charged with and sentenced on 18 separate counts violated the Double Jeopardy Clauses of the U.S. and Nebraska Constitutions which preclude multiple punishments for the same offense imposed in a single proceeding. See *State v. Spurgin*, 261 Neb. 427, 623 N.W.2d 644 (2001).

[4] The Double Jeopardy Clauses of both the federal Constitution and the Nebraska Constitution protect against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *Id.*; *State v. Decker*, 261 Neb. 382, 622 N.W.2d 903 (2001). Although in his brief Mather couches his argument in terms of multiple "counts," we understand his claim to be based on the prohibition against multiple punishments for one offense.

[5] The issue raised by Mather with respect to whether or not he has received multiple punishments for the same offense is resolved by reference to the statutory language of § 28-1463.03(1) and (3). It is well settled that whether a particular course of conduct involves one or more distinct offenses under a statute depends on how a legislature has

defined the allowable unit of prosecution. See, *Sanabria v. United States*, 437 U.S. 54, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978); *Bell v. United States*, 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 2d 905 (1955). Thus, whether Mather's conduct in creating the 18 different photographs involved 1 offense or 18 separate offenses depends on how the statute defines the offense and the "'unit of prosecution'" intended by the Legislature as reflected in the plain language of the statute. See *State v. Taylor*, 262 Neb. 639, 634 N.W.2d 744 (2001) (in reading statute, court must determine and give effect to purpose and intent of Legislature as ascertained from entire language of statute considered in its plain, ordinary, and popular sense).

With respect to the prohibited conduct, a person commits an offense under § 28-1463.03(1) by making, publishing, directing, creating, providing, or generating "any visual depiction" of the subject matter described, which depiction under § 28-1463.02(6) may be a "photographic representation." A person commits an offense under § 28-1463.03(3) by employing, forcing, authorizing, inducing, or causing a child to engage in the creation of any such "visual depiction."

[6] Distilled, the focus of subsection (1) is on generating "any visual depiction," and the focus of subsection (3) is on causing a child to engage in the creation of "any visual depiction." The plain language of the statute focuses on "*any* visual depiction." Under § 28-1463.02(6) a "photographic representation" is such a depiction. The singular form of "photographic representation" covered under the statute read in conjunction with the term "any" indicates that the Legislature intended prosecution for each differing photographic representation. The statute is not ambiguous with respect to the prosecution of a photograph as a "photographic representation." Under either § 28-1463.03(1) or (3), an offense is committed as to each differing visual depiction of the type described in the statute. A person who generates differing and multiple prohibited visual depictions or causes a child to engage in the creation of such visual depictions commits multiple offenses of § 28-1463.03(1) or (3), even though each such differing visual depiction involves the same subject captured in a narrow timeframe. Our reading of § 28-1463.03(1) and (3) is in accord with other jurisdictions with similar statutory language.

See, *U.S. v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987) (under federal statute prohibiting use of minor for purpose of producing "'*any visual depiction*'" of sexually explicit conduct, correct unit of prosecution held to be per photograph; each photograph represented separate and distinct use of child); *Burk v. State*, 705 So. 2d 1003 (Fla. App. 1998) (legislative intent was to make production of each individual photograph separate crime; direction of poses and taking of each photograph sufficient to support separate violations for each photograph); *Vineyard v. State*, 958 S.W.2d 834, 837 (Tex. Crim. App. 1998) (use of singular tense in statute meant unit of prosecution for possession was per "'film image'"); *State v. Morrison*, 31 P.3d 547, 556 (Utah 2001) (each individual "'visual representation'" of child pornography possessed constitutes basis for separate offense); *State v. Multaler*, 252 Wis. 2d 54, 81, 643 N.W.2d 437, 450 (2002) (where statute referred to possession of "'any . . . photograph,'" unit of prosecution was each of 28 images found on two computer disks). Compare *State v. Root*, 141 Wash. 2d 701, 710, 9 P.3d 214, 218 (2000) (where focus of Washington statute was on causing minor to engage in sexually explicit conduct rather than on resultant depictions, unit of prosecution for sexual exploitation of minor was "per photo session" per minor involved in each session).

We are mindful that the dissent concludes that the use of the word "any" in § 28-1463.03 makes the statute ambiguous. In reaching this conclusion, the dissent relies, in part, on two cases involving federal statutes, *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975), and *U.S. v. Coiro*, 922 F.2d 1008 (2d Cir. 1991). The former involved "any" in the context of a federal statute dealing with the crime of felon in possession of a firearm and the latter involved "any" in the context of a federal statute dealing with obstruction of communication regarding crime. The dissent also relies on *U.S. v. Kimbrough*, 69 F.3d 723, 729-30 n.6 (5th Cir. 1995), which involved a federal possession statute with an explicit quantitative provision making it a single crime to "'possess 3 or more books, magazines, periodicals, films, video tapes, or other matter which contain any visual depiction'" of child pornography; *State v. Parella*, 736 So. 2d 94 (Fla. App. 1999), which involved the crime of the possession of movies

with the objective of intending to promote child pornography; and *American Film Distributors, Inc. v. State*, 471 N.E.2d 3 (Ind. App. 1984), which involved the crime of the exhibition of movies containing child pornography where complainant paid one fee to view the movies.

We believe the federal child pornography statute at issue in *U.S. v. Esch*, 832 F.2d at 541, which "proscribes the use of a minor to engage in 'any sexually explicit conduct for the purpose of producing *any visual depiction* of such conduct.' (emphasis added)," is a more compelling comparison to the statute and facts at issue in this case. The Court of Appeals for the 10th Circuit concluded that the words "any visual depiction" contained in the federal child pornography statute, see 18 U.S.C. 2251(a) (2000), required that each photograph be charged as a separate and distinct violation. The language of the federal child pornography statute is similar to that of § 28-1463.03.

In a similar analysis, the Wisconsin Supreme Court in *State v. Multaler*, 252 Wis. 2d 54, 643 N.W.2d 437 (2002), concluded that "any" in the Wisconsin child pornography statute, Wis. Stat. Ann. § 948.12 (West 1996), required a separate charge per photograph. The *Multaler* court reasoned that the term "any" indicated that the legislature intended prosecution for each photograph. In *Multaler*, the Wisconsin Supreme Court rejected the defendant's assertion that the unit of prosecution in that case was each of two computer disks and stated that notwithstanding the fact that the 28 images to which the defendant entered pleas to 28 counts of possession of child pornography were found on two computer disks, a separate charge per image was nevertheless indicated. The *Multaler* court stated: "In essence, because it appears that the images on the disks were photographs of actual children, the disks served as electronic photo albums [and it is] appropriate to bring separate charges for separate photographs in a traditional photo album." 252 Wis. 2d at 84, 643 N.W.2d at 451. In *Multaler*, the court found that every time the defendant downloaded a new image, he recommitted himself to additional criminal conduct. In the present case, every time Mather directed and caused T.P. to assume a new pose and took a differing photograph, he recommitted himself to additional criminal conduct.

We are aware of the Washington Supreme Court's decision in *State v. Root*, 141 Wash. 2d 701, 9 P.3d 214 (2000), cited favorably by the dissent. We note, however, that the statute at issue in *Root* differs from the Nebraska provisions. The statute involved in *Root* stated as follows:

> "(1) A person is guilty of sexual exploitation of a minor if the person:
>
> "(a) Compels a minor by threat or force to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance;
>
> "(b) Aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance; or
>
> "(c) Being a parent, legal guardian, or person having custody or control of a minor, permits the minor to engage in sexually explicit conduct, knowing that the conduct will be photographed or part of a live performance."

141 Wash. 2d at 706-07, 9 P.3d at 216-17. The Washington Supreme Court concluded that the Washington statute essentially consisted of two elements: (1) posing a minor in sexually explicit conduct and (2) knowing that the conduct will be photographed. Based on the particular language of the statute, the Washington Supreme Court concluded that the unit of prosecution under the Washington statute was "per photo session." *Id.* at 710, 9 P.3d at 218. While such conclusion is supported by the language of the Washington statute, the language of the Nebraska statute differs and does not support a "per session" unit of prosecution.

Finally, the dissent posits that under our interpretation of § 28-1463.03, if a child is the subject of a motion picture, each frame of the film could conceivably be charged as a separate count. We note that the present case involves 18 works of still photography, each of which is clearly encompassed by "photographic representation," see § 28-1463.02(6), and that the issue of a motion picture is not before us. In this regard, we note that unlike Nebraska, other states address the motion picture issue in statutory language. For example, in Wisconsin, § 948.12 provides: "Whoever possesses any undeveloped film, photographic

negative, photograph, motion picture, videotape or other pictorial reproduction or audio recording of a child engaged in sexually explicit conduct under all of the following circumstances is guilty of a Class E felony . . . ." Because it is not the subject of this prosecution, we make no comment on the "motion picture" hypothetical.

In the present case, Mather was charged with making 18 photographs and causing a child to engage in 18 differing visual depictions of sexually explicit conduct, each of which was the type of "visual depiction" or "photographic representation" described in and prohibited by the statutes under discussion. Under the language of § 28-1463.03(1) and (3) and the facts of this case, each photograph represented a separate offense, and Mather was properly charged with 18 separate offenses. Because each photographic work represented a separate offense, Mather was not subjected to multiple punishments for "the same offense" and there was no violation of double jeopardy principles. We reject Mather's first assignment of error.

Admission of Photographs Into Evidence.

Mather next argues that the district court erred in admitting exhibits 1 through 18 and 31 into evidence. Exhibits 1 through 18 are prints of the 18 photographs at issue in this case, and exhibit 31 is a packet found in the search of Mather's home and studio containing prints and negatives of the 18 photographs at issue in this case as well as other photographs. At trial, Mather generally objected to the foundation for each of these exhibits.

On appeal, Mather asserts that his objections regarding foundation related to "the chain of custody as well as the issue of venue." Brief for appellant at 12. With respect to the chain of custody, Mather argues on appeal that "there was a complete lack of evidence regarding the chain of custody for said photographs, as well as the Officer's failure to decipher whether exhibits 1 through 18 were original photographs or copies." *Id.* With respect to his argument regarding the venue of the crimes charged, Mather argues on appeal that T.P.'s testimony did not establish the exact location where the photographs shot outside Weeping Water were taken.

The testimony regarding exhibits 1 through 18 and 31 was as follows: Randall Olsen testified that as an investigator for the

Cass County sheriff's office he conducted the search of Mather's residence and studio. During the search, another officer found the packet of prints and negatives, which would become exhibit 31, and gave them to Olsen, who looked at them and gave them to the evidence officer. Olsen testified that the evidence officer tagged the exhibit and checked it into the evidence room at the sheriff's office.

Olsen testified that he later checked the negatives and prints out of the evidence room and took them to a film processing shop to have additional prints made for the county attorney. Olsen handed the negatives to the operator at the film processing shop and had her sign the evidence log. While in Olsen's view, the operator placed the negatives into a processing machine which produced additional prints. The operator returned the negatives to Olsen and gave him the additional prints. Olsen returned the negatives to the packet and returned the packet containing the prints and negatives to the evidence room. Olsen gave the additional prints which became exhibits 1 through 18 to the county attorney's office.

Exhibits 1 through 18 and 31 were offered into evidence during T.P.'s testimony. T.P. was shown exhibits 1 through 18 and testified that each photograph depicted her and that each print fairly and accurately represented her poses in photographs that were taken by Mather in September or October 1999. T.P. was also shown exhibit 31 and identified it as containing photographs corresponding to exhibits 1 through 18 as well as other photographs taken by Mather on the same day. T.P. described the area where the photographs were taken as being in Weeping Water and another location about 5 miles to the west of Weeping Water and inside Cass County.

As to exhibits 1 through 18, it was not asserted by the State that such photographs were found in Mather's studio, but, rather, the import of Olsen's testimony was that such exhibits were the additional prints made at the film processing shop from the negatives found at Mather's studio. T.P. testified that each of the photographs, exhibits 1 through 18, fairly and accurately represented poses directed by Mather and photographs of her taken by Mather. Such testimony was sufficient for the introduction of exhibits 1 through 18 into evidence, which exhibits contained proof of the conduct charged against Mather.

[7-9] With respect to the chain of custody regarding the packet identified as exhibit 31, we have stated that proof that an exhibit remained in the custody of law enforcement officials is sufficient to prove a chain of possession and is sufficient foundation to permit its introduction into evidence. See *State v. Carter*, 255 Neb. 591, 586 N.W.2d 818 (1998). Whether there is sufficient foundation evidence for the admission of physical evidence must necessarily be determined on a case-by-case basis. *Id.* A trial court's determination of the admissibility of physical evidence will not ordinarily be overturned except for an abuse of discretion. *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991).

There was testimony by Olsen that exhibit 31 remained in the custody of law enforcement officials, which was sufficient evidence to prove a chain of possession and provided a sufficient foundation to permit its introduction into evidence. The district court in this case did not abuse its discretion in admitting exhibit 31.

On appeal, Mather mentions "the issue of venue." Brief for appellant at 12. Mather's appellate argument appears to be that the State failed to prove that the charged conduct took place in Cass County where the case was tried. In this regard, we note that the right to be tried in the county where the offense is committed is a statutory right. Neb. Rev. Stat. § 29-1301 (Reissue 1995). Mather did not object at trial to a trial in a county other than where the offense was committed. He therefore acquiesced to holding the proceedings in Cass County and waived his rights under § 29-1301. See *State v. Meers*, 257 Neb. 398, 598 N.W.2d 435 (1999). We reject Mather's second assignment of error.

Excessive Sentences.

Mather finally argues that the district court imposed excessive sentences. He argues that he "was self employed as a photographer for many years, had recently suffered the loss of his son, had no prior criminal history and had a large volume of character reference letters submitted in support of a probationary sentence [rather than incarceration] by members of the Weeping Water community." Brief for appellant at 14.

Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of

judicial discretion. *State v. Heitman*, 262 Neb. 185, 629 N.W.2d 542 (2001). Mather was convicted of 18 counts of violating § 28-1463.03. The 18 counts were each charged as first offenses which, pursuant to Neb. Rev. Stat. § 28-1463.04 (Reissue 1995), are Class III felonies. The sentencing range for a Class III felony is a minimum 1 year's imprisonment and a maximum 20 years' imprisonment, a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Cum. Supp. 2000). Mather was sentenced to 3 to 5 years' imprisonment on each count to be served concurrently.

Mather was convicted of a serious crime. The statute under which Mather was convicted is aimed at combating child pornography. The U.S. Supreme Court has observed: "The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. . . . [T]he materials produced are a permanent record of the children's participation . . . ." *New York v. Ferber*, 458 U.S. 747, 758-59, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982).

The record and presentence report show that at the time of sentencing, Mather was 53 years old and that at the time the photographs of T.P. were taken, she was 17 years old. When T.P. picked up her senior photographs, Mather encouraged T.P. to repeat a session of nude photography, but she refused. The presentence report includes the observation that the victim continues to endure the negative effects of the event giving rise to this prosecution. Mather's sentences were within statutory limits, and we find no abuse of discretion in the district court's sentencing. We therefore reject Mather's third assignment of error.

CONCLUSION

T.P., aged 17, was depicted sexually in 18 differing photographs taken and generated by Mather. Mather was charged, tried, and convicted by a jury of 18 counts of visual depiction of sexually explicit conduct which has a child as one of its participants in violation of § 28-1463.03. Mather was sentenced to 18 concurrent sentences of 3 to 5 years' imprisonment.

In view of the 18 differing photographs and the statutory language, we conclude that the proper unit of prosecution under

§ 28-1463.03(1) and (3) was each photograph and that the district court therefore did not err in determining that the State properly charged Mather with 18 separate counts rather than 1 count as urged by Mather. We further conclude that the district court did not err in admitting exhibits 1 through 18 and 31 into evidence and did not abuse its discretion in sentencing Mather. We therefore affirm Mather's convictions and sentences.

AFFIRMED.

WRIGHT, J., dissenting.

The State filed an information charging Mather with 18 counts of knowingly making a visual depiction of sexually explicit conduct based on 18 separate photographs. Mather was convicted on all 18 counts and was sentenced to a term of 3 to 5 years' imprisonment on each count, with the sentences to run concurrently. I respectfully disagree with the majority's statutory interpretation of how many criminal acts were committed.

Neb. Rev. Stat. § 28-1463.03 (Reissue 1995) provides in relevant part: "(1) It shall be unlawful for a person to knowingly make . . . create . . . or in any manner generate any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers." The term "visual depiction" shall mean "live performance or photographic representation." See Neb. Rev. Stat. § 28-1463.02(6) (Reissue 1995).

The question of how many convictions can lawfully be obtained under circumstances such as those in the case at bar is a question of the appropriate unit of prosecution, and that is a question of legislative intent. See *Castaldi v. United States*, 783 F.2d 119 (8th Cir. 1986), *cert. denied* 476 U.S. 1172, 106 S. Ct. 2897, 90 L. Ed. 2d 983. With respect to federal law, when Congress fails to set the unit of prosecution with clarity, doubt as to congressional intent is resolved in favor of lenity for the accused. See *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975).

In *Kinsley*, the court confronted the issue of whether a felon's possession of four firearms constituted one or four violations of 18 U.S.C. app. § 1202(a) (1970), which prohibited a convicted felon's possession of " 'any firearm.' " See 518 F.2d at 666. The court noted that in many cases in which courts have found ambiguity in connection with the allowable unit of prosecution, the object of the offense has been prefaced by the word "any." The

court concluded that the phrase "any firearm" in 18 U.S.C. app. § 1202(a) was ambiguous. In contrast, the court noted that because I.R.C. § 5861(d) (1970) is drawn in terms of " 'a firearm,' " the provision arguably suffers from no ambiguity. See *Kinsley*, 518 F.2d at 670 n.9.

In *U.S. v. Coiro*, 922 F.2d 1008 (2d Cir. 1991), the court held that 18 U.S.C. § 1510(a) (1982), which prevents the obstruction, delay, or prevention of the communication of information relating to a violation of any criminal statute of the United States by any person to a criminal investigator, was ambiguous with respect to the allowable unit of prosecution. The court found that use of the word "any" in the phrase "any person" made the phrase ambiguous. It stated that in cases in that and other circuits, the word "any" has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural rather than specifying the singular, relying on *United States v. Kinsley, supra.*

Courts have also noted the difference between the use of the terms "a" and "any" in cases involving pornography. See, *U.S. v. Kimbrough*, 69 F.3d 723 (5th Cir. 1995); *State v. Parrella*, 736 So. 2d 94 (Fla. App. 1999); *American Film Distributors, Inc. v. State*, 471 N.E.2d 3 (Ind. App. 1984). These cases conclude that when the statute uses "any" instead of "a," the intent of the legislature is not clear, and the cases must be resolved against turning a single transaction into multiple offenses.

For example, the majority relies in part on *Burk v. State*, 705 So. 2d 1003 (Fla. App. 1998). In *Burk*, the statute criminalized the production of "a" sexual performance of a child. There, the court held that it was permissible to charge a defendant with 25 counts for 25 different photographs. But other Florida cases have held the opposite when the statute used the term "any" instead of the term "a."

In *Parrella*, the fourth district of the Florida Court of Appeals, the same district that decided *Burk*, held that the showing of multiple movies containing child pornography could not be charged as separate counts when the statute criminalized the possession of "any" motion picture. The court specifically stated that when the term "any" is used instead of the term "a," the legislature intended only a single unit of prosecution. See, also,

Wallace v. State, 724 So. 2d 1176 (Fla. 1998) (discussing difference between terms in case involving resisting police officer).

The majority relies on *State v. Multaler*, 252 Wis. 2d 54, 643 N.W.2d 437 (2002), as an example in which multiple counts were permissible under a statute that utilizes the term "any." In *Multaler*, there were more than 28 separate image files. Multaler began downloading images over a period of time. The court determined that since there were more than 28 separate files, every time Multaler downloaded a new file, he recommitted himself to additional criminal conduct. The statute in question provided: " 'Whoever possesses any . . . photograph, motion picture, videotape . . . is guilty of a . . . felony.' " *Id.* at 81, 643 N.W.2d at 450. The court found that because Multaler had downloaded, compiled, and stored multiple images over time, multiple punishments were appropriate. Therefore, I find *Multaler* to be factually distinguishable. In addition, to the extent *Multaler* is read to hold that in all cases, separate counts may be imposed per photograph, I disagree with its reasoning.

In the case at bar, § 28-1463.03(1) refers to "any visual depiction of sexually explicit conduct." Mather took 18 photographs of T.P., and the majority has determined that each photograph constituted a separate offense and that Mather was properly charged with 18 counts.

In my opinion, § 28-1463.03 is ambiguous because of the phrase "any visual depiction." In this case, one could logically conclude that two separate events occurred because two photographs were taken when Mather and T.P. were near a lake and Mather then drove to an area 5 miles west of Weeping Water and took 16 more photographs of T.P. at a different location. Following this line of reasoning, two separate counts would be appropriate. See *State v. Root*, 141 Wash. 2d 701, 710, 9 P.3d 214, 218 (2000) (Supreme Court of Washington, en banc, held that correct unit of prosecution was "per photo session" involved).

Another problem with § 28-1463.03 is that equally culpable conduct may be charged differently. For example, a 10-minute live performance in which a child depicts sexually explicit conduct may be charged as one count. If the child is photographed using a standard 35-mm motion picture camera, which would produce the equivalent of 14,400 still frames,

each frame could be charged as a separate count. Unlike criminal statutes in other jurisdictions, which describe the terms "photograph," "motion picture," "photographic negative," or "videotape," § 28-1463.02(6) defines "visual depiction" as "live performance or photographic representation."

Separate criminal conduct may be charged in the same act if the Legislature expressly so provides, but if the Legislature does not expressly provide, or when it fails to set the unit of prosecution with clarity, any doubt as to the Legislature's intent is to be resolved in favor of the accused. I find nothing in § 28-1463.03 which suggests that the Legislature intended to impose multiple punishments depending on the number of photographs taken during a photography session in which a minor engages in sexually explicit conduct.

In my opinion, the statutory provision "in any manner generate any visual depiction of sexually explicit conduct" is ambiguous, and the ambiguity should be construed in favor of a criminal defendant. See § 28-1463.03. While Mather committed a serious act, for which a serious punishment should be imposed, I believe it would have been more appropriate to charge him with 2 counts rather than 18.

CONNOLLY and MCCORMACK, JJ., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V.
ROBERT FABER, APPELLANT.
647 N.W.2d 67

Filed June 28, 2002. No. S-01-893.

1. **Constitutional Law: Statutes: Appeal and Error.** Whether a statute is constitutional is a question of law; accordingly, the Nebraska Supreme Court is obligated to reach a conclusion independent of the decision reached by the court below.
2. **Motions to Suppress: Investigative Stops: Warrantless Searches: Probable Cause: Appeal and Error.** A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous.
3. **Motions to Suppress: Judgments: Appeal and Error.** When reviewing a trial court's ruling on a motion to suppress evidence, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.

4. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
5. **Sentences: Appeal and Error.** An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences.
6. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
7. **Constitutional Law: Statutes.** As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth.
8. ____: ____. An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right.
9. ____: ____. A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable.
10. **Constitutional Law: Criminal Law: Minors.** Child abuse is not a constitutionally protected activity.
11. **Constitutional Law: Criminal Law: Statutes.** The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.
12. **Constitutional Law: Statutes: Legislature: Notice.** The more important aspect of the void-for-vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement.
13. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
14. ____: ____: ____. A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court.
15. ____: ____: ____. The test for standing to assert a vagueness challenge is the same whether the challenge asserted is facial or as applied.
16. **Search Warrants: Motions to Suppress: Judges: Affidavits.** Suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid.
17. **Search Warrants: Affidavits: Probable Cause: Words and Phrases.** A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found.

18. **Search Warrants: Affidavits: Probable Cause.** In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the "totality of the circumstances" rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).
19. ____: ____: ____. In evaluating probable cause for the issuance of a search warrant, the magistrate who is evaluating the probable cause question must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him or her, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
20. ____: ____: ____. In evaluating probable cause for the issuance of a search warrant, the question is whether the issuing magistrate had a "substantial basis" for finding that the affidavit established probable cause.
21. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits.** Not every defect in an affidavit renders a search warrant defective or the seizure made pursuant to the warrant unconstitutional.
22. **Constitutional Law: Search and Seizure: Search Warrants: Affidavits: Probable Cause.** Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained.
23. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
24. ____: ____. The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
25. **Search Warrants: Affidavits: Appeal and Error.** As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of an affidavit used to obtain a search warrant.
26. **Search Warrants: Affidavits: Probable Cause: Appeal and Error.** After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts.
27. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time.
28. **Search Warrants: Time.** In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon.

29. **Affidavits: Probable Cause: Time.** Where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant.
30. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
31. **Criminal Law: Convictions: Appeal and Error.** On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
32. **Verdicts: Appeal and Error.** 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. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
33. **Sentences: Appeal and Error.** An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result.
34. **Sentences.** In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
35. ____. In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors.
36. ____. The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life.

Appeal from the District Court for Madison County: PATRICK G. ROGERS, Judge. Affirmed.

Bradley C. Easland, of Johnson, Morland & Easland, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

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

MCCORMACK, J.

I. NATURE OF CASE

Robert Faber was charged by information in the district court for Madison County with knowing and intentional child abuse

pursuant to Neb. Rev. Stat. § 28-707(1) and (4) (Cum. Supp. 2000). After a bench trial, Faber was found guilty of said charge and received an indeterminate sentence of 24 to 28 months' imprisonment. On appeal, Faber challenges the constitutionality of § 28-707(1)(a) as applied to the facts of his case. This case also presents the issues of whether a search warrant was supported by probable cause, whether the evidence was sufficient to find Faber guilty of the charged offense, and whether the sentence he received was excessive.

II. BACKGROUND

Jimsonweed is a plant that grows in the eastern and midwestern regions of the United States. Each plant bears pods containing seeds, with each pod containing 50 to 100 seeds. Jimsonweed is an anticholinergic poison containing four active toxins: atropine, scopolamine, hyoscyamine, and nitrates. Although jimsonweed has some medical uses when used in small dosages, it can be toxic to humans and other animals.

When ingested, jimsonweed begins breaking down into its component toxins and begins to produce a number of harmful effects on the human body. Those portions of the central nervous system that regulate heart rate become severely impaired, resulting in a rapid increase in heart rate up to the point of cardiac arrest. Body temperature is also impaired, potentially causing hypothermia. Jimsonweed can also produce respiratory failure and can have significant effects on the digestive system. Specifically, jimsonweed slows down the processes in the digestive and urinary systems, resulting in a slow expulsion of the ingested jimsonweed from the individual and, thus, prolonged exposure to the toxins. Individuals who have ingested jimsonweed also experience an inability to focus their eyes because of dilation of the pupils and an inability to talk because of a lack of saliva in the mouth. Jimsonweed also produces a hallucinogenic effect in individuals. The confusion, poor judgment, and disorientation produced by jimsonweed can last for up to 2 weeks after ingestion.

At Faber's trial, the State presented the testimony of S.B., who was a minor at the time. S.B. testified that on an occasion prior to November 12, 2000, Faber approached her and asked if

she would help Faber find people to buy jimsonweed pods from him. Eventually, S.B. and a friend ingested some of the jimsonweed seeds, causing them to become ill. S.B. later informed Faber that the seeds had made her sick, and she told Faber that he should no longer sell them. Faber replied that S.B. should have ingested more seeds than she had actually consumed.

On November 12, 2000, 15-year-old J.W. went with two friends, C.B. and C.S., also minors, to S.B.'s apartment in Norfolk, Nebraska, for the purpose of obtaining jimsonweed pods. At the apartment, J.W., C.B., and C.S. met Faber, who offered to sell several pods to J.W. for $5. Because he did not have the proper change to complete the transaction, J.W. was initially unwilling to buy any pods. This prompted Faber to offer to leave and get change for J.W. Upon returning to the apartment with the change, Faber sold three pods to J.W. Faber also instructed J.W., C.B., and C.S. how to consume the jimsonweed. Faber said that the seeds should first be separated from the stem and leaves and then should be swallowed whole, along with something to drink. Faber did not instruct them about how many seeds should be consumed at one time. Because J.W. was then on probation for a juvenile offense and subject to drug tests, Faber also told J.W. that the jimsonweed would not produce a positive drug test. Faber told J.W. that the jimsonweed would produce a "really, really hard trip." The word "trip" is often used to refer to hallucinations and other effects produced by jimsonweed.

Approximately 45 minutes to 1 hour after leaving S.B.'s apartment, J.W., C.B., and C.S. arrived at J.W.'s home. J.W. then ingested the seeds from one of the jimsonweed pods as previously instructed by Faber, while C.B. and C.S. also ingested seeds. J.W. passed out soon after taking the seeds. When he awoke, J.W. testified that his face was "beet red" and that he could not stand up because his legs were not functioning properly. He further testified that he could not talk, think, eat, or drink; that he "walked into things"; and that he "missed doorknobs and things." He also stated that he could not recognize his parents when he saw them. J.W. did not remember being taken to the hospital.

J.W.'s mother testified that when she returned home, she found "puke all over my kitchen, everywhere." She found J.W. lying on the couch and observed that he was "not coherent at

all." His pupils appeared to be "bigger than the color of his eyes," and he was very aggressive, leading her to remove any sharp objects from his control to prevent him from injuring himself. She testified that when she held J.W., his body temperature was very hot. J.W.'s parents had difficulty trying to take J.W. to the hospital because J.W. repeatedly would take his clothes off in an effort to cool down.

One of the doctors who treated J.W. at the hospital testified that upon admission to the hospital, J.W.'s heart rate was escalated, his pupils were dilated, and he was confused and "not really with the program." J.W. was diagnosed as suffering from an anticholinergic reaction. The doctors testified that, to a reasonable degree of medical certainty, J.W.'s physical safety was endangered as a result of his ingestion of the jimsonweed. J.W. remained in the hospital for 4 days.

While investigating another case in the area involving jimsonweed, Investigator David Bos of the Norfolk Police Division became aware of J.W.'s case. The investigation eventually led law enforcement to Faber, and on December 5, 2000, a search warrant was issued for Faber's apartment. At the apartment, police confiscated several items, including a plastic bag containing 84 jimsonweed pods.

On December 8, 2000, Faber was arrested pursuant to an arrest warrant and was transported to the Norfolk Police Division. At the police station, Faber was interrogated by Bos. Bos began the interrogation by identifying himself and reading Faber his *Miranda* rights. Faber signed a rights waiver form indicating that he understood his rights. Faber then requested the services of an attorney. Bos promptly terminated the interview and left the room to arrange for Faber's transport to jail. Bos returned to the interview room and informed Faber that he would be taken to jail. Faber then began indicating that he did not want a lawyer and was willing to talk to Bos. Bos replied he was not allowed to continue the interrogation because of Faber's request for a lawyer. After Faber made several more requests to talk to Bos, Bos again reviewed the rights waiver form with Faber. Faber indicated that he understood his rights and that he wanted to proceed without an attorney.

During the interrogation, Faber indicated that he was familiar with jimsonweed and had used it in the past, but had never sold it

to anyone. Faber did admit to giving it to friends in the past, but claimed he had stopped giving it away after one of his friends had gotten sick from using it. Faber described to Bos some of the hallucinogenic effects of jimsonweed, specifically comparing it to the effects produced by "acid." Faber also told Bos that he did not know J.W. However, Faber was able to recall an occasion at S.B.'s apartment where Faber gave, but did not sell, some jimsonweed to C.S. and two of C.S.'s friends, neither of whom Faber knew. Bos also confronted Faber with the fact that Faber's apartment had been searched 3 days earlier and that a bag containing jimsonweed had been discovered. Faber admitted that the bag was his.

An information was filed in district court charging Faber with knowing and intentional child abuse pursuant to § 28-707(1) and (4). On February 12, 2001, Faber filed a motion to quash the prosecution against him on the grounds that § 28-707(1) was unconstitutionally overbroad and vague, both on its face and as applied. On February 27, the district court overruled the motion to quash, citing *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). At his February 28 arraignment, Faber pled not guilty.

On April 4, 2001, Faber filed a motion to suppress all evidence seized during the search of his apartment, alleging that (1) the affidavit in support of the search warrant failed to state sufficient probable cause to believe the evidence sought would be found at the location described in the warrant; (2) the affidavit contained information that was " 'stale' "; (3) statements were taken from Faber in violation of his *Miranda* rights and were involuntary, the products of inducements, threats, or promises, and should be suppressed according to *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964); (4) the affidavit in support of Faber's arrest warrant did not contain facts sufficient to establish probable cause for Faber's arrest on the charges of child abuse, and any evidence obtained from or following Faber's arrest, including any statements made by him, should be suppressed as fruit of the poisonous tree pursuant to *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The district court subsequently overruled Faber's motion. After a bench trial, Faber was found guilty of knowing and intentional child abuse under § 28-707(1)(a) and (4). He was sentenced to 24 to 28 months' imprisonment.

III. STANDARD OF REVIEW

[1] Whether a statute is constitutional is a question of law; accordingly, this court is obligated to reach a conclusion independent of the decision reached by the court below. *In re Adoption of Baby Girl H.*, 262 Neb. 775, 635 N.W.2d 256 (2001).

[2,3] A trial court's ruling on a motion to suppress evidence, apart from determinations of reasonable suspicion to conduct investigatory stops and probable cause to perform warrantless searches, is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). In making this determination, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

[4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002).

[5] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *Id.*

IV. ASSIGNMENTS OF ERROR

Faber asserts that the district court erred in (1) overruling the motion to quash the information filed against him because § 28-707(1) and (4) are unconstitutionally overbroad and vague as applied to the facts of this case, (2) overruling the motion to suppress because the search warrant obtained by law enforcement was not supported by probable cause and because statements taken from Faber should have been suppressed as "fruit of the poisonous tree," (3) finding that there was sufficient evidence presented at trial to find Faber guilty of knowing and intentional child abuse, and (4) imposing an excessive sentence.

V. ANALYSIS

1. CONSTITUTIONALITY

Faber argues that the district court erred in overruling his motion to quash because § 28-707(1) and (4) are unconstitution-

ally overbroad and vague as applied to the facts of his case. Section 28-707 provides in relevant part:

> (1) A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or physical or mental health;
>
> . . . .
>
> (4) Child abuse is a Class IIIA felony if the offense is committed knowingly and intentionally and does not result in serious bodily injury as defined in section 28-109.

[6] Although Faber now argues that § 28-707(4) is unconstitutional, his motion to quash in the district court challenged the constitutionality of only § 28-707(1). An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Thomas*, 262 Neb. 138, 629 N.W.2d 503 (2001). Therefore, we limit our review to the constitutionality of § 28-707(1).

(a) Overbreadth

[7] As a general rule, in a challenge to the overbreadth and vagueness of a law, a court's first task is to analyze overbreadth. *State v. Hookstra*, 263 Neb. 116, 638 N.W.2d 829 (2002).

[8,9] An attack on the overbreadth of a statute asserts that language in the statute impermissibly infringes on a constitutionally protected right. *State v. Sommerfeld*, 251 Neb. 876, 560 N.W.2d 420 (1997). A statute may be unconstitutionally overbroad only if its overbreadth is substantial, that is, when the statute would be unconstitutional in a substantial portion of the situations to which it is applicable. *State v. Sommerfeld, supra*; *State ex rel. Dept. of Health v. Jeffrey*, 247 Neb. 100, 525 N.W.2d 193 (1994).

Faber argues that § 28-707(1) reaches a substantial amount of constitutionally protected activity, citing a number of hypothetical situations which could constitute child abuse under § 28-707(1), but which he claims are generally without criminal fault or are constitutionally protected. However, "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984).

In *State v. Sinica*, 220 Neb. 792, 372 N.W.2d 445 (1985), a defendant challenged § 28-707(1)(b) (Cum. Supp. 1984) on overbreadth grounds. After finding that the term "cruelly punished," as used in § 28-707(1)(b), was clearly defined, we concluded that the defendant's overbreadth challenge must fail.

[10] For the same reasons, Faber's overbreadth challenge fails. We have previously held that § 28-707(1)(a) has an easily and commonly understood meaning. *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990). Section 28-707(1)(a) reaches only that activity which causes or permits a minor child to be placed in a situation that exposes the minor child's life or health to danger or the peril of probable harm or loss. *Id.* We reiterate here our pronouncement in *Sinica*: "Child abuse is not a constitutionally protected activity." *State v. Sinica*, 220 Neb. at 798-99, 372 N.W.2d at 449. Thus, the statute does not reach a substantial amount of constitutionally protected activity and, therefore, the overbreadth challenge is without merit.

(b) Vagueness

[11,12] The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *State v. Roucka*, 253 Neb. 885, 573 N.W.2d 417 (1998). The more important aspect of the vagueness doctrine is not actual notice, but the requirement that a legislature establish minimal guidelines to govern law enforcement. *State v. Sommerfeld, supra.*

[13-15] To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *State v. Irons*, 254 Neb. 18, 574 N.W.2d 144 (1998); *State v. Roucka, supra*; *State v. Severin*, 250 Neb. 841, 553 N.W.2d 452 (1996); *State v. Carpenter*, 250 Neb. 427, 551 N.W.2d 518 (1996); *State v. Kelley*, 249 Neb. 99, 541 N.W.2d 645 (1996). A court will not examine the vagueness of the law as it might apply to the conduct of persons not before the court. *State v. Beyer*, 260 Neb. 670, 619 N.W.2d 213 (2000). The test for standing to assert a

vagueness challenge is the same whether the challenge asserted is facial or as applied. *Id.*

Faber argues that he has standing to challenge § 28-707(1) on vagueness grounds because his conduct is not clearly prohibited by the statute. Faber characterizes his conduct as providing jimsonweed to J.W. and argues that because jimsonweed is not a controlled substance, his conduct is not clearly prohibited by the statute. However, Faber was not charged with distributing a controlled substance, but with knowingly and intentionally causing or permitting a minor child to be placed in a situation in which the minor child's life or health is exposed to danger or the peril of probable harm or loss.

In *Crowdell*, we rejected a facial challenge to § 28-707(1)(a), finding that the word "'endangers' means to expose a minor child's life or health to danger or the peril of probable harm or loss" and thus has an easily and commonly understood meaning. 234 Neb. at 474, 451 N.W.2d at 699. We conclude, therefore, that Faber's constitutional challenge for vagueness is without merit.

2. Motion to Suppress

In his second assignment of error, Faber argues that the district court erred in not suppressing the evidence gathered during the search of his apartment. Faber claims that the affidavit in support of the search warrant was not supported by probable cause. Faber further claims that the affidavit failed to establish the reliability of several informants mentioned in the affidavit and that the affidavit relies upon stale information.

[16] Suppression is an appropriate remedy if (1) the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his or her reckless disregard of the truth; (2) the issuing magistrate wholly abandoned his or her judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 99 S. Ct. 2319, 60 L. Ed. 2d 920 (1979); (3) the warrant is based on an affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; or (4) the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). If none of the

aforementioned circumstances exist, the evidence should not be suppressed. *Id.*

[17] A search warrant, to be valid, must be supported by an affidavit which establishes probable cause. Probable cause sufficient to justify issuance of a search warrant means a fair probability that contraband or evidence of a crime will be found. *Id.*

[18-20] In reviewing the strength of an affidavit as a basis for finding probable cause to issue a search warrant, we have adopted the " 'totality of the circumstances' " rule established by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). *State v. Detweiler*, 249 Neb. 485, 489, 544 N.W.2d 83, 88 (1996). The magistrate who is evaluating the probable cause question must make a practical, commonsense decision. The magistrate must determine whether, given the totality of the circumstances set forth in the affidavit, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The question is whether the issuing magistrate had a " 'substantial basis' " for finding that the affidavit established probable cause. *Id.*

[21,22] The affidavit in support of the search warrant for Faber's apartment was sworn to by Investigator Steven Mills of the Norfolk Police Division. The affidavit relies in part on information provided by a confidential informant and also on information provided by two other informants: Eric Lech and C.T. Faber argues that the affidavit fails to establish the reliability of the confidential informant and therefore, the information provided by the confidential informant may not be considered in determining whether probable cause existed. See *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999). We assume, without deciding, that Faber's assertion is correct. However, not every defect in an affidavit renders the warrant defective or the seizure made pursuant to the warrant unconstitutional. *Id.* Although it may be necessary to excise certain matter from an affidavit, if the remainder of the affidavit is sufficient to establish probable cause, the warrant issued upon such remaining information in the affidavit will be proper and the results of the search pursuant to the warrant are constitutionally obtained. *Id.* We conclude that even after excising the information provided

by the confidential informant, the remainder of the affidavit contains sufficient evidence to establish probable cause.

As grounds for the search warrant, Mills averred:

> 2. That affiant is aware that [A.M.], D.O.B. 10/24/1982, was missing since November 19, 2000 from Madison County, Nebraska, and her vehicle that she was last reported driving was found in a ditch located in Stanton County, Nebraska.
>
> 3. That affiant is awarethat [sic] on December 2, 2000, a landowner, who was pheasant hunting, observed an unresponsive body lying in a pasture located in Stanton County, Nebraska. The landowner immediately called authorities. The body was located approximately ½ mile from where the missing persons vehicle was located.
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> 4. That affiant was advised by Investigator Keith Janata of the Stanton County Sheriff's [office] that on December 2, 2000, at approximately 5:50 p.m., Investigator Janata had contact with Eric Lech and [C.T.]. Investigator Janata furhter [sic] advised that Eric and [C.T.] are friends of [A.M.] and they advised that they were with her on the night of November 19, 2000 and dropped her off at her car located in King's Lanes parking lot at approximately 1:00 a.m. on November 20, 2000.
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> 5. Affiant was advised by Investigator Janata that Eric and [C.T.] both stated in written statements that they were present with [A.M.] when [A.M.] received two pods of Jimson Weed from Robert Faber who lives at the Kensington [Apartments] in Room #538 on November 19, 2000.
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> . . . .
>
> 7. Affiant was also advised by Investigator Janata Eric and [C.T.] advised him that another male subject, Jeremy Langenberg, was also present with [A.M.] inside Room #538 on November 19, 2000. Eric and [C.T.] stated that [A.M.] received the "Jimson Bud" from Robert Faber while inside Room #538 at the Kensington Apartments on November 19, 2000. Eric and [C.T.] also stated that Jeremy Langenbeg [sic] purchased "Jimson Bud" from Robert [Faber] while they were in Room #538.
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> . . . .

> 10. Investigator Janata also advised that [C.T.] stated to him [that] at approximately 11:00 p.m[.], she observed [A.M.] consume a palm full of the "Jimson Bud" seeds that she had received earlier from Robert Faber. Inv. Janata advised that he had asked [C.T.] if she had seen [A.M.] use any other drugs that night and she said "not that she had seen".
>
> 11. Affiant was advised advised [sic] by Investigator Janata that on December 4, 2000, he attended an autopsy that was conducted on [A.M.] Investigator Janata was informed by Dr. Robert Bowen, who conducted the autopsy, that there was no trauma to the body and no visual cause of death. Dr. Bowen provided Investigator Janata with approximately 25 Jimson seeds that were recovered from the stomach of [A.M.] Dr. Bowen advised Investigator Janata that blood and urine tests will be conducted to help determine the cause of death and the levels of Jimson Seed in [A.M.]'s system.

[23-25] When a search warrant is obtained on the strength of information from an informant, the affidavit in support of issuance of the warrant must set forth facts demonstrating the basis of the informant's knowledge of criminal activity and establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Ildefonso*, 262 Neb. 672, 634 N.W.2d 252 (2001). The reliability of an informant may be established by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, or (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.* As a general rule, an appellate court is restricted to consideration of the information and circumstances found within the four corners of the affidavit. *State v. Ortiz*, 257 Neb. 784, 600 N.W.2d 805 (1999).

The district court found that Lech and C.T. were

> citizen informants, close friends of [A.M.], whose motivation, identity and relationship to the case are immediately

> apparent from the affidavit, and whose statements were given for the purpose motivated by good citizenship. In addition, their statements in the affidavit can be considered to be corroborated by the results of the autopsy conducted on December 4, 2000, on [A.M.], wherein 25 Jimson seeds were discovered in her stomach.

[26] After-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review. A magistrate's determination of probable cause should be paid great deference by reviewing courts. *State v. Ildefonso, supra*; *State v. Detweiler*, 249 Neb. 485, 544 N.W.2d 83 (1996).

We do not determine if Lech and C.T. were citizen informants because the district court was not clearly erroneous in finding that their reliability was established by independent police investigation. The autopsy of A.M. indicated that she had ingested approximately 25 jimsonweed seeds prior to her death. This corroborates the information provided by Lech and C.T. They stated to police that they observed A.M. obtain two pods of jimsonweed from Faber at Faber's apartment and later, according to C.T., consume "a palm full" of the seeds that A.M. had received from Faber. Having established the reliability of Lech and C.T., we now consider Faber's argument that the information provided by Lech and C.T. was stale.

[27,28] Proof of probable cause justifying issuance of a search warrant generally must consist of facts so closely related to the time of issuance of the warrant as to justify a finding of probable cause at that time. *State v. Ortiz, supra*. In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon. *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). As the Eighth Circuit stated in *U.S. v. LaMorie*, 100 F.3d 547, 554 (8th Cir. 1996):

> "There is no bright-line test for determining when information is stale. Whether the averments in an affidavit are sufficiently timely to establish probable cause depends on the particular circumstances of the case, and the vitality of probable cause cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors

> must be examined in the context of a specific case and the nature of the crime under investigation." . . . Where continuing criminal activity is suspected, the passage of time is less significant.

[29] Where the affidavit recites a mere isolated violation, it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature—a course of conduct—the passage of time becomes less significant. *United States v. Johnson*, 461 F.2d 285 (10th Cir. 1972). See, also, *United States v. Tucker*, 638 F.2d 1292 (5th Cir. 1981) (primary consideration in evaluating staleness issue is whether affidavit describes single transaction or continuing pattern of criminal conduct).

Lech and C.T. advised police that they were inside Faber's apartment on November 19, 2000, and that while they were there, they observed Faber provide jimsonweed to two individuals. The affidavit was sworn to by Mills on December 5, 2000—16 days after Lech's and C.T.'s observations. The search warrant for Faber's apartment was issued and executed on December 5.

In addition to those portions of the affidavit recited above, Mills also averred:

> 12. Affiant is aware that on December 4, 2000, Investigator Janata had contact with Dr. Richard Bell[,] M.D. of Faith Regional West Campus. Dr. Bell advised Investigator Janata that the hospital has seen several cases of subjects coming into the Emergency Room feeling extremely ill and advising they had consumed Jimson seeds. Dr. Bell advised that Jimson seeds has [sic] had the effect of causing persons to be under the influence, to wander disoriented, and, often times, to disrobe.

We conclude that under the facts of this case, the information provided by Lech and C.T. 16 days prior to the issuance of the search warrant was not stale. The affidavit provided evidence of recurring activity of jimsonweed use by individuals and the harmful effects it produced. When combined with the assertion that jimsonweed was located in Faber's apartment, we cannot say the district court was clearly erroneous in finding that there

was a fair probability of finding jimsonweed in Faber's apartment at the time the search warrant was issued.

3. Suppression of Faber's Statements

Faber also argues that the district court erred in failing to suppress the statements Faber made to law enforcement. Faber argues that his statements were made after being confronted with evidence obtained during the purported illegal search of Faber's apartment and thus should be suppressed as "'fruit of the poisonous tree'" under *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

[30] Faber's argument is without merit for two reasons. First, the search of Faber's apartment was valid, as stated above, and thus any statements produced by evidence obtained during that search are not "fruit of the poisonous tree." Furthermore, this argument is not properly before this court. In his motion to suppress filed in district court, Faber asserted, inter alia, that his statements were the product of his allegedly invalid *arrest* warrant. Faber now asserts that the statements were the product of an allegedly invalid *search* warrant. The district court never considered whether Faber's statements were the product of an allegedly invalid search warrant. When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002).

4. Sufficiency of Evidence

[31,32] On appellate review, a criminal conviction must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Jackson*, 258 Neb. 24, 601 N.W.2d 741 (1999). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Leonor*, 263 Neb. 86, 638 N.W.2d 798 (2002). 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. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *Id.*

Faber was convicted of knowing and intentional child abuse under § 28-707(1)(a) and (4). This statute prohibits a person from knowingly and intentionally causing or permitting a minor child to be placed in a situation that endangers his or her life or physical or mental health and which does not result in serious bodily injury. The evidence presented by the State at trial is recounted above. We believe that evidence satisfies the essential elements of the crime of knowing and intentional child abuse beyond a reasonable doubt. The evidence is thus sufficient to support Faber's conviction.

5. Excessive Sentence

Faber's final assignment of error is that the district court abused its discretion in imposing a term of imprisonment of 24 to 28 months.

[33] An appellate court will not disturb sentences within statutory limits, unless the district court abused its discretion in establishing the sentences. *State v. Leonor, supra.* An abuse of discretion takes place when the sentencing court's reasons or rulings are clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *Id.*

[34,35] In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *Id.* In considering a sentence, a court is not limited in its discretion to any mathematically applied set of factors. *Id.*

[36] The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observations of the defendant's demeanor and attitude and all of the facts and circumstances surrounding the defendant's life. *Id.*

Faber was found guilty of knowing and intentional child abuse not resulting in serious bodily injury. This offense is a Class IIIA felony, for which the maximum penalty is 5 years'

imprisonment, a $10,000 fine, or both. There is no minimum penalty. Neb. Rev. Stat. § 28-105(1) (Cum. Supp. 2000). Thus, Faber's sentence was within the statutory limits.

At the sentencing hearing, the district court noted that Faber had received medical training in the past and that the evidence indicated Faber knew that jimsonweed was harmful. The court, based on its observation of Faber's demeanor and attitude and other facts surrounding his life, declined probation. The court determined that if placed on probation, Faber would likely engage in additional criminal activity and that probation would depreciate the seriousness of the offense. The district court did not abuse its discretion in sentencing Faber, and we therefore conclude that Faber's sentence was not excessive.

VI. CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

GERRARD, J., participating on briefs.

SERENNA D. RUSSELL, APPELLANT, V.
JOAN C. BRIDGENS, APPELLEE.
647 N.W.2d 56

Filed June 28, 2002. No. S-01-965.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **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. **Foreign Judgments: Jurisdiction: States.** A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment.
4. **Constitutional Law: Foreign Judgments: States: Collateral Attack.** The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter.

5. **Summary Judgment: Proof.** A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Appeal from the District Court for Douglas County: JOSPEH S. TROIA, Judge. Reversed and remanded for further proceedings.

Susan Ann Koenig and Angela Dunne Tiritilli, of Law Office of Susan Ann Koenig, P.C., for appellant.

John F. Eker III for appellee.

Christine Biancheria, of Biancheria, Eriksen, Maliver & Angell, P.C., Leonore F. Carpenter, Frank Cervone, Susan Frietsche, and Tiffany L. Palmer, for amici curiae Support Center for Child Advocates et al.

Amy A. Miller for amici curiae American Civil Liberties Union Foundation of Nebraska et al.

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

STEPHAN, J.

Appellant, Serenna D. Russell, appeals from an order of the district court for Douglas County granting the summary judgment motion of appellee, Joan C. Bridgens, and a further order overruling Russell's motion for reconsideration. We conclude that the district court erred in granting the summary judgment motion, and reverse, and remand for further proceedings.

FACTS

Bridgens adopted a minor child in Pennsylvania in September 1996. In December 1997, both Bridgens and Russell adopted the same minor child in what is referred to in the record as a "coparent" adoption. Although a certified copy of the 1997 adoption decree is a part of the record, the petition requesting such adoption is not. The certified decree expressly states that "[a]ll requirements of the Acts of Assembly have been fulfilled and complied with."

Bridgens and Russell are unmarried and of the same sex. They lived together and raised the child until August 1999. At that time, Russell and the minor child, who both had been residing with Bridgens in Germany, returned to the United States while Bridgens remained in Germany. On November 21, 2000, Russell filed a petition to establish custody and support for the minor child in the district court for Douglas County, Nebraska. After answering and cross-petitioning for custody and support, Bridgens filed a motion for summary judgment on May 16, 2001. The motion alleged that the 1997 adoption was invalid under Pennsylvania law. On July 23, 2001, the district court granted Bridgens' motion for summary judgment. The court reasoned that Pennsylvania law required Bridgens to terminate her parental rights prior to the 1997 adoption and found that "[i]t appears to the Court this was not done and [Russell] has not offered evidence to the contrary." In a subsequent order denying Russell's motion for reconsideration, the district court clarified that because the Pennsylvania statutory requirements for adoption were not met, the Pennsylvania court lacked subject matter jurisdiction to grant the adoption and that therefore, the adoption was not entitled to full faith and credit under the U.S. Constitution. Russell timely appealed, and we moved the case to our docket on our own motion pursuant to our authority to regulate the dockets of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

Russell assigns that the district court erred in (1) failing to apply the Full Faith and Credit Clause of the U.S. Constitution, (2) failing to recognize that res judicata bars an attack on the Pennsylvania decree, (3) not admitting Russell's affidavit in evidence, (4) failing to consider and find equitable estoppel as a bar to Bridgens' motion for summary judgment, and (5) failing to address Russell's status as a parent under the in loco parentis doctrine and failing to consider the minor's best interests.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as

to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *McCarson v. McCarson, supra.*

ANALYSIS

[3,4] The dispositive issue in this appeal is whether the record demonstrates as a matter of law that the 1997 Pennsylvania adoption decree was not entitled to full faith and credit under the U.S. Constitution. A judgment rendered in a sister state court which had jurisdiction is to be given full faith and credit and has the same validity and effect in Nebraska as in the state rendering judgment. *Susan H. v. Keith L.*, 259 Neb. 322, 609 N.W.2d 659 (2000). The Full Faith and Credit Clause of the U.S. Constitution prohibits a Nebraska court from reviewing the merits of a judgment rendered in a sister state, but a foreign judgment can be collaterally attacked by evidence that the rendering court was without jurisdiction over the parties or the subject matter. *Walksalong v. Mackey*, 250 Neb. 202, 549 N.W.2d 384 (1996). In the instant case, Bridgens seeks to collaterally attack the judgment on the basis that the Pennsylvania court lacked subject matter jurisdiction to grant the adoption.

Whether the Pennsylvania court had subject matter jurisdiction is dependent upon Pennsylvania law. See *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975) (holding only defenses that would be valid in rendering state can be relied upon by courts of another state). Bridgens' argument is based upon the contention that the Pennsylvania court lacked subject matter jurisdiction because Bridgens and Russell did not comply with the requirements of the Pennsylvania adoption statutes at the time of the 1997 decree. Specifically, Bridgens argues that the extrinsic evidence in the record establishes that she had not relinquished her parental rights prior to the 1997 "coparent" adoption and that the requisite parental consents were not included in the

adoption petition. In this regard, 23 Pa. Cons. Stat. Ann. § 2701(7) (West 2001) provides that a petition for adoption shall state that "all consents required by section 2711 (relating to consents necessary to adoption) are attached as exhibits or the basis upon which such consents are not required." Further, 23 Pa. Cons. Stat. Ann. § 2711(a)(3) (West 2001) requires consent from "[t]he parents or surviving parent of an adoptee who has not reached the age of 18 years." In particular, the consenting parent must state, in part, "I hereby voluntarily and unconditionally consent to the adoption of the [minor] child. I understand that by signing this consent I indicate my intent to permanently give up all rights to this child." § 2711(d)(1). See *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000). An exception to the unqualified consent requirement is found in 23 Pa. Cons. Stat. Ann. § 2903 (West 2001), which provides that "[w]henever a parent consents to the adoption of his child by his spouse, the parent-child relationship between him and his child shall remain whether or not he is one of the petitioners in the adoption proceeding." In addition, 23 Pa. Cons. Stat. Ann. § 2901 (West 2001) provides that "[u]nless the court for cause shown determines otherwise, no decree of adoption shall be entered unless . . . all other legal requirements have been met."

[5] A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial. *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002). Once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Id.* As the party moving for summary judgment, it was Bridgens' burden to demonstrate that the Pennsylvania court lacked subject matter jurisdiction due to lack of compliance with the requirements of the adoption statutes. The record before us, however, contains only the 1997 Pennsylvania adoption decree which affirmatively alleges on its face that it was decreed in conformance with Pennsylvania law. There is no evidence in the record establishing that the necessary consents were not included with the petition for adoption or that Bridgens did not,

in fact, relinquish her parental rights prior to the 1997 "coparent" adoption. Contrary to the finding of the district court, based upon this evidence the burden did not shift to Russell to affirmatively demonstrate that the requirements of the adoption statutes were met prior to the 1997 decree. On the record before us, Bridgens failed to meet her burden entitling her to summary judgment, and the district court erred in granting the motion.

Because this error requires reversal and remand for further proceedings, we do not reach Russell's remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings. For the benefit of the parties and the district court, we note that the legal issue of whether compliance with the statutory requirements of the Pennsylvania adoption act is an aspect of subject matter jurisdiction is an issue we view to be significantly dependent upon the Supreme Court of Pennsylvania's resolution of the pending appeals in *In re Adoption of R.B.F.*, 762 A.2d 739 (Pa. Super. 2000), and *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000).

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GERRARD, J., concurring.

I agree with the majority's disposition of this appeal insofar as the court concludes that Pennsylvania law controls the question whether the Pennsylvania adoption decree is valid and that on the record presented, the district court erred in entering summary judgment for Joan C. Bridgens. I would, however, reverse the judgment of the district court based on my view that the Pennsylvania adoption decree was entered by a court with subject matter jurisdiction and is entitled to full faith and credit in Nebraska. I write separately, not because of a petty disagreement with the rationale of the majority opinion or as a mere intellectual exercise, but because the record reflects that the minor child's best interests have needlessly remained unaddressed while these proceedings continue on. The minor child affected by these proceedings has not had court-ordered visitation with

Serenna D. Russell (a primary caregiver in his life) for several months, nor have the custody or visitation issues been addressed as they should have.

Significantly, for the reasons that follow, I would also conclude that even if the Pennsylvania Court of Common Pleas erred in concluding that it had subject matter jurisdiction, under Pennsylvania law, the Court of Common Pleas' determination that all jurisdictional requirements had been satisfied is res judicata as to the parties to the adoption. Finally, I believe that the district court erred in excluding Russell's affidavit concerning her relationship with the minor child and in not considering the doctrine of in loco parentis at the summary judgment proceeding, as that doctrine provides a basis for Russell to proceed with this action regardless of the validity of the Pennsylvania adoption decree.

SUBJECT MATTER JURISDICTION

U.S. Const. art. IV, § 1, provides that "Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State." In order to fulfill this constitutional mandate, the judgment of a state court should have the same credit, validity, and effect in every other court of the United States, which it had in the state where it was pronounced. *Underwriters Assur. Co. v. N. C. Guaranty Assn.*, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982).

There are, however, basic limitations on the principles of full faith and credit. *Id.* Chief among these limitations is the caveat that " 'a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first State had power to pass on the merits—had jurisdiction, that is, to render the judgment.' " *Id.* at 704. Consequently, before a court is bound by the judgment rendered in another state, it may inquire into the jurisdictional basis of the foreign court's decree. *Id.* If that court did not have jurisdiction over the subject matter or the relevant parties, full faith and credit need not be given. *Id.*

For purposes of argument, I am assuming that under Pennsylvania law—at least, as that law currently stands—the Court of Common Pleas may have erred in entering the adoption decree at issue in this case. See, *In re Adoption of R.B.F.*, 762

A.2d 739 (Pa. Super. 2000), and *In re Adoption of C.C.G.*, 762 A.2d 724 (Pa. Super. 2000) (appeals granted at 566 Pa. 684, 784 A.2d 119 (2001)). However, the dispositive question in this appeal is whether Bridgens' failure to relinquish her parental rights prior to the purported adoption was fatal to the subject matter jurisdiction of the Pennsylvania court.

Jurisdiction of subject matter relates to the competence of a court to hear and determine controversies of the general nature of the action before the court. *Vendetti v. Schuster*, 418 Pa. 68, 208 A.2d 864 (1965). See, also, *Aronson v. Sprint Spectrum, L.P.*, 767 A.2d 564 (Pa. Super. 2001). The test of whether a court has jurisdiction over a particular controversy depends upon the competency of the court to determine controversies of the general class to which the case presented for consideration belonged—whether the court had power to enter upon the inquiry, not whether it might ultimately decide that it was unable to grant the relief sought in a particular case. *Com. v. Ct. of Common Pleas, Philadelphia Cty.*, 506 Pa. 410, 485 A.2d 755 (1984). See, also, *In re Jones & Laughlin Steel Corp.*, 488 Pa. 524, 412 A.2d 1099 (1980); *Kaelin v. University of Pittsburgh*, 421 Pa. 220, 218 A.2d 798 (1966); *Vendetti, supra*; *Aronson, supra*; *Dynamic Sports Fitness v. Community YMCA*, 768 A.2d 375 (Pa. Commw. 2001). The thing of chief importance on a question of jurisdiction over the subject matter is not whether the petitioner may recover in the particular forum on the cause of action pleaded but whether the court is empowered to hear and determine a controversy of the character involved. See *Kaelin, supra.*

It is plain that pursuant to the foregoing propositions, the Court of Common Pleas had subject matter jurisdiction to enter the adoption decree at issue. "The court of common pleas of each county shall exercise . . . original jurisdiction over voluntary relinquishment, involuntary termination and adoption proceedings." 23 Pa. Cons. Stat. Ann. § 2301 (West 2001).

> If satisfied that the statements made in the petition are true, that the needs and welfare of the person proposed to be adopted will be promoted by the adoption and that all requirements of this part have been met, the court shall enter a decree so finding and directing that the person proposed to be adopted shall have all the rights of a child and

> heir of the adopting parent or parents and shall be subject to the duties of a child to him or them.

23 Pa. Cons. Stat. Ann. § 2902 (West 2001).

The Superior Court's decisions of *In re Adoption of R.B.F., supra*, and *In re Adoption of C.C.G., supra*, are not to the contrary. Those cases were presented to the Superior Court as direct appeals from the Court of Common Pleas from denials of petitions for adoption. The Superior Court was not confronted with a collateral attack on a final adoption decree. In this case, the Court of Common Pleas had jurisdiction over adoption cases generally and entered a decree of adoption and that decree became a final judgment not subject to collateral attack on the ground of subject matter jurisdiction.

Bridgens relies on *List Adoption Case*, 418 Pa. 503, 508-09, 211 A.2d 870, 873-74 (1965), a case involving a petition to vacate a decree of adoption, in which the Pennsylvania Supreme Court stated:

> In determining this appeal certain principles of law must be kept in mind: (1) an adoption decree entered by a court having jurisdiction over the subject matter and the parties is generally immune from collateral attack, particularly where the record shows a substantial compliance with the adoption statute; (2) where the record in the adoption proceedings affirmatively reveals a lack of jurisdiction, then the adoption decree is subject to collateral attack; (3) notice to a natural parent of the adoption proceedings and the consent of a natural parent, where necessary, are jurisdictional prerequisites in an adoption proceeding; (4) when an adoption decree is collaterally attacked, the entry of the decree raises a presumption of its validity and regularity and an implication arises that the court did find the necessary facts and did perform all the steps essential to the jurisdiction of the court; (5) the burden is upon the person attacking an adoption decree to establish its invalidity by clear and convincing evidence.

The clear import of *List Adoption Case* is that a petition to vacate an adoption decree—in essence, a collateral attack—will be entertained where a natural parent has been unjustly deprived of parental rights. The rule established by *List Adoption Case*,

while couched in jurisdictional language, relates more to the power of a court to enter an adoption decree than to the subject matter jurisdiction of the court. See *Riedel v. Human Relations Com'n of Reading*, 559 Pa. 34, 739 A.2d 121 (1999) (distinguishing between jurisdiction and exercise of power). Consequently, biological parents whose parental rights have been terminated by operation of law may seek to have a decree of adoption vacated where the consent of the relinquishing biological parents was not properly obtained. See, e.g., *In re Fritz*, 460 Pa. 265, 333 A.2d 466 (1975); *Singer Adoption Case*, 457 Pa. 518, 326 A.2d 275 (1974). This does not compel the conclusion, however, that a parent whose parental rights have remained intact can compel the vacation of an adoption decree that has finally inured to the benefit of another party.

To the contrary, the Pennsylvania Supreme Court has specifically noted that

> " '[i]t is especially important that persons who adopt minor children may rely on the decree as some guarantee that, in addition to the child, they are not also adopting at some future time litigation whose goal is to extinguish the parent-child relationship and force the adoptive parents to relinquish the child upon whom they have showered care and affection.' "

Matter of Adoption of Christopher P., 480 Pa. 79, 85, 389 A.2d 94, 97 (1978) (quoting *Adoption of Minor Child*, 109 R.I. 443, 287 A.2d 115 (1972)). Given this express principle, with which I agree, I cannot conclude that the Pennsylvania Supreme Court intended *List Adoption Case, supra*, to permit a collateral attack, under the circumstances of this case, on the evident subject matter jurisdiction of the Court of Common Pleas.

Because the record is sufficient to conclude, as a matter of law, that the Court of Common Pleas had subject matter jurisdiction to enter the adoption decree at issue, I would reverse the district court's order of summary judgment on that basis, and remand the cause to the district court for a determination of the merits of Russell's petition.

RES JUDICATA

Even assuming that the Court of Common Pleas lacked subject matter jurisdiction because of the parties' failure to strictly

comply with the Pennsylvania adoption statutes, Bridgens cannot assert that argument in this proceeding. Under Pennsylvania law, jurisdictional determinations made in a prior proceeding are res judicata in a subsequent proceeding involving the same litigants.

Although a court may have no jurisdiction over a particular subject matter, it may have jurisdiction to determine the question of its own jurisdiction, and an unappealed final determination of its subject matter jurisdiction—albeit erroneous—is res judicata as to those litigants. *Com. ex rel. Cook v. Cook*, 303 Pa. Super. 61, 449 A.2d 577 (1982); *Connellsville T. S. v. Connellsville*, 14 Pa. Commw. 532, 322 A.2d 741 (1974). Accord *Chartiers Valley School Dist. v. Board*, 154 Pa. Commw. 81, 622 A.2d 420 (1993). See, e.g., *Drummond v. Drummond*, 414 Pa. 548, 200 A.2d 887 (1964); *Irwin Boro. S. D. v. N. Huntingdon Twp. S. D.*, 374 Pa. 134, 97 A.2d 96 (1953); *Federal Land Bank v. Putnam et al.*, 350 Pa. 533, 39 A.2d 586 (1944); *Bartron v. Northampton County*, 342 Pa. 163, 19 A.2d 263 (1941); *Chartiers Valley v. Bd. of Prop. Assessment*, 94 Pa. Commw. 4, 503 A.2d 66 (1985).

This principle, long recognized in the Commonwealth of Pennsylvania and other forums, reflects judicial concern for finality of judgments, even when said judgments have been rendered by a court without jurisdiction of the subject matter. *Com. ex rel. Cook, supra* (citing *United States v. Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947); *Chicot County Dist. v. Bank*, 308 U.S. 371, 60 S. Ct. 317, 84 L. Ed. 329 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 59 S. Ct. 134, 83 L. Ed. 104 (1938); *Hodge v. Hodge*, 621 F.2d 590 (3d Cir. 1980); *Dyndul v. Dyndul*, 620 F.2d 409 (3d Cir. 1980); *Bartron, supra*; *Strauss v. W. H. Strauss & Co., Inc.*, 328 Pa. 72, 194 A. 905 (1937); *Pulaski Avenue*, 220 Pa. 276, 69 A. 749 (1908); and *Kase v. Best*, 15 Pa. 101 (1850)).

> "[W]hen a court decides that it has jurisdiction in a case pending before it, its decision in favor of its own jurisdiction is res judicata and cannot be collaterally attacked. The court has jurisdiction to determine its own jurisdiction, and hence its decision on this point is valid even if erroneous. That decision may be reversed on appeal, but if not, it is res judicata, and the issue of that court's jurisdiction cannot again be questioned by the parties or their privies."

Com. ex rel. Cook, 303 Pa. Super. at 69, 449 A.2d at 581-82 (quoting Dan B. Dobbs, *The Validation of Void Judgments: The Bootstrap Principle, Part II—The Scope of Bootstrap*, 53 Va. L. Rev. 1241 (1967)). Thus, the principles of res judicata apply to questions of subject matter jurisdiction as well as to other issues, and such a judgment is entitled to full faith and credit even as to questions of jurisdiction. See, *Underwriters Assur. Co. v. N. C. Guaranty Assn.*, 455 U.S. 691, 102 S. Ct. 1357, 71 L. Ed. 2d 558 (1982); *Durfee v. Duke*, 375 U.S. 106, 84 S. Ct. 242, 11 L. Ed. 2d 186 (1963).

In the present case, Bridgens asserts that the adoption decree was entered without jurisdiction because all the requirements of the Pennsylvania adoption statutes were not met, i.e., the necessary consents were not filed with the adoption petition. The district court agreed with this argument as the basis for entering summary judgment. The adoption decree entered by the Court of Common Pleas, however, specifically sets forth the court's finding that "[a]ll requirements of the Acts of Assembly have been fulfilled and complied with." This determination—that the petition and filings fulfilled the requirements of the adoption statutes—may potentially have been in error, but was not appealed from and, under Pennsylvania law, is res judicata as to the parties.

In other words, Bridgens and Russell together invoked the jurisdiction of the court and received the decree they requested. Under these circumstances, Bridgens cannot now collaterally attack the jurisdiction of the court in the original proceeding. "[She] will not be permitted to 'blow hot and cold' by now taking a position inconsistent with that by which [she] previously induced" the entry of the adoption decree. See *Reese v. Reese*, 351 Pa. Super. 521, 527, 506 A.2d 471, 474 (1986).

While this broad principle admits to exceptions, none are present here. See *Connellsville T. S. v. Connellsville*, 14 Pa. Commw. 532, 322 A.2d 741 (1974). "In Pennsylvania, the courts have differentiated between jurisdictional determinations which are void on their face, i.e., where the want of jurisdiction is patent, and those where the determination is based upon extant jurisdictional facts, or merely an error of law, the unappealed determinations of which are binding." *Id.* at 537 n.4, 322 A.2d at 743 n.4. The

findings of the Court of Common Pleas in the instant case, even if erroneous, would clearly fall within the latter category and would be binding on the parties. Compare *Chartiers Valley School Dist. v. Board*, 154 Pa. Commw. 81, 622 A.2d 420 (1993) (want of jurisdiction patent where notice of appeal filed prior to trial court's jurisdictional determination).

Thus, even if we were to assume that subject matter jurisdiction was wanting, the Court of Common Pleas made a jurisdictional determination regarding compliance with the requirements of the "Acts of Assembly" and specifically foreclosed the argument Bridgens now seeks to advance. Under established principles of Pennsylvania law, the court's determination is res judicata, even if erroneous, and entitled to full faith and credit in the State of Nebraska.

IN LOCO PARENTIS

Russell also assigned that the district court erred by not considering Russell's affidavit concerning her relationship with the minor child and in not discussing the doctrine of in loco parentis. Russell's assigned error has merit and should be considered on appeal. Discussion of this issue is essential because under the in loco parentis doctrine, as established by both Nebraska and Pennsylvania law, Russell can maintain her petition for custody even if the Pennsylvania adoption decree is not entitled to full faith and credit. The district court's order of summary judgment was premised on the assumption that the adoption issue was dispositive of the action. However, we have stated that

> a person standing in loco parentis to a child is one who has put himself or herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship, without going through the formalities necessary to a legal adoption, and *the rights, duties, and liabilities of such person are the same as those of the lawful parent.*

(Emphasis in original.) *Weinand v. Weinand*, 260 Neb. 146, 152-53, 616 N.W.2d 1, 6 (2000). Accord *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (2001) (lesbian former partner of biological mother had standing, in loco parentis, to maintain complaint for custody and visitation against biological mother). See, also, *In re Interest of Destiny S.*, 263 Neb. 255, 639 N.W.2d 400 (2002);

State on behalf of Hopkins v. Batt, 253 Neb. 852, 573 N.W.2d 425 (1998); *Hickenbottom v. Hickenbottom*, 239 Neb. 579, 477 N.W.2d 8 (1991); *Charles v. Stehlik*, 560 Pa. 334, 744 A.2d 1255 (2000), *cert. denied* 530 U.S. 1243, 120 S. Ct. 2689, 147 L. Ed. 2d 961.

The term "in loco parentis" refers to a person who has fully put himself or herself in the situation of a lawful parent by assuming *all* the obligations incident to the parental relationship and who actually discharges those obligations. *Weinand, supra.* Accord *T.B., supra.* The assumption of the parental relationship is largely a question of fact which should not lightly or hastily be inferred. *Weinand, supra.* The parental relationship should be found to exist only if the facts and circumstances show that the stepparent *means* to take the place of the lawful father or mother not only in providing support but also with reference to the natural parent's office of educating and instructing and caring for the general welfare of the child. *Id.* Once established, "[t]he rights and liabilities arising out of an *in loco parentis* relationship are, as the words imply, exactly the same as between parent and child." *T.B.*, 567 Pa. at 229, 786 A.2d at 917.

Based on the foregoing principles, it is clear that resolution of the validity of the Pennsylvania adoption is not dispositive of Russell's petition. Russell can maintain her petition regardless of whether the Pennsylvania adoption decree is given full faith and credit, if Russell can demonstrate an in loco parentis relationship with the minor child. The fact that Russell affected an adoption of the minor child is, standing alone, persuasive evidence supporting the existence of an in loco parentis relationship between Russell and the minor child. Furthermore, Russell proffered evidence to support such a finding. Russell offered an affidavit which describes, in detail, Russell's activities in the role of "primary care provider for [the minor child] since [the minor child] was adopted at age 9 months." The district court determined that this affidavit was irrelevant because of the district court's resolution of the adoption issue.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *V.C. v. Casady*, 262 Neb. 714,

634 N.W.2d 798 (2001). Based on the applicability of the in loco parentis doctrine, evidence of Russell's relationship with the minor child is clearly of consequence to the determination of the action. The district court erred by excluding Russell's affidavit and by dismissing Russell's petition absent a determination of whether Russell stood in loco parentis to the minor child.

Moreover, in my view, the record establishes conclusively that there exists a material issue of fact with respect to Russell's in loco parentis relationship with the minor child. On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Mondelli v. Kendel Homes Corp.*, 262 Neb. 263, 631 N.W.2d 846 (2001), *modified* 262 Neb. 663, 641 N.W.2d 624. If a genuine issue of material fact exists, summary judgment may not properly be entered. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002). Even if the Pennsylvania adoption decree is not entitled to full faith and credit, Russell is entitled to proceed to trial standing in loco parentis. This does not necessarily mean that Russell will prevail in seeking custody—but she at least has standing to fully litigate the issue. See *T.B. v. L.R.M.*, 567 Pa. 222, 786 A.2d 913 (2001).

At the very least, Russell's opportunity to litigate the issues of custody and visitation, pursuant to the doctrine of in loco parentis, should suggest to the district court that interim arrangements be made for the minor child's visitation with whichever party does not have temporary custody. So long as the ultimate disposition of this case remains uncertain, a temporary order of visitation should be entered that is consistent with the best interests of the child.

CONCLUSION

Therefore, for substantially different reasons than the majority—in both import and impact on the best interests of the minor child—I concur only with the result (i.e., reversal of summary judgment).

WRIGHT, J., joins in this concurrence.

CHADD MCLAUGHLIN, APPELLEE, V. REBECCA L. MCLAUGHLIN, NOW KNOWN AS REBECCA L. SHEETS, APPELLANT.

647 N.W.2d 577

Filed June 28, 2002. No. S-01-1137.

1. **Child Custody: Visitation: Appeal and Error.** Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.
2. **Judges: Words and Phrases.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Child Custody.** In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her.
4. ____. A career enhancement for a custodial parent's spouse is a legitimate reason for removal.
5. **Child Custody: Visitation.** Neither a custodial parent nor the spouse of a custodial parent is required to exhaust all possible job leads locally before securing a better position in another state. Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate motive in and of itself.
6. ____: ____. In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation.
7. **Child Custody.** Custodial parents are not required to consult with their ex-spouses before considering out-of-state employment.
8. **Child Custody: Visitation.** When seeking removal, custodial parents are not prohibited from making out-of-state living arrangements while awaiting court approval if they have not moved without court approval and have not interfered with the noncustodial parent's visitation rights.
9. **Child Custody.** The ultimate question in evaluating the parties' motives in seeking removal of a child to another jurisdiction is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party.
10. ____. In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment

will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties.

11. ____. This list of factors to be considered in determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted.
12. ____. A custodial parent's income can be enhanced because of a new spouse's career opportunities.
13. ____. A legitimate expectation of income based on commissions can be considered in evaluating the opportunity for enhanced earning potential.
14. **Child Custody: Proof.** Once a custodial parent has met his or her burden of proof for removal, he or she will not be placed in a position of deciding between custody of a child and a career advancement, whether it is his or her own career or the career of a new spouse.

Appeal from the District Court for Douglas County: MICHAEL W. AMDOR, Judge. Reversed.

Clarence E. Mock III and Denise E. Frost, of Johnson & Mock, for appellant.

John S. Slowiaczek and Willow T. Head, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., for appellee.

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

CONNOLLY, J.

I. NATURE OF CASE

Rebecca L. McLaughlin, now known as Rebecca L. Sheets, is a custodial parent who has remarried and wishes to move to Huron, South Dakota, with her child because of her new husband's employment. Chadd McLaughlin, her former husband and father of the child, opposed the application for removal, and the district court denied Rebecca's application. She appeals. We determine that Rebecca satisfied her burden of showing a legitimate reason for the removal and that it was in the best interests of the child to continue living with her. Accordingly, we reverse.

II. BACKGROUND

The parties' marriage was dissolved in April 1999. In the decree, Rebecca and Chadd were awarded joint legal custody of their daughter, who was almost 4 years old at the time the application for removal was filed. Rebecca was awarded primary physical custody. Chadd was given reasonable and liberal visitation. He was not granted extended summer or holiday visitation. Beginning in May 2001, the parties agreed to a visitation schedule that gave Chadd custody from Thursday evening to Sunday evening, every other weekend.

In April 2000, Rebecca married Clayton Sheets. She stated that she continued to work because they needed her income. She earned about $22,000 in the year 2000. She quit her job in May 2001 to stay home with her daughter, and she and Clayton had a daughter in June 2001.

Clayton testified that soon after Rebecca and Clayton were married, he began searching for a new job so that he could earn enough income for Rebecca to stay home. His background and experience were in agriculture. He earned his bachelor's degree in agricultural sciences in 1996. When they married, he worked as an agronomist for a national farmers' cooperative in Gretna, Nebraska. His duties included scouting fields and giving farmers recommendations on their crops, and he also sold seed and chemicals to farmers. In addition, he was required to perform long hours of manual labor at the farmers' cooperative during the spring and summer. His annual base salary was $31,000, and he received $6,500 in bonuses for the year 2000. He stated that he had virtually no opportunity for advancement.

Clayton looked for new employment in Nebraska, but the only offers he received were for farmers' cooperative positions similar to the one he held in Gretna. He applied to some of the larger seed companies but did not receive an offer. He was offered an outside sales position in Omaha with an insurance company that paid $50,000 annually. He stated that he did not accept the position because it did not provide benefits; required considerable travel; and required him to provide his own vehicle and pay for all of his travel expenses, including food, gas, and hotels.

In June 2001, Clayton received an offer from Garst Seed Company in Huron, South Dakota, for a district sales manager

position. The company required an answer within a week, and he accepted. Clayton testified that his annual base salary with Garst Seed was $45,000 and that his new job offered scheduling flexibility, a home office, company car, and benefits. He was confident that he could earn enough in bonuses to exceed the income he and Rebecca had earned together while in Nebraska.

On July 6, 2001, Rebecca filed an application for removal and requested an expedited hearing because Clayton was to start at his new job on July 17. In his response, Chadd denied that the removal was in the child's best interests and cross-applied for physical custody. Rebecca also filed a motion for temporary removal or, alternatively, a trial date for the end of August. The court denied the motion for temporary removal, and trial was held on September 10.

At some point between Clayton's acceptance of the new position and the trial, Clayton and Rebecca sold their home in Papillion and purchased a new home in Huron. Rebecca stated that Huron is about a 4- to 4½-hour drive from the Omaha area. Clayton moved to Huron to begin his job. The record reflects that Rebecca and the children stayed in Huron for visits before the hearing and that she was able to describe the community and their new home to the court. She testified, however, that she was still living with her children at her parents' home in Elkhorn, Nebraska.

She described the neighborhood as quiet and friendly with an elementary school within a couple of blocks of their home. She stated that the new home cost no more than their old home but had an additional bedroom and had twice as much square footage. She believed that the cost-of-living in general was lower in Huron than in Omaha. She also stated that her daughter got along well with Clayton and her new half sister. She maintained that the loss of contact with her family in Omaha would be offset by the benefits of their new community and improved lifestyle. She stated that her family already had plans for visits and that she would visit Omaha frequently to see them. The record reflects that Huron is a city of 12,000 people.

Regarding Chadd's visitation, she testified that she would maintain the same visitation schedule until the child began kindergarten. She was also willing to meet Chadd halfway every

other weekend to shorten the drive time for him. After the child began school, she proposed an extended summer visitation of 5 weeks to compensate for the shortened weekend visitations.

Rebecca was asked what she would do if the court denied the removal, and she stated, "If it came to that, we would have to move back . . . ." She stated that she would not give up custody if the court denied the application because she did not believe it was in the child's best interests to live with Chadd. She stated the child's best interests were to continue living with her because she could stay home with her children in South Dakota and the family's lifestyle and home would be improved by Clayton's new position. She also asserted that her children would be safer in Huron than in Omaha. Finally, she testified that because of their increased disposable income, she and Clayton could save for their children's college educations, which they could not afford to do in Omaha.

On cross-examination, she stated she and Clayton did not inform Chadd that they intended to move to South Dakota until after Clayton had accepted the position, but before they had sold their house. Rebecca also stated that Clayton had not inquired about two Garst Seed positions that became available in Nebraska after he had accepted the Huron position because the positions were an extension of the territories for only existing representatives and were not available to new employees.

Chadd testified that he was told about Clayton's new job in South Dakota sometime between June 25 and 30, 2000. He stated that at that time, Clayton had already accepted the job, but Chadd did not believe the house was listed for sale yet. He maintained that Rebecca had already moved to South Dakota because he had received a telephone call from his daughter while she was there. Rebecca had also left a telephone message once stating that they were going to South Dakota. But he could not point to specific time periods when he thought she was there. He stated that he was not asking for custody of his daughter, but only asking the court to deny her removal from the jurisdiction, and that if the court denied the removal, and Rebecca still wanted to leave, he would assume custody.

Chadd asserted that it was in the child's best interests to remain with him in Elkhorn because he enjoyed a close relationship with

her and she was also very close to his stepson. He was concerned that he could not maintain his daily contact with his daughter if Rebecca's application were granted. In addition to his visitation, he alternated picking up and dropping off his daughter at preschool on the 2 days a week that she attended, and he picked her up from daycare on his visitation days.

Chadd believed that his daughter should not be separated from her extended family in the Omaha area. He stated that his sister was currently living with him and that his present wife's family lived in Elkhorn. He stated that Rebecca's and Clayton's extended families lived in the Omaha area also. His own parents lived in Hebron, however, and saw the child about once a month. Other than his sister, he admitted that he had no extended family in the Omaha area. He also admitted that he did not currently take the child to see any members of Rebecca's family when he had custody.

An attorney appointed by the court to serve as the guardian ad litem testified that he had observed the child in Chadd's home and at Rebecca's parents' home. He generally found that the child interacted well with both families. Just before testifying, he had observed a report from Joseph L. Rizzo, Ph.D., a clinical psychologist whom Chadd hired as an expert. He admitted that Rizzo had recommended that the court grant the application because (1) the child's primary bond was with Rebecca, (2) Rebecca was seeking to enrich her life and care for her child, and (3) Clayton's job in Huron was consistent with his training and future stability. Chadd did not call Rizzo as a witness.

Despite Rizzo's recommendations, the guardian ad litem recommended that the court deny the application for removal. He testified that he made his recommendation because Clayton was not required to move to South Dakota. He agreed that the child would be fine moving with her mother, but he thought that Clayton's desire "to better his position financially [was] not a sufficient reason to separate a child from her father."

Rebecca's expert witness, Kevin R. Cahill, Ph.D., a clinical psychologist specializing in marriage and family therapy, interviewed Rebecca and Chadd separately twice, alone and with their daughter. Although he found Chadd to be a loving and competent father, he stated that the child had developed a stronger

relationship with Rebecca. He believed that because Rebecca had been her primary caretaker during her infancy, the child's primary attachment was with her. He stated that both parents responded well to their child's demands and expectations for her developmental age and level and could relegate their needs to her needs. But he stated that when a child is removed from its primary attachment parent, there are a number of negative psychological effects.

Cahill opined that the potential gains weighing in favor of the removal were an improved quality of life, more time and attention from Rebecca, and a quieter, easier lifestyle. He stated that it was in the child's best interests—in terms of her security and stability—for Rebecca to stay home. The potential harm was the loss of frequent interaction with Chadd. But he stated that the loss was mitigated by Rebecca's stated willingness to maintain the visitation schedule and provide Chadd with visits when she returned to see her family and for extended visits in the summer. He stated she would not be harmed by the decreased weekend visitation with Chadd when she started school. He stated that with longer visitation in the summer, the density of the contacts with Chadd could actually be greater.

Cahill saw no indication that Rebecca had applied for the removal with the intent of damaging the child's relationship with Chadd. He also reviewed Rizzo's report while on the stand and stated that those recommendations were consistent with his own. Cahill opined it was in the child's best interests to be allowed to move to South Dakota.

After the parties' closing arguments, the court rendered its judgment from the bench. The court stated that this court had not decided whether a career improvement for a custodial parent's spouse could constitute a legitimate reason for leaving the jurisdiction. Nonetheless, the court found that Rebecca had a legitimate reason for the removal. Similarly, the court did not question Rebecca's motives for seeking the removal. The court believed, however, that Rebecca had already moved, and found it significant that Rebecca had not talked to Chadd before searching for a job, listing their home, or moving. The court recognized that the move considered and affirmed in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), was from Omaha to Denver,

but found this case distinguishable because the custodial parent's career prospects were improved in *Farnsworth*.

The court next considered the potential that the move held for enhancing the quality of life for the child and the custodial parent. It found that (1) the child's emotional and physical needs would be equally met with either Rebecca or Chadd, (2) the child was too young to express a preference, (3) Rebecca's income would not be enhanced because the income belonged to Clayton, (4) the housing and living conditions would be improved, and (5) the education advantages in Huron were no greater than in Omaha. It made no specific finding regarding the quality of the child's relationship with each parent.

The court further found that Cahill had conceded that a substantial reduction in time with Chadd would negatively affect the child and that the family ties were in Nebraska, not South Dakota. The court stated that it could not decide whether the move would antagonize the relationship between the parties. The court believed that Clayton could find work in Nebraska. Based on these findings, the court determined that it was not in the child's best interests to move to South Dakota and denied the application.

III. ASSIGNMENTS OF ERROR

Rebecca assigns that the district court erred in finding that she had not satisfied her burden of proving that the removal to Huron was in the child's best interests and in denying the application for removal.

IV. STANDARD OF REVIEW

[1] Child custody determinations, and visitation determinations, are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[2] A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrains from acting, and the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through

a judicial system. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002).

V. ANALYSIS

[3] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. After clearing that threshold, the custodial parent must next demonstrate that it is in the child's best interests to continue living with him or her. *Vogel, supra.*

1. Legitimate Reason to Leave State

[4,5] The court found that Rebecca had a legitimate reason for removal, but also found that Clayton could find work in Nebraska. This court has previously determined that a career enhancement for a custodial parent's spouse is a legitimate reason for removal when the career change occurred after a remarriage. See, *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994); *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989). See, also, *Little v. Little*, 221 Neb. 870, 381 N.W.2d 161 (1986). Further, this court has stated:

> [W]e have never required a custodial parent to exhaust all possible job leads locally before securing a better position in another state. Absent some aggravating circumstance, such as an ulterior motive to frustrate the noncustodial parent's visitation rights, significant career enrichment is a legitimate motive in and of itself.

Farnsworth v. Farnsworth, 257 Neb. 242, 252-53, 597 N.W.2d 592, 600 (1999). Because we have held that career advancement for the custodial parent can constitute a legitimate reason for removal, our holding in *Farnsworth* applies equally to the spouse of a custodial parent.

Although Clayton was offered employment in Nebraska with an insurance company, the position was not in an area in which he had experience and required him to incur significant expenses and travel time. There was no requirement in *Harder* that the new spouse search for employment outside of his field. Clayton testified that he had been unable to find a position that offered career advancement in Nebraska and that his new position offered sig-

nificant opportunities in his chosen field. He was not required to accept work outside of his field. The court acknowledged that the career change was a considerable advancement for Clayton. We conclude that Rebecca has shown a legitimate reason for removal.

2. Child's Best Interests

Rebecca contends that the court erred in finding that she had already moved to Huron and in failing to find that the move was in her daughter's best interests. Chadd contends that Rebecca acted in bad faith under the parenting plan by failing to consult him before Clayton accepted this position or making a decision to move. He also contends that the court correctly found that Rebecca had failed to prove that removal was in their daughter's best interests.

[6] In determining whether removal to another jurisdiction is in the child's best interests, the trial court considers (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

(a) Each Parent's Motives

The court determined that because the parenting plan called for both parents to have expansive contact with their daughter, Rebecca and Clayton should have consulted Chadd before searching for a job out of state, or listing and selling their home.

[7] This court has never required custodial parents to consult with their ex-spouses before considering out-of-state employment. To expect consensus on such an issue is unrealistic. The parties' personal interests in removal situations are almost always at odds. The parties did agree in their parenting plan that it was in the best interests of their daughter that both parents maintain an ongoing involvement to the greatest extent possible. But such agreements cannot be interpreted as a mandate for the custodial parent to seek permission from his or her divorced spouse over future career choices. Chadd testified that Rebecca and Clayton informed him of the job offer about the end of June,

which was very shortly after the offer was made. The court erred in its finding that Rebecca was required to consult with Chadd before Clayton could consider out-of-state employment.

[8] The court also found that Rebecca had already moved to South Dakota with her daughter, in violation of our rule set out in *Jack v. Clinton*, 259 Neb. 198, 609 N.W.2d 328 (2000). One issue in *Jack* was temporary removals. But that concern was directed toward trial courts and intended to discourage them from granting temporary permission for removal before holding a full hearing and ruling on permanent removal. Further, the evidence does not support the court's finding that Rebecca had moved. Although Clayton moved before the hearing to begin his job, Rebecca testified that she was living with her children at her parents' house. Despite Chadd's belief that she had already moved, he could not point to specific time periods that Rebecca and his daughter were in South Dakota. He testified that Rebecca had not interfered with his visitation times. Rebecca was not prohibited from making living arrangements in South Dakota if the court approved the removal. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994) (noting that by time of hearing, both custodial parent and spouse had obtained employment and leased home out-of-state). On the contrary, such efforts can assist the trial court in evaluating the merits of the removal.

Rebecca did not interfere with Chadd's visitation by spending time in South Dakota making preparations for a move, and the evidence does not indicate that she intended to avoid the court's jurisdiction. She filed an application for removal within 2 weeks of the position's becoming available to Clayton, and she testified that she would move back to Nebraska if removal were denied. We do not interpret her statement that she would move back to Nebraska to mean that she had moved without court permission, but that she and Clayton would be willing to sell their home in Huron and give up Clayton's job if the court denied the removal. The court erred to the extent that it found that Rebecca had already moved or imputed her preparations as bad faith in evaluating her motives for making the request.

[9] The ultimate question in evaluating the parties' motives is whether either party has elected or resisted a removal in an effort to frustrate or manipulate the other party. See *Farnsworth*

v. Farnsworth, 257 Neb. 242, 597 N.W.2d 592 (1999). There is no evidence that either Rebecca or Chadd has acted in bad faith. Clayton's significant career advancement is a compelling motive for Rebecca to seek removal. On the other hand, Chadd's desire to maintain frequent contact with his daughter is an equally compelling motive to resist the move. Their motives are balanced. See *id.*

(b) Quality of Life

[10,11] In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, a court should consider the following factors: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000). This list should not be misconstrued as setting out a hierarchy of factors. Depending on the circumstances of a particular case, any one factor or combination of factors may be variously weighted. *Id.*

We conclude that the court did not err in finding that a 4-year-old child is too young to express a preference between parents. We further conclude that the court did not err in finding that Rebecca had failed to show that schools in their new community would be superior to schools in their Nebraska community. See, *Brown, supra*; *Farnsworth, supra* (educational advantages factor receives little or no weight when custodial parent fails to prove that new schools are superior). We also agree with the court that the quality of housing and living conditions for Rebecca and the child would be improved by the move and that this factor weighs for the removal.

The court found that either parent could meet their daughter's emotional and physical needs. The record confirms that both

parties are loving parents and genuinely concerned with their daughter's needs. The court concluded that it could not tell whether the removal would antagonize the relationship between the parties. The record indicates that the parties have cooperated well in the past regarding their daughter's welfare, and we find no reason to presume that they would not continue to do so despite their dispute over the relocation. See *Brown, supra*. We disagree, however, with the court's findings on other quality of life factors.

(i) Enhancement of Income or Employment

[12,13] Although the court found that Rebecca had a legitimate reason to relocate, it also found that Rebecca's income could not be increased by Clayton's career opportunities. The court erred in this finding. See *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). In *Harder*, the facts did not indicate whether the custodial mother's employment opportunities would be improved at all. It was sufficient that her husband's new job held out considerable opportunities for commission income. See *id.* Similarly, there was evidence that Clayton would have ample opportunities for bonuses and commissions, including a letter from his employer outlining the basis for that income. He testified that he could earn more income alone in Huron than he and Rebecca had earned together while in Nebraska. Although Chadd argues that Clayton has no guarantee of his income other than his base salary, a legitimate expectation of income based on commissions can be considered in evaluating the opportunity for enhanced earning potential. See *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999). We conclude that Rebecca satisfied her burden of showing that her income would be enhanced by the move.

(ii) Ties to Community and Extended Family

The court also found that the strength of the child's ties to the present community and extended family there weighed against removal because all of Rebecca's extended family was in the Omaha area and because she had no family in Huron. However, no evidence was adduced concerning the child's relationships with Rebecca's extended family. In any case, Rebecca testified that she and her family had plans to visit often.

Chadd conceded that other than his sister, who was living with him at the time of the hearing, he did not have extended family in the Omaha area. He testified that his parents saw his daughter about once a month and that he could still provide that visitation time with his parents if the removal were granted. Under these facts, this factor receives little weight in our de novo review.

(iii) Quality of Relationship Between Child and Parents

The court made no specific finding regarding the relationship between the child and each parent. It did note that removal would be beneficial to her relationship with Rebecca and would negatively affect her relationship with Chadd. The effect of the removal, however, must be evaluated in light of the child's relationship with each parent. See *Brown v. Brown*, 260 Neb. 954, 621 N.W.2d 70 (2000) (concluding that because of close relationship and extensive contacts between father and children, this factor weighed against long-distance relocation with mother).

The guardian ad litem reported that the child interacted well with both families. His opinion that removal should be denied was based wholly on his incorrect belief that Clayton's improved financial position was an insufficient reason for removal. Cahill, however, opined that the child had bonded more strongly with Rebecca because Rebecca had been her primary caretaker. He found that Chadd was a loving and competent father and that both parents responded well to the child's demands and expectations. But because of the child's primary bond with Rebecca, he opined that she would benefit from Rebecca's improved lifestyle and ability to stay home with her in Huron.

The court found that Cahill had conceded that a substantial reduction of time with Chadd would negatively affect the child. Contrary to this finding, however, Cahill stated that a child would be affected by a removal which precluded the possibility for contact with a parent. He specifically stated that he did not believe the child's well-being would be negatively affected by the parties' visitation schedule or the reduced weekend visitations once school started. He stated that Rebecca would make every effort to ensure that the child kept a positive relationship with Chadd and that Chadd could actually have a greater density of contacts because of extended summer visitation.

We find it significant that Chadd's own expert, Rizzo, while he did not testify, recommended that the court allow the relocation, in part, because of the child's bond with Rebecca. We conclude that the child's primary relationship is with Rebecca.

(iv) Quality of Life Conclusion

We determine that the court erred in (1) failing to find that the child's primary relationship was with Rebecca, (2) finding that Rebecca's income could not be enhanced by Clayton's employment opportunities, and (3) finding that the strength of the child's ties to the community and extended family weighed against removal. Under our de novo review, we conclude that Rebecca has satisfied her burden of proving that the removal will enhance the quality of life for her child and herself.

(c) Impact of Move on Contact Between Chadd and Child

The final consideration in the best interests of the child analysis is the effect of the relocation upon Chadd's ability to maintain a meaningful parent-child relationship with his daughter. This effect must be viewed in light of the court's ability to devise reasonable visitation arrangements. See *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). Rebecca testified that she is willing to drive halfway to help Chadd maintain the current visitation schedule until school starts. Afterward, when Chadd's weekend visitation is reduced, she is willing to provide extended summer visitation.

We recognize the difficulty that courts face in determining removal issues. In most applications for removal, the frequency of the noncustodial parent's visitation is likely to be diminished by distance. But the relocation here, from Omaha to Huron, involves no greater distance than some moves which could have been made within the state. Compared to some of the more distant relocations this court has considered, the impact on Chadd's visitation is not as great. See, *Brown, supra*; *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000). Chadd will still have weekend visitation, even if it will be somewhat reduced after the child starts school. We determine that Chadd could maintain a meaningful relationship with his daughter after school starts through a reasonable visitation schedule, which included extended visitation in the summer.

We conclude in our de novo review that Rebecca has satisfied her burden of proving that it is in the child's best interests to continue living with her.

VI. CONCLUSION

[14] A custodial parent has the burden of proving that he or she has a legitimate reason for removal and that it is in the best interests of the child to continue living with him or her. Once a parent has met that burden, he or she will not be placed in a position of deciding between custody of a child and a career advancement, whether it is his or her own career or the career of a new spouse. See, *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999); *Harder v. Harder*, 246 Neb. 945, 524 N.W.2d 325 (1994). The district court abused its discretion in refusing to grant Rebecca's application for removal. The judgment of the court is reversed. Upon remand, the court is to enter an order granting the application consistent with this opinion.

REVERSED.

STEPHAN, J., dissenting.

I respectfully dissent. I agree with the conclusion of the trial court and the majority that Rebecca established a legitimate reason for relocation through the evidence of Clayton's enhanced employment opportunities in Huron, South Dakota. I also agree with the majority that Rebecca was not required to consult with Chadd before Clayton could consider out-of-state employment and that the evidence does not support a conclusion that she had actually relocated the child to South Dakota at the time of the hearing on her request to do so. I also agree with the majority that there is no evidence of bad faith on the part of Rebecca. That said, I cannot agree that the district court abused its discretion in denying her request to remove the child from this state.

The crux of my position was aptly stated by the trial judge as a preface to his ruling from the bench when he remarked, "Well, this is a painfully close case." My review of the record leads me to precisely the same conclusion. The record discloses two fit, loving, and devoted parents. Both have played active roles in their daughter's life, and each recognizes the importance of the other in her continuing development. Were either of the parties lesser parents, this would be an easier case to judge. However,

the admirable qualities exhibited by each parent make it an extremely difficult one.

Because a legitimate reason for the relocation was established, the case turns on the "best interests of the child" analysis. Citing *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002), the majority frames the issue as whether the custodial parent can "demonstrate that it is in the child's best interests *to continue living with him or her*." (Emphasis supplied.) While this is an accurate statement of what we said in *Vogel* and other cases, I think it misstates the "best interests" issue under the facts of this case. Rebecca testified that if she is not granted permission to relocate to South Dakota, she and her new family would live in Nebraska with the child. At trial, Chadd only requested that the court deny Rebecca leave to relocate the child and did not ask the court to award custody to him. Thus, the child will continue to live with Rebecca whether or not Rebecca is given leave to relocate. The issue as presented to the district court was whether, on the basis of all relevant factors, it is in the best interests of the child to move to South Dakota *with Rebecca* or continue residing *with Rebecca* in Nebraska. The guardian ad litem correctly perceived this issue in arriving at his recommendation that the application for relocation be disallowed. The expert who testified on behalf of Rebecca seems to have missed the point when he opined that it would be in the best interests of the child "to move to South Dakota and maintain contact with her — primary contact with her custodial parent, her mother." This opinion ignores the fact that the child will have "primary contact" with Rebecca as the custodial parent regardless of whether she lives in Nebraska or South Dakota. The continuing integrity of the maternal bond is simply not an issue in this case.

As I read the record, there is credible evidence on each side of the issue. The move to South Dakota holds the promise of certain benefits to the child in that she would live in a larger house and stands to benefit in other ways from the economic opportunities anticipated by Clayton in his new employment. Also, if such opportunities are realized, Rebecca would be able to stay home with her children instead of working to supplement the family income, an arrangement which she and her expert witness believe will be beneficial to the child. It is also true that

the distance between Omaha and Huron, South Dakota, is not so great that it would absolutely preclude regular visitation; as the majority correctly notes, this distance is no greater than some intrastate relocations which would not require court approval.

On the other hand, the guardian ad litem for the child recommended that the court not allow the relocation because the potential benefits to the child did not outweigh the negative effect of separation from Chadd. Rebecca admitted that the move would make it virtually impossible for Chadd to participate in his daughter's school activities. She also admitted that under the biweekly visitation schedule she proposed in the event of relocation, her daughter would spend 9 hours every other weekend traveling by automobile between Rebecca's home in South Dakota and Chadd's home in Nebraska. The evidence also establishes that the child's extended family resides in Nebraska.

Based upon my de novo review of the record, I would conclude that in taking their respective positions in this case, each parent is sincerely motivated by what he or she genuinely believes to be in the best interests of their child. The proposed relocation would improve the child's quality of life in some respects as a result of the improved economic opportunities for Clayton and Rebecca's plan to stay home with her children, but the child's quality of life would be negatively impacted by the long biweekly commute for visitation and the diminished opportunity for interaction with her extended family. While the relocation would not completely eliminate the opportunity for regular visitation by Chadd, it would drastically alter the nature and frequency of the visitation he has exercised to date. Weighing these factors in order to determine whether to permit Rebecca to relocate with the child is a difficult task. Where, as in this case, there are no absolutes and no clearly right or clearly wrong answers, it is particularly important to bear in mind that our standard of review requires an appellate court to give deference to the discretion of the trial judge, who observed the demeanor of the witnesses as he or she heard their testimony. In order to reverse on the basis of an abuse of discretion, we must be able to state that the decision of the district court is untenable and unfairly deprives a litigant of a substantial right or a just result. I cannot reach that conclusion on this record. Finding no abuse of discretion, I would affirm.

JOHN WAYS, JR., APPELLANT, V. DAVE SHIVELY, ELECTION COMMISSIONER, AND GARY LACEY, COUNTY ATTORNEY, APPELLEES.

646 N.W.2d 621

Filed July 5, 2002. No. S-01-382.

1. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below.
2. ____: ____. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
3. **Appeal and Error.** When an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition.
4. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
5. **Mandamus: Proof.** In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act.
6. **Constitutional Law: Voting.** The right to vote is a civil right, and the restoration referred to in Neb. Const. art. VI, § 2, is the restoration of the right to vote.
7. **Statutes: Legislature: Intent.** In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute, considered in its plain, ordinary, and popular sense.
8. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
9. **Statutes.** To the extent that there is a conflict between two statutes on the same subject, the specific statute controls over the general.
10. **Constitutional Law: Criminal Law: Statutes: Voting.** The purpose of Neb. Rev. Stat. § 29-112 (Reissue 1995), as evident from its plain language, is to provide the mechanism by which a felon's right to vote is restored.

Appeal from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Robert Wm. Chapin, Jr., for appellant.

Gary Lacey, Lancaster County Attorney, Michael E. Thew, and Douglas D. Cyr for appellees.

Don Stenberg, Attorney General, and Laurie Smith Camp for amicus curiae State of Nebraska.

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

MILLER-LERMAN, J.

NATURE OF CASE

Appellant, John Ways, Jr., brought this action seeking a writ of mandamus compelling appellee, Dave Shively, election commissioner of Lancaster County, Nebraska, to permit Ways to register to vote. The district court for Lancaster County denied Ways' petition for writ of mandamus and dismissed the petition. Ways has been convicted of a felony and is, therefore, not qualified to vote under Neb. Const. art. VI, § 2. Because Ways' right to vote has not been restored under Neb. Rev. Stat. § 29-112 (Reissue 1995), Ways has failed to show that he is entitled to vote and that Shively has a clear legal duty to permit Ways to register to vote. We affirm.

STATEMENT OF FACTS

The relevant facts are not in dispute. Ways is a felon who was discharged from the Nebraska State Penitentiary in June 1998 after completing his sentences for the crimes of pandering, carrying a concealed weapon, and attempting to possess a controlled substance. Upon his release from custody, Ways was provided a certificate of discharge from the Department of Correctional Services, which provided, inter alia, as follows:

> This document shall be evidence to all persons that the above captioned individual is finally discharged and restored all his/her civil rights, as provided by law, effective this 24th day of June, 1998.
>
> The issuance of this Certificate of Discharge does not restore to the above captioned individual his/her right to bear firearms.

Following his release, Ways attempted to register to vote at the Lancaster County election commissioner's office. Shively

refused to allow Ways to register to vote, citing to § 29-112, which provides:

> Any person sentenced to be punished for any felony, when sentence shall not have been reversed or annulled, shall be deemed incompetent to be an elector or juror, or to hold any office of honor, trust, or profit within this state, unless such convict shall receive from the Board of Pardons of this state a warrant of discharge, in which case such convict shall be restored to his civil rights and privileges; *Provided*, such warrant of discharge shall not release such convict from the costs of his conviction, unless otherwise ordered by the Board of Pardons.

On February 27, 2001, Ways filed a petition for writ of mandamus, seeking a writ compelling Shively to permit Ways to register to vote. The petition was filed in the Lancaster County District Court. The district court scheduled a show cause hearing for February 28, ordering Shively to show cause why he ought not be compelled to permit Ways to register to vote in Lancaster County.

On February 28, 2001, the parties appeared at the show cause hearing. In support of his petition, Ways claimed that Shively's refusal to permit him to register to vote violated Neb. Rev. Stat. § 83-1,118(5) (Reissue 1999), which provides: "Whenever any committed offender has completed the lawful requirements of the sentence, the director [of the Department of Correctional Services] shall issue a certificate of discharge to the offender, and the certificate shall restore the civil rights of the offender."

Shively responded that as a result of Ways' felony conviction, the sentence for which had neither been reversed nor annulled, Ways had lost his right to vote and the only method by which Ways' right to vote could be restored was through a warrant of discharge issued by the Board of Pardons pursuant to the specific provisions in § 29-112. It is undisputed that no warrant of discharge had been issued. In further argument in response to Ways' claim, Shively stated that the rights encompassed by the certificate referred to under § 83-1,118(5) would be such "civil rights" as the right to "liberty" and the right to travel but that such rights did not include the right to vote. In sum, Shively claimed that Ways did not have the right to vote and that Shively was not under

any duty to permit Ways to register to vote. Shively requested that the district court deny Ways' petition for writ of mandamus.

The district court agreed with Shively's reasoning. On March 1, 2001, the district court entered an order denying Ways' request for writ of mandamus and dismissing his petition. Ways appeals.

ASSIGNMENT OF ERROR

On appeal, Ways assigns one error. Ways claims the district court erred in concluding that § 29-112 controlled and in finding that Ways' voting rights had not been restored and dismissing his petition for writ of mandamus.

STANDARDS OF REVIEW

[1,2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the decision made by the court below. *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *In re Interest of S.B.*, 263 Neb. 175, 639 N.W.2d 78 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Chambers v. Lautenbaugh, supra.*

ANALYSIS

Constitutional Claim Not at Issue.

As an initial matter, we note that the Attorney General's office has filed an amicus brief in this appeal on behalf of the State of Nebraska, asking that the district court's order be affirmed. The State argues, in part, that "[t]o the extent § 83-1,118(5) purports to restore to a convicted felon any civil rights which a felon forfeits by operation of statute or constitution," § 83-1,118(5) violates the Nebraska Constitution's separation of power provision found at art. II, § 1. Brief for amicus curiae at 1. The State argues that under Neb. Const. art. IV, § 13, a separate Board of Pardons within the executive branch has been established, which board is solely authorized to "remit fines and forfeitures and to grant respites, reprieves, pardons, or commutations in all cases of conviction for offenses against the laws of the state, except treason and cases of impeachment."

[3] The constitutional issue raised by the State as amicus curiae on appeal was neither presented nor ruled on in the district court. We have stated that when an issue is raised for the first time in an appellate court, it will be disregarded inasmuch as a lower court cannot commit error in resolving an issue never presented and submitted to it for disposition. *In re Adoption of Luke*, 263 Neb. 365, 640 N.W.2d 374 (2002). Accordingly, we do not consider the constitutional issue raised by the State.

Requirements for Issuance of Writ of Mandamus.

[4] We have recently stated:

> Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. . . . The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.

Sydow v. City of Grand Island, 263 Neb. 389, 400, 639 N.W.2d 913, 922-23 (2002). See, also, *State ex rel. AMISUB v. Buckley*, 260 Neb. 596, 618 N.W.2d 684 (2000); *State ex rel. Cherry v. Burns*, 258 Neb. 216, 602 N.W.2d 477 (1999).

[5] In a mandamus action, the party seeking mandamus has the burden of proof and must show clearly and conclusively that such party is entitled to the particular thing the relator asks and that the respondent is legally obligated to act. *State ex rel. AMISUB, supra*. Accordingly, Ways has the burden in the present case to demonstrate that he was entitled to register to vote and that Shively was legally obligated to permit him to register to vote.

Ways Has No Clear Right to Register to Vote, and Shively Has No Duty to Permit Ways to Register to Vote.

[6] Ways was convicted of a felony and lost his right to vote under Neb. Const. art. VI, § 2, which provides: "No person shall

be qualified to vote . . . who has been convicted of [a] felony under the laws of the state or of the United States, unless restored to civil rights." The right to vote is a civil right, *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), and the restoration referred to in Neb. Const. art. VI, § 2, is the restoration of the right to vote. Restoration of the right to vote is implemented through statute.

[7-9] The parties rely on different statutory provisions. This appeal presents a question of statutory construction. In construing a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute, considered in its plain, ordinary, and popular sense. *Heathman v. Kenney*, 263 Neb. 966, 644 N.W.2d 558 (2002). When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Id.* Furthermore, to the extent that there is a conflict between two statutes on the same subject, the specific statute controls over the general. *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). We have stated that " '"[w]here general and special provisions of the statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same . . . ."' " *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 472, 471 N.W.2d 398, 400 (1991).

When an offender convicted of a felony completes the requirements of his or her sentence, a certificate of discharge is issued to the offender by the Department of Correctional Services. We observe that by its terms, the "civil rights" restored by the certificate of discharge are only those civil rights "as provided by law." Section 83-1,118(5) authorizing the issuance of the certificate of discharge, uses the phrase "civil rights" but does not enumerate the rights included within such phrase. In particular, the statute does not address the restoration of the right to vote. Nevertheless, Ways claims that when the certificate of discharge was issued to him pursuant to § 83-1,118(5) in June 1998, the right to vote was one of the "civil rights" restored to him, and accordingly, Shively was obligated to permit Ways to register to vote. We do not agree.

[10] Ways' reliance on § 83-1,118(5), which refers to "civil rights" without specification, ignores § 29-112, which is the statutory provision directly addressing restoration of a felon's right to vote. Under § 29-112, a felon whose sentence has not been reversed or annulled may not vote "unless such convict shall receive from the Board of Pardons of this state a warrant of discharge." The purpose of § 29-112, as evident from its plain language, is to provide the mechanism by which a felon's right to vote is restored. Comparing §§ 83-1,118(5) and 29-112, it is clear that § 29-112 is the more specific statute relative to the restoration of a felon's right to vote, and, therefore, the specific statute, § 29-112, must control the conditions under which a felon's right to vote is restored.

There is no dispute that Ways' felony sentence has not been reversed or annulled and that Ways has not received a warrant of discharge from the Board of Pardons. Thus, we conclude as a matter of law that pursuant to § 29-112, the specific right to vote was not restored to Ways upon his discharge from incarceration at the completion of his sentences. The certificate of discharge issued under § 83-1,118(5) did not restore Ways' right to vote. See, generally, *State v. Illig*, 237 Neb. 598, 467 N.W.2d 375 (1991) (concluding, inter alia, that specific language of Neb. Rev. Stat. § 83-1,130(2) (Reissue 1987), which provided that Board of Pardons could restore right to possess firearms to person convicted of felony, controlled over more general language of Neb. Rev. Stat. § 29-2264 (Reissue 1989), which provided that upon completion of probation, convicted person's civil rights were restored, and, therefore, absent Board of Pardon's restoration of right to bear arms, person previously convicted of felony could be convicted of being felon in possession of firearm, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989)). Ways did not have the right to vote restored, and Shively was not required to permit Ways to register to vote. The district court's order was correct.

CONCLUSION

Ways was convicted of a felony and, therefore, not qualified to vote. His sentence was not reversed or annulled. The Board of Pardons has not issued a warrant of discharge. Because Ways'

right to vote has not been restored under § 29-112, Shively did not have a clear duty to permit Ways to register to vote. The district court did not err in denying Ways' petition for writ of mandamus. We, therefore, affirm the district court's order denying Ways' petition for writ of mandamus and dismissing the petition.

AFFIRMED.

JOHN M. BURK ET AL., APPELLANTS, V.
MARILYN M. DEMARAY ET AL., APPELLEES.
646 N.W.2d 635

Filed July 5, 2002. No. S-01-395.

1. **Equity: Quiet Title.** A quiet title action sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
4. **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.
5. **Deeds: Acknowledgments: Public Policy: Presumptions: Proof.** Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it.
6. **Deeds: Forgery.** A forged deed is void and will not pass title for any purpose to the grantee or those who take under the grantee.
7. **Adverse Possession.** In order to tack the possession of predecessors in title for the purpose of establishing adverse possession, the predecessor occupant's possession must have been adverse to the true owner.
8. **Adverse Possession: Proof: Time.** A party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession under a claim of ownership for the statutory period of 10 years.

9. **Adverse Possession.** It is the visible and exclusive possession with intention to possess the land occupied under the belief that it belongs to him or her that constitutes its adverse character.
10. **Adverse Possession: Fraud.** If the possessor has committed fraud against the true owner to obtain title, he or she has no claim of right or ownership against the true owner unless the owner has reason to know of the possessor's malfeasance and fails to take action to protect his or her interests.
11. ____: ____. Proof of a possessor's actual fraud negates the adverse character of his or her possession.

Appeal from the District Court for Holt County: WILLIAM B. CASSEL, Judge. Reversed and remanded for further proceedings.

James G. Egley, of Moyer, Moyer, Egley, Fullner & Warnmunde, for appellants.

James D. Gotschall, of Strope, Krotter & Gotschall, P.C., for appellees.

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

CONNOLLY, J.

This is an appeal from a district court's order quieting title in the appellees, Gary Bartak and Mary Bartak (the Bartaks) to a quarter section of farmland in Holt County, Nebraska. Appellants John M. Burk (John), Barbara A. Burk King (Barbara), and her husband, Robert L. King (Robert) (collectively the Burk heirs), filed a petition asking the court to quiet title in them to their four-ninths interest in the property. The court found that the Bartaks were the owners of the property through adverse possession and dismissed the Burk heirs' petition with prejudice. The Bartaks obtained title from Marilyn M. Demaray (Marilyn), and her husband, Louis Eugene Demaray (Gene) (collectively the Demarays).

The Burk heirs alleged that deeds purporting to convey John and Barbara's property interests to their mother, Marilyn, were forged. Marilyn died before the hearing.

The trial court found that the Bartaks were entitled to summary judgment based on adverse possession regardless of whether the deeds were forged. We determine that there are genuine issues of material fact whether the deeds were forged and

that the parties' rights cannot be determined until the forgery issue is decided. We reverse, and remand for further proceedings.

BACKGROUND

On March 22, 2000, the Burk heirs filed suit to quiet title against the Demarays, the Bartaks, and all other persons claiming an interest in the property. They alleged that John and Barbara had inherited their interests while they were minors and had never been told of their inheritance. They also alleged that their interests were fraudulently conveyed to Marilyn through forgeries and that the Demarays had then conveyed the property to the Bartaks. They prayed for the court to quiet title in them for their combined four-ninths interest and provide any further relief as equity may require.

Gene filed an answer in which he generally denied the allegations. The Bartaks, in their amended answer and counterclaim, alleged that they were innocent good faith purchasers for value. They also alleged that they had become the owners of the property because they and their predecessors in title had maintained an actual, continuous, notorious, and adverse possession of the real estate for a period of 10 years. Finally, they alleged that the claimed forged deeds had been recorded for more than 22 years before the filing of the petition and that they were therefore entitled to rely upon the validity of the deeds under Neb. Rev. Stat. §§ 76-258, 76-288, and 76-289 (Reissue 1996). They also asked that the court quiet title in them.

The Bartaks moved for summary judgment asserting that they were entitled to judgment as a matter of law under Nebraska's curative statutes and adverse possession. The evidence submitted at that hearing showed the following facts:

John and Barbara are the surviving children of Marilyn and Patrick J. Burk (Patrick). Their sister, Linda LaRue (Linda), died in the 1980's. Patrick died intestate in May 1961. The final decree in the probate proceeding for his estate gave each of his three minor children a two-ninths interest in a quarter section of property that Patrick had acquired in 1959. John was about 9 years old when Patrick died, and Barbara was 4 years old.

In February 1978, two quitclaim deeds were filed with the register of deeds in Holt County. The first deed was signed and

notarized in November 1972 and conveyed Barbara's interests in the property to Marilyn, who was then Marilyn Petersen. Barbara was 19 years old at that time. The second deed was signed and notarized on February 27, 1978, the same day that both of the deeds were recorded. The second deed conveyed the interests of John and Linda and their spouses to Marilyn, who was then Marilyn Demaray. Both conveyances were made "in consideration of LOVE, AFFECTION AND ONE DOLLAR."

At some point after 1978—the deed is not in the record—Marilyn, alone or with Gene, sold the property to Schmiser Farms, Inc. (Schmiser). According to Barbara, Schmiser filed for bankruptcy and deeded the land back to the Demarays. The record does contain a quitclaim deed, dated March 1, 1984, in which Schmiser conveyed the property back to the Demarays for $1. The Bartaks stated in affidavits that in March 1989, the Demarays began leasing the property to them. The Demarays conveyed the property to the Bartaks in a warranty deed for $150,000, which was signed and dated March 28, 1990. The Bartaks made their last payment to Marilyn in 1999 and recorded the deed in April 1999. John and Barbara both testified that they knew that Marilyn had sold the property to the Schmisers and the Bartaks.

In 1999, Marilyn became ill and spent several weeks in the hospital. She needed nursing home care, and in July, while she was still hospitalized, she asked some of her family members to go through her personal papers to look for documentation that she might need. Barbara, Barbara's daughter, and Marilyn's brother went to her home in Grand Island for that purpose. It was during this search that they discovered copies of the quitclaim deeds purporting to convey the children's property interests to Marilyn. Marilyn's brother gave a copy of the deed to John.

John testified that Marilyn had never asked him to convey his ownership interests to her. In October 1999, John went to the courthouse to do research after Marilyn's brother gave him a copy of the deed. He discovered that he, Barbara, and Linda had each received a two-ninths interest in Patrick's property and that the quitclaim deeds had been recorded. The record reflects that a guardian ad litem was appointed for the children in Patrick's probate proceeding. John and Barbara testified, however, that

they had been unaware of the appointment, that no one had told them of their ownership interests, and that they had no knowledge of their interests before July 1999. John stated that until that time, he and Barbara had assumed the property had been left to Marilyn.

Dorothy Sojka, the notary public who notarized the 1972 quitclaim deed purportedly conveying Barbara's interests to Marilyn testified by deposition. Although she did not remember the deed, she remembered that Marilyn and Barbara came into the bank where she worked to have the deed notarized. The notary seal is not clearly legible, but she stated that her seal might not have penetrated. She stated that she had known Marilyn for 30 to 40 years and, therefore, did not check her identity with a driver's license. She admitted that she might not have known Barbara on sight at that time, and she did not state that she asked Barbara for identification.

Florence Ponton, the notary public who notarized the 1978 quitclaim deed, died before this action was commenced. John stated that he had known Florence well because she prepared his tax returns for many years, but he did not know her signature. He did not know of any reason that would account for her notarizing a signature that was not his.

Barbara testified that her signature on the 1972 quitclaim deed was a forgery. John testified that he knew the handwriting of the other people who purportedly signed the 1978 quitclaim deed and that his signature and the other signatures were forgeries. John's ex-wife also testified that her signature and the other signatures on the 1978 deed were forgeries. John and Barbara both believed that Marilyn had forged the deeds.

Neither John nor Barbara confronted Marilyn about the deeds. Barbara testified that she asked Marilyn about her financial status numerous times, but Marilyn would never discuss these matters. John stated that he had not been on speaking terms with Marilyn for 3 to 4 years before her illness. Marilyn died on June 16, 2000. The record does not reflect the content of a will or probate of her estate.

After the hearing, the court rendered its judgment in a written interlocutory order. The court found that the Bartaks conceded that there was a genuine issue of fact whether the 1972 and 1978

quitclaim deeds were forged and that, therefore, they could prevail only if they were entitled to judgment despite any forgeries. The court found that under § 76-288, to extend the chain of title back the required 22 years, the fraud claims had to be considered. Because claims of marketable record title are subject to claims or defects of title based on fraud, the court determined that § 76-288 provided no basis of relief for the Bartaks. The court further found that a forged deed could not be cured under § 76-258 because it was not a "'defect, irregularity or omission.'" The Bartaks have not cross-appealed on these issues.

Finally, the court considered the Bartaks' claim of adverse possession. The court found that the Bartaks were bona fide purchasers for value without notice of the forgeries. The court further found that the Bartaks had satisfied all of the requirements for adverse possession since the time they became owners of the property on March 28, 1990. Because the petition was filed on March 22, 2000, however, the court found that the time of possession was short of the statutory period of 10 years. The court found, however, that the Bartaks were entitled to tack their possession to the Demarays' possession, as their predecessors in title.

Because John and Barbara admitted that they knew Marilyn had sold the property to Schmiser, the court found that the sale constituted an ouster sufficient to put them on notice of Marilyn's hostile possession. Although the deed evidencing the date of the sale to Schmiser was not in the record, the deed conveying the property back to the Demarays on March 1, 1984, was recorded and in the record. The court concluded that John and Barbara were given constructive notice of the hostile character of Marilyn's possession as of that date.

The court found that under Nebraska law, cotenants' ignorance of their property rights would not prevent the statute of limitations from running when they had actual or constructive knowledge of an ouster, in the absence of fraudulent concealment or misrepresentation. The court found that viewed in the light most favorable to the Burk heirs, there was no genuine issue as to any material fact regarding fraudulent concealment or misrepresentation. The court reasoned that because both John and Barbara had attained the age of majority when the alleged forgeries were committed, "whatever duty Marilyn might have owed to a minor

child had terminated. Thus, Marilyn had no duty to disclose the children's ownership interest." Because she had no duty to disclose their ownership interests, the court found that the evidence did not show concealment. The court also found that John and Barbara did not show that Marilyn had made any fraudulent misrepresentations to them regarding their interests. Under these facts, the court concluded that "Nebraska law, through the concept of adverse possession . . . values the defendants' rights over the wrong allegedly done to the plaintiffs."

The court dismissed the petition as to all defendants. After the Bartaks entered a motion to voluntarily dismiss their counterclaim without prejudice, a final order was entered quieting title to the property in the Bartaks. The Burk heirs appealed.

ASSIGNMENTS OF ERROR

The Burk heirs assign, restated and condensed, that the district court erred in (1) determining that the period of possession by the Demarays could be tacked to the period of possession by the Bartaks to satisfy the requirements for adverse possession, (2) finding that there was no evidence of fraudulent concealment by Marilyn because she had no duty to disclose her adult children's inheritance from Patrick, and (3) failing to find that the governing statute of limitations was Neb. Rev. Stat. § 25-207(4) (Reissue 1995) instead of Neb. Rev. Stat. § 25-202 (Reissue 1995).

STANDARD OF REVIEW

[1,2] A quiet title action sounds in equity. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

[3,4] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Reisig v. Allstate Ins. Co., ante* p. 74, 645 N.W.2d 544

(2002). In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

ANALYSIS

The Burk heirs contend that the period of possession by the Demarays could not be tacked to the period of possession by the Bartaks to satisfy the 10-year time requirement for adverse possession. They argue that tacking should not be permitted because the Demarays' possession was predicated upon fraudulent concealment, misappropriation, and forgery.

[5] The Bartaks conceded at the hearing that there were genuine issues of fact whether the signatures were forged. Although only the Burk heirs adduced evidence on the issue of forgery, there is a presumption favoring the validity of notarized deeds which creates an issue of fact to be resolved.

> " '"Public policy forbids that deeds and mortgages of real estate, duly authenticated in the mode pointed out by statute, should be set aside except upon clear and convincing proof that the certificate of acknowledgment is false. The presumption is in favor of the certificate, and the burden is upon the party alleging such a defense to prove it." . . .' "

Gaeth v. Newman, 188 Neb. 756, 766, 199 N.W.2d 396, 403 (1972); *Kucaba v. Kucaba*, 146 Neb. 116, 18 N.W.2d 645 (1945).

[6] The court correctly determined that a forged deed is void and will not pass title for any purpose. See, *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980); *Lindsay v. Palmer*, 58 Neb. 168, 78 N.W. 371 (1899). This is true not only as to the grantee, but also to those who take under the grantee. See *Martin v. Harvey*, 89 Neb. 173, 130 N.W. 1039 (1911) (affirming directed verdict for defendant in ejection action when evidence was sufficient to show forged deed in plaintiff's chain of title). In general, courts hold that a forged deed will not pass title even to an innocent, good faith purchaser for value. See, e.g., *Wutzke v. Bill Reid Painting Service, Inc.*, 151 Cal. App. 3d 36, 198 Cal. Rptr. 418 (1984); *Moore v. Smith-Snagg*, 793 So. 2d 1000 (Fla. App. 2001); *VanderWall v Midkiff*, 166 Mich. App. 668, 421 N.W.2d

263 (1988); *Prater v. Prater*, 208 Miss. 59, 43 So. 2d 582 (1949); *Yin Wu v. Wu*, 288 A.D.2d 104, 733 N.Y.S.2d 45 (2001). See, also, 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property § 82.02[1][e][i] (2002) (forged deeds are an exception to the general rule that good faith purchasers are protected by recording acts from claims of which they have no notice); 23 Am. Jur. 2d *Deeds* §§ 162 and 164 (2002).

The court, however, found that the Bartaks were entitled to summary judgment even if the deeds were forged based on the tacking of the Demaray's possession. But this conclusion is not correct if the deeds were forged, which—in this case—presents a genuine issue of material fact.

[7] The court correctly determined that the Bartaks' period of possession before this action was commenced was 7 days short of the 10-year statutory period. See *Wanha v. Long*, 255 Neb. 849, 587 N.W.2d 531 (1998). The court found, however, that the Bartaks were entitled to tack their possession to the Demarays' possession as their predecessors in title. For the Bartaks to tack their period of possession to the Demarays' possession, the Demarays' possession must have been adverse to John and Barbara also. See *Bartlett v. Kloepping*, 195 Neb. 755, 240 N.W.2d 592 (1976).

The court found that Marilyn's sale of the property to Schmiser constituted an ouster sufficient to put John and Barbara on notice of the hostile character of Marilyn's possession. Thus, the court found that Marilyn's possession was adverse against her adult children as cotenants, from the earliest date in the record evidencing that conveyance. That date was March 1, 1984, when Schmiser deeded the property back to the Demarays. But if Marilyn had forged the deeds, then she obtained no rights to John and Barbara's property interests, and her conveyance to Schmiser could not convey their interests. See *Martin v. Harvey, supra.*

[8] Also, a party claiming title through adverse possession must prove by a preponderance of the evidence that the adverse possessor has been in (1) actual, (2) continuous, (3) exclusive, (4) notorious, and (5) adverse possession *under a claim of ownership* for the statutory period of 10 years. *Wanha v. Long, supra.* Marilyn could not assert a claim of ownership against her children if she had defrauded them of their property interests.

[9,10] A possessor may be mistaken in a claim of ownership. *McCain v. Cook*, 184 Neb. 147, 165 N.W.2d 734 (1969). Title may be acquired by adverse possession though the claim of ownership was invalid and the occupant believed he was asserting only legal rights. See *Wanha v. Long, supra*. But "it is the visible and exclusive possession with intention to possess the land occupied *under the belief that it belongs to him* that constitutes its adverse character." (Emphasis supplied.) *Id.* at 860, 587 N.W.2d at 540. If the possessor commits fraud against the true owner to obtain title, he or she has no belief that the property belongs to him or her. Thus, the possessor has no claim of right or ownership against the true owner unless the owner has reason to know of the possessor's malfeasance and fails to take action to protect his or her interests. See *Bell v. Dingwell*, 91 Neb. 699, 136 N.W. 1128 (1912) (requiring mother and her husband to account to her adult children for fraudulently obtaining deed in her name only and omitting children's interests in their deceased father's estate when children did not discover the fraud until 4 years after the youngest child reached age of majority and despite mother's claim of adverse possession).

Further, if Marilyn forged the deeds, her fraudulent conduct would result in the imposition of a constructive trust. See *Waite v. Cornette*, 259 Neb. 850, 856, 612 N.W.2d 905, 911 (2000) ("constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property"). Cotenancy alone does not create a fiduciary relationship as to the property owned by the cotenants; but if one cotenant has possession of property or funds belonging to the other cotenant, he or she becomes trustee thereof and stands in fiduciary relationship to a cotenant with respect thereto to the extent of the interest of the cotenant who may compel an accounting. *Hafeman v. Gem Oil Co.*, 163 Neb. 438, 80 N.W.2d 139 (1956).

As a constructive trustee, she could not possess the property adverse to her children's interests unless they had reason to know of her conduct and failed to take action to protect their interests. See *Waite v. Cornette, supra*. See, also, *Adams v. Adams*, 512 So. 2d 1150 (Fla. App. 1987) (cotenants' fraudulent scheme to obtain title through tax sale resulted in constructive trust for other

cotenants); *Tanner v. Tanner*, 698 S.W.2d 342 (Tenn. 1985) (father who fraudulently obtained deed to property he had previously conveyed to his ex-wife in dissolution for benefit of his children became constructive trustee and could not hold adverse to his children's interests despite his open declaration to do so). Compare *Giacomini v. Giacomini*, 163 Neb. 798, 807, 81 N.W.2d 194, 199 (1957) (" 'a personal representative who takes possession of property in his fiduciary capacity is generally estopped to deny the title of his decedent or to set up an adverse title to the injury of those beneficially interested in the estate' ").

[11] Proof of Marilyn's actual fraud would negate the adverse character of her possession against her children. Thus, the Bartaks could not tack their period of possession to the Demarays' possession.

In light of this holding, we need not discuss the Burk heirs' remaining assignments of error.

CONCLUSION

We conclude that the district court erred in granting summary judgment to the Bartaks on their claim of adverse possession when the Bartaks could not satisfy the statutory period for adverse possession without tacking to the Demarays' possession. Because genuine issues of material fact exist on whether the quitclaim deeds filed with the register of deeds in 1978 were forged and the court made no findings regarding the forgeries, we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JUDITH K. COLLINS, PERSONAL REPRESENTATIVE OF THE ESTATE OF EDWIN P. HENNINGS, APPELLANT, V. STATE OF NEBRASKA, APPELLEE.

646 N.W.2d 618

Filed July 5, 2002. No. S-01-401.

1. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.

2. **Tort Claims Act: Time.** The reasoning of *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), and *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), concerning the time to file an action after the claimant has withdrawn the claim from the State Claims Board does not apply to claims that were decided by the State Claims Board.
3. **Tort Claims Act: Public Officers and Employees: Limitations of Actions: Notice.** Under Neb. Rev. Stat. §§ 81-8,213 and 81-8,227(1) (Reissue 1996), a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within 2 years as provided by § 81-8,227(1), has 6 months to file suit from the date the board gives written notice to the claimant as to the final disposition of the claim.

Appeal from the District Court for Hall County: TERESA K. LUTHER, Judge. Reversed and remanded for further proceedings.

David Geier for appellant.

Don Stenberg, Attorney General, and Vicki L. Boone-Lawson for appellee.

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

CONNOLLY, J.

This case involves the interplay between Neb. Rev. Stat. §§ 81-8,213 and 81-8,227(1) (Reissue 1996). These statutes pertain to the time in which claims must be filed with the State Claims Board and the effect of the filing of a claim on the 2-year statute of limitations for filing an action in the district court.

We hold that when a claimant files a claim with the claims board within 2 years from the date the claim accrued and allows the claims board to reach a determination on the claim, the claimant has 6 months to file suit from the date of mailing of notice as to the final disposition of the claim. To the extent *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), and *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), indicate a different rule, they are overruled.

BACKGROUND

On November 29, 2000, Judith K. Collins, the appellant and personal representative of the estate of Edwin P. Hennings, filed a petition against the appellee, the State of Nebraska. She alleged that on November 7, 1997, Hennings died as a result of

negligence of the State. She alleged that on November 1, 1999, she filed a claim with the State Claims Board and that the claims board rejected the claim on June 21, 2000.

The State filed a demurrer alleging that the court lacked subject-matter jurisdiction and that the petition failed to state sufficient facts to constitute a cause of action. The district court sustained the demurrer, holding that the action was barred by the 2-year statute of limitations. The court found that the time period to file an action was not extended when it was filed within 6 months of the denial of the claim by the claims board, but more than 6 months after the claim could have been withdrawn. The court relied on this court's decision in *Hullinger*. In *Hullinger*, we held that when a claim has been withdrawn from the State Claims Board, the time in which to file a petition runs from the date the claim could have been withdrawn instead of when it was actually withdrawn. The court applied the reasoning of *Hullinger* and dismissed the petition with leave to amend. Collins filed an amended petition, and the State filed a demurrer. The district court sustained the demurrer and dismissed the action. Collins appeals.

ASSIGNMENT OF ERROR

Collins assigns, rephrased, that the district court erred in dismissing her petition.

STANDARD OF REVIEW

[1] Statutory interpretation is a matter of law, and an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *Ottaco, Inc. v. McHugh*, 263 Neb. 489, 640 N.W.2d 662 (2002).

ANALYSIS

Collins contends that when a claim filed with the State Claims Board is not actually withdrawn, the time period to file suit in district court is within 6 months from the date the claims board denies the claim. She argues that our decisions in *Hullinger v. Board of Regents, supra*, and *Coleman v. Chadron State College, supra*, are distinguishable because those cases involved claims that had been withdrawn from the State Claims Board. In the alternative, she argues that *Hullinger* and *Coleman* should be reversed.

Section 81-8,213 provides:

> No suit shall be permitted under the State Tort Claims Act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under such act.

Section 81-8,227(1) provides:

> Every tort claim permitted under the State Tort Claims Act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by such act. The time to begin suit under such act shall be extended for a period of six months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim or from the date of withdrawal of the claim from the board under section 81-8,213 if the time to begin suit would otherwise expire before the end of such period.

In *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), we first addressed the interplay between §§ 81-8,213 and 81-8,227. Coleman filed a claim with the State Claims Board in the 22d month after his claim had accrued. Because § 81-8,213 requires that a claim must remain with the State Claims Board at least 6 months before the claim can be withdrawn, Coleman was prevented from filing suit before the 2-year statute of limitations ran. Coleman withdrew the claim approximately 31 months after it had accrued. The district court granted Chadron State College's motion for summary judgment, concluding that the action was time barred.

On appeal, we looked at the legislative history and determined that the Legislature intended the period of limitation for filing an action in court under the State Tort Claims Act to be 2 years. We then noted that under § 81-8,213, a claim had to be filed with the State Claims Board but could not be withdrawn for 6 months. Thus, any claim filed over 18 months after the cause of action accrued could still be pending before the State Claims Board when the 2-year period for filing in district court had run. Interpreting §§ 81-8,213 and 81-8,227, we held that

> a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within the 2-year statute of limitations, has 6 months from the first day on which the claim may be withdrawn from the claims board in which to begin suit.

237 Neb. at 501, 466 N.W.2d at 533. We then stated:

> This interpretation ensures that effect is given to the legislative intent embodied in §§ 81-8,213 and 81-8,227 and that both are applied in a consistent and commonsense fashion. Furthermore, fourth-quarter claimants are given the same opportunity as those who file earlier to withdraw their claim and file suit within 6 months thereafter.

Id.

In *Hullinger v. Board of Regents*, 249 Neb. 868, 546 N.W.2d 779 (1996), the claimant filed his claim with the State Claims Board 2 days before the 2-year time period ran. Over a year later, the claims board notified him that it would consider his claim. He then withdrew the claim and filed suit. The district court determined that the action was time barred. On appeal, Hullinger argued that § 81-2,213 extended his time to file in district court by 6 months from the date that his claim was withdrawn. We reaffirmed the interpretation set out in *Coleman* and disagreed with Hullinger's argument, stating:

> The interpretation Hullinger urges would allow a claimant to file a claim with the claims board just before 2 years after the accrual of the cause of action, wait however long until just before final disposition of the claim by the claims board to withdraw the claim, and then receive an additional 6 months in which to file suit in the district court.

249 Neb. at 873, 546 N.W.2d at 783.

Here, Collins filed her claim with the State Claims Board 6 days before the 2-year limitation period ran. May 1, 2000, was the date at which Collins could withdraw her claim, and November 1, 2000, was 6 months from that date. Collins, however, chose to allow the claims board to reach a determination. The claim was rejected on June 21, 2000, and December 21, 2000, was 6 months from that date. Collins filed her action in district court on November 29, 2000.

Under a strict interpretation of the rule set forth in *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991), and *Hullinger v. Board of Regents, supra*, Collins had 6 months from the first day on which her claim could have been withdrawn from the claims board in which to file suit. She failed to file suit within that time period. Collins contends, however, that her case is distinguished from *Coleman* and *Hullinger* because she did not withdraw her claim from the board and instead waited until her claim was denied. We agree.

In *Coleman* and *Hullinger*, our focus was on situations in which a claimant chose to withdraw a claim from the claims board. In particular, in *Hullinger*, we expressed concern that a claimant could allow a claim to remain undecided by the board for as long as possible as a way for the claimant to delay the filing of an action in district court. This reasoning does not apply when a claim has been decided by the claims board. When a claimant allows the claims board to reach a decision, any delay in the process is beyond the control of the claimant.

[2,3] Under the plain language of § 81-8,227, a claimant has 6 months to file suit after notice of the denial of the claim is mailed by the claims board. The reasoning of *Coleman* and *Hullinger* does not apply to claims that are decided by the claims board. Accordingly, we hold that a claimant who files a tort claim with the Risk Manager of the State Claims Board 18 months or more after his or her claim has accrued, but within 2 years as provided by § 81-8,227(1), has 6 months to file suit from the date the board gives written notice to the claimant as to the final disposition of the claim. To the extent *Coleman* or *Hullinger* indicate a different rule regarding claims that are decided by the claims board, they are overruled. Because Collins filed suit within 6 months after the claims board denied her claim, her suit was not time barred. Accordingly we reverse, and remand for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

MATILDE LOPEZ, APPELLEE, V. IBP, INC., APPELLANT.

646 N.W.2d 628

Filed July 5, 2002. No. S-01-1281.

1. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law.
2. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
3. **Workers' Compensation: Judgments: Time: Appeal and Error.** Neb. Rev. Stat. § 48-170 (Cum. Supp. 2000) is clear that any party who wishes to appeal the order of a single judge of the Nebraska Workers' Compensation Court shall file an application for rehearing before a three-judge panel within 14 days after the date of the single judge's order.
4. **Workers' Compensation: Final Orders: Time.** If a claimant does not file an application for a rehearing with the compensation court within 14 days after the date of the single judge's order, the order becomes conclusive and final.
5. **Negligence: Public Officers and Employees: Time: Appeal and Error.** The Nebraska Supreme Court has recognized an exception that allows an appellate court to consider an appeal filed after the statutorily prescribed time for appeal where the appellant was free from neglect and was prevented from having the appeal filed in the appellate court within the statutory period through the neglect or failure of the proper court official.
6. **Negligence: Principal and Agent: Public Officers and Employees: Appeal and Error.** If the negligence of the appellant or his agent concurs with that of a court official, it precludes an appeal.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Terry R. Wittler, of Cline, Williams, Wright, Johnson & Oldfather, L.L.P., and John M. Guthery, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Todd Bennett, of Rehm Bennett Law Firm, for appellee.

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

HENDRY, C.J.

INTRODUCTION

IBP, inc., appeals from the order of a three-judge review panel of the Nebraska Workers' Compensation Court, which dismissed IBP's application for review for lack of jurisdiction because it was not timely filed.

FACTUAL BACKGROUND

On June 3, 1999, Matilde Lopez filed a petition against IBP in the Workers' Compensation Court. A hearing was held, and on October 26, 2000, a single judge of the Workers' Compensation Court entered an award in favor of Lopez. IBP had until November 9 to file its application for review of the October 26 order because Neb. Rev. Stat. § 48-170 (Cum. Supp. 2000) provides, "Every order and award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within fourteen days after the date of entry of the order or award."

On November 8, 2000, IBP's counsel sent, from Dakota City, Nebraska, IBP's application for review via United Parcel Service (UPS) next day air delivery. IBP directed UPS to deliver the document to " 'State of Nebraska, Workers' Compensation Court, State Capitol Building, Lincoln, Nebraska 68509-8908.' "

As of March 1, 2000, the clerk's office for the Workers' Compensation Court had been temporarily moved from the State Capitol Building to the Old Federal Building located at 129 North 10th Street in Lincoln, Nebraska, because the offices in the State Capitol Building were undergoing renovation. When UPS attempted to deliver IBP's application for review to the State Capitol at 9:53 a.m. on November 9, UPS was informed that the Workers' Compensation Court had been relocated. UPS did not determine the court's relocated address until 5:29 p.m. on November 9 and did not deliver IBP's application for review that day. UPS was not able to deliver IBP's application on Friday, November 10, because state offices were closed in observance of Veterans' Day, a legal holiday. It was not until Monday, November 13, that UPS delivered IBP's application for review to the clerk's office of the Workers' Compensation Court at its relocated address. The application was received and file stamped that same day.

On November 22, 2000, IBP filed a "Defendant's Motion to Accept Appeal as Timely" and Lopez filed a "Motion to Quash Appeal." On November 27, a hearing was held by a single judge of the Workers' Compensation Court regarding the motions filed by IBP and Lopez. On December 5, the single judge sustained

Lopez' motion and dismissed IBP's application for review for lack of jurisdiction. The judge determined that IBP's application for review was not filed within 14 days of the entry of the award as required by § 48-170.

On December 19, 2000, IBP appealed the December 5 order, arguing that the single judge erred in finding that the court did not have jurisdiction and in failing to refer the motions filed by IBP and Lopez to a three-judge review panel for its decision. Additionally, on January 2, 2001, IBP filed a "'protective appeal'" to the Nebraska Court of Appeals "because the [December 5] order purported to dismiss an application for review by a 3 member panel and was therefore arguably a final, appealable order." Brief for appellant at 6. On February 20, the Court of Appeals dismissed the appeal for lack of jurisdiction pursuant to Neb. Ct. R. of Prac. 7A(2) (rev. 2000). See *Lopez v. IBP, inc.*, 9 Neb. App. lxiv (No. A-01-108, Feb. 20, 2001).

Thereafter, on May 22, 2001, a hearing was held before a three-judge review panel regarding the December 5, 2000, order. On June 1, 2001, the review panel determined that the single judge lacked jurisdiction to consider IBP's and Lopez' motions and to enter the December 5, 2000, order. The panel concluded that the motions should receive a hearing before a three-judge review panel.

A hearing was held before a three-judge review panel on August 29, 2001. The sole evidence presented at the hearing was exhibit 1, a stipulation by the parties as to the relevant facts. Exhibit 1 had several exhibits attached to it as follows: (1) a copy of the UPS shipping receipt dated November 8, 2000, for IBP's application for review, (2) a copy of an envelope and letter sent from the Workers' Compensation Court to IBP's counsel, (3) a copy of the relocation notice from the Workers' Compensation Court that was included with every mailing from the clerk of that court for several weeks before and after the court's relocation in March 2000, (4) copies of the call for the Workers' Compensation Court from March 22, 2000, through January 24, 2001, (5) a copy of the relocation notice which was posted on the Workers' Compensation Court Internet Web site, (6) a copy of the UPS tracking record for IBP's application for review, and (7) copies of a preface to the Nebraska Workers'

Compensation Act and Workers' Comp. Ct. R. of Proc. 1 and 2 (2000). On October 16, 2001, the review panel entered its order determining that it did not have jurisdiction over IBP's application for review because it was not timely filed. The panel dismissed IBP's appeal.

On November 2, 2001, IBP appealed to the Court of Appeals. We moved this case to our docket pursuant to our power to regulate the Court of Appeals' caseload and that of this court. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENT OF ERROR

IBP assigns, rephrased and summarized, that the review panel of the Workers' Compensation Court erred in determining that IBP's delivery of its application for review to the State Capitol Building on November 9, 2000, was not sufficient to confer jurisdiction upon the review panel.

STANDARD OF REVIEW

[1] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law. *Douglas Cty. Bd. of Comrs. v. Civil Serv. Comm.*, 263 Neb. 544, 641 N.W.2d 55 (2002); *Hagelstein v. Swift-Eckrich*, 257 Neb. 312, 597 N.W.2d 394 (1999).

[2] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001).

ANALYSIS

IBP asserts that the three-judge review panel erred in dismissing IBP's appeal for lack of jurisdiction based on its determination that IBP's application for review was untimely filed with the clerk of the Workers' Compensation Court. IBP claims that delivery of its application for review to the State Capitol on November 9, 2000, would have been sufficient to confer jurisdiction upon the Workers' Compensation Court if the clerk of the court had fulfilled his or her statutory duty to have the clerk's office located in the State Capitol Building. IBP states, "Under the undisputed facts, it is clear that this appeal would have been timely filed but

for the fact that the Clerk was not present at the office's official location." Brief for appellant at 12.

In support of its argument, IBP relies primarily on § 48-170 and Neb. Rev. Stat. § 48-167 (Reissue 1998). Section 48-170 states, "Every order and award of a single judge of the Nebraska Workers' Compensation Court shall be binding upon each party at interest unless an application for review has been filed with the compensation court within fourteen days after the date of entry of the order or award." Section 48-167 states, "The Nebraska Workers' Compensation Court shall keep and maintain, in its office at the State Capitol, full and true record of all proceedings, documents, or papers ordered filed, rules and regulations, and decisions or orders." In addition, IBP cites Workers' Compensation Court rules of procedure 1 and 2 and a preface to the Nebraska Workers' Compensation Act. Rule 1 states:

> The office of the Nebraska Workers' Compensation Court shall be deemed to be in the State Capitol Building, Lincoln, Nebraska.
>
> Hearings or review hearings in compensation cases may be held at any other place within the State as provided by statute, but no such other place shall be deemed to be an office or branch office of the court.

Rule 2 states, in relevant part: "No paper or pleading regarding a proceeding of the Nebraska Workers' Compensation Court shall be deemed to be filed with the court until the same has been received and recorded by the clerk of said court at the office of the court in Lincoln."

The preface, as contained in the parties' stipulation of facts, states in relevant part:

> Attention is called to the fact that the situs of the compensation court is in the Capitol building at Lincoln, Nebraska, and all filings of every kind and nature must be filed with the court at that place. The date of filing is the date on which the filings are received by the clerk. (Dolner v. Peter Kiewit & Sons Co., 143 Neb. 384, 9 N.W.2d 483.)

IBP argues that taken together, §§ 48-167 and 48-170 and the Workers' Compensation Court rules of procedure make it clear that all applications for review must be filed in the clerk's office of the Workers' Compensation Court in the State Capitol Building

within 14 days of the entry of the award. IBP maintains that it complied with these provisions when it presented an application for review at the State Capitol on November 9, 2000. It argues that its application should not be considered untimely when the delay in filing resulted from the clerk's failure to be at his or her statutorily required location during normal business hours.

[3,4] Section 48-170 is clear that any party who wishes to appeal the order of a single judge of the Nebraska Workers' Compensation Court shall file an application for rehearing before a three-judge panel within 14 days after the date of the single judge's order. See *Schmidt v. Shoftstall Alfalfa*, 239 Neb. 248, 475 N.W.2d 523 (1991). If a claimant does not file an application for a rehearing with the compensation court within 14 days after the date of the single judge's order, the order becomes conclusive and final. *Id.*

[5] This court has recognized an exception that allows an appellate court to consider an appeal filed after the statutorily prescribed time for appeal. This exception was discussed in *Larson v. Wegner*, 120 Neb. 449, 451-52, 233 N.W. 253, 254 (1930), in which we stated:

> The only exception that has been made to the above rule and the only excuse which has been held sufficient to entitle the appellant to a review of the judgment of the lower court in this state has been *where the appellant was free from neglect* and was prevented from having his appeal docketed by the appellate court within the statutory period through the neglect or failure of the proper officer to prepare the transcript. . . .
>
> . . . The rule applicable in these cases may be stated thus: If the delay in filing the transcript in the appellate court is *caused without fault of the appellant solely by the act or omission of the court official charged with a duty* in connection with the preparation and filing thereof, it may be filed after the expiration of the prescribed time. *However, if the negligence of the appellant or his agent concurs with that of such a court official, it precludes an appeal.*

(Emphasis supplied.) See, also, *Dolner v. Peter Kiewit & Sons Co.*, 143 Neb. 384, 386, 9 N.W.2d 483, 484 (1943) (workers' compensation case where "[t]he failure to make a timely filing

was plaintiff's, as no negligence of the officials or failure to perform any duty [was] shown").

We must conclude that Lopez' award became "binding upon each party at interest" on November 9, 2000, pursuant to § 48-170, unless IBP can establish that (1) IBP was "free from neglect" and (2) IBP was "prevented from having [its] appeal docketed by the appellate court within the statutory period through the neglect or failure of the proper officer" whose duty it was to ensure that the clerk's office of the Workers' Compensation Court was located in the State Capitol Building. See *Larson*, 120 Neb. at 451, 233 N.W. at 254.

IBP'S NEGLIGENCE

In determining whether IBP was "free from neglect," we are guided by the general rule of law set forth in *Larson*. In *Larson*, the appellant chose to send a transcript for filing in Lincoln through the U.S. Postal Service. The appellant mailed the transcript on October 17, 1930, from Creighton, Nebraska, anticipating that it would arrive the same day, which was 1 day before the final day of the statutory appeal period. However, the transcript did not arrive at the clerk's office until October 20.

Although the court in *Larson* was not squarely presented with the alleged negligence of both the appellant and the court official, as in this case, the court discussed the effect of an agent's negligence in those situations where an appellant's appeal is untimely filed. The court stated:

> The appellant selected the United States mail for the purpose of transporting the transcript from Creighton, Nebraska, to the office of the clerk of the supreme court in Lincoln, Nebraska. . . . The appellant has thus selected the United States mail as his agent to transport and deliver the transcript to the office of the clerk of the supreme court. The agent was selected by the appellant, and the negligence of the agent, if any, was the negligence of the appellant.

Larson v. Wegner, 120 Neb. 449, 452-53, 233 N.W. 253, 254-55 (1930). The court found that the appellant's conduct did not qualify for the exception and denied the appellant's motion requesting the court to consider his appeal timely.

The present case is similar to *Larson* in that both IBP and the appellant in *Larson* selected agents to file documents with a

court. IBP selected UPS as its agent to file its application for review. The application needed to be filed by the end of the business day on November 9, 2000, and UPS arrived at the State Capitol Building at 9:53 a.m. that day. At that time, UPS was informed that the clerk's office of the Workers' Compensation Court had relocated. UPS still had the entire day to locate the clerk's office and file the application on time. However, UPS did not discover the location of the clerk's office until 5:29 p.m. As a result, IBP's application for review was not timely filed.

IBP's situation also resembles *Drier v. Knowles Vans, Inc.*, 144 Neb. 619, 14 N.W.2d 222 (1944), another case in which an appellant similarly selected an agent for filing. In *Drier*, an appeal from the justice of the peace court was dismissed because the appellant's required bond for appeal was not filed on time. The appellant's attorney, who could not find the specific street address for the justice of the peace, had chosen to mail the bond 3 days before the filing deadline to " 'Judge Woolsey, Justice of the Peace, Lancaster County, Lincoln, Nebraska.' " *Id.* at 621, 14 N.W.2d at 224. According to the appellant, the "postal authorities first delivered [the bond] to the wrong address and finally to the justice on September 14," 1 day after the filing deadline. *Id.* The appellant argued, inter alia, that the postal authorities were at fault and that the appeal should not be deemed untimely. This court determined that the postal authorities' actions did not excuse the appellant's untimely filed bond, stating, "Having so selected his agent, [the appellant] placed the burden upon that agent to search out and find the justice in Lincoln, Nebraska. The agent performed the task, but too late. The delay here was occasioned by the [appellant's] laches in proceeding as he did." *Id.* at 623, 14 N.W.2d at 225.

We recognize that *Larson* and *Drier* involved the filing of a transcript and bond, respectively, while the present case involves the filing of an application for review. However, the same principles apply equally in each situation.

We determine that in the same way the appellants in *Larson* and *Drier* were not free from neglect, neither was IBP, through its agent, UPS. The record simply does not disclose any reason why, despite having knowledge of the court's relocation at 9:53 a.m., well prior to the close of the court's business day, IBP's

agent could not have located the clerk's office and timely filed the application. In making this determination, we note from the exhibits attached to the parties' stipulation it is clear that the office telephone numbers for the Workers' Compensation Court remained unchanged despite the court's relocation.

In addition to the actions of IBP's agent as discussed above, the stipulation of facts before us shows that for several weeks "before and after the relocation" on March 1, 2000, a "Notice of Relocation" of the Workers' Compensation Court's State Capitol Building offices was "included with every mailing from the Clerk of the Court." This "Notice" clearly stated: "Effective March 1, 2000, the Nebraska Workers' Compensation Court's State Capitol Offices, located on the twelfth and thirteenth floors, will be relocated to the old Federal Courthouse, 129 North 10th Street, Lincoln, Nebraska. Office phone numbers will remain the same." The "Notice" also provided specific instructions for "**DELIVERIES**": "When a physical location address is required (FedX, *UPS*, deliveries, etc.) please use: Nebraska Workers' Compensation Court 129 North 10th Street, Suite 300 Lincoln, NE, 68508." (Emphasis supplied.) The Internet Web site of the Workers' Compensation Court also included a notice "For Immediate Release" dated "02/10/00" which contained the same relocation information and provided identical "UPS" delivery instructions.

The stipulation further shows that the Workers' Compensation Court had been at its relocated address for 8 months 8 days before IBP's attempted filing. During this time, as the stipulation demonstrates, the written call of the Workers' Compensation Court, which clearly identified the new location of the clerk's office, included cases involving IBP on May 24 and August 30, 2000, months prior to November 9, 2000.

For these reasons, we cannot conclude that the delay in filing IBP's application for review was "caused without fault of [IBP and] solely by the act or omission of the court official." See *Larson v. Wegner*, 120 Neb. 449, 452, 233 N.W. 253, 254 (1930). We determine that IBP was not "free from neglect" as required under *Larson* for a court to consider an untimely filed appeal.

Relocation of Clerk's Office

[6] Since we determine that IBP was not "free from neglect," it is unnecessary for us to address IBP's assertion that the clerk

of the Workers' Compensation Court was negligent in relocating the clerk's office in violation of § 48-167. Even assuming the clerk was negligent, "if the negligence of the appellant or his agent concurs with that of such a court official, it precludes an appeal." *Larson*, 120 Neb. at 452, 233 N.W. at 254.

CONCLUSION

We determine that IBP does not qualify for the exception that would allow the Workers' Compensation Court to consider an application for review filed after the prescribed time for appeal in § 48-170. Accordingly, the review panel's order dismissing IBP's appeal for lack of jurisdiction is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

GONZALO VEGA, APPELLANT, V. IOWA BEEF PROCESSORS, INC., APPELLEE.

646 N.W.2d 643

Filed July 12, 2002. No. S-01-141.

1. **Workers' Compensation: Appeal and Error.** An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award.
2. **Statutes.** The meaning of a statute is a question of law.
3. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
4. **Workers' Compensation.** The workers' compensation statutes do not prohibit a worker from concurrently receiving statutory benefits for separate injuries arising out of separate accidents, so long as the combined payments do not exceed the maximum weekly rate allowed by Neb. Rev. Stat. § 48-121.01 (Reissue 1998).
5. ____. A worker may not simultaneously receive benefits for temporary total disability during vocational rehabilitation and benefits for a whole body permanent partial disability (i.e., loss of earning power) arising out of the same injury.
6. ____. There is no prohibition in the workers' compensation statutes, other than the statutory maximum set forth in Neb. Rev. Stat. § 48-121.01 (Reissue 1998), to prevent an injured worker from concurrently being paid permanent partial disability benefits arising out of a prior accident and temporary total disability benefits as a result of a subsequent injury.

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

Joseph C. Dowding, of Dowding, Dowding & Dowding, for appellant.

Nicole M. Mailahn, of Jacobsen, Orr, Nelson, Wright & Lindstrom, P.C., for appellee.

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

GERRARD, J.

FACTUAL AND PROCEDURAL BACKGROUND

Gonzalo Vega, the appellant, suffered injuries as a result of accidents arising out of and in the course of his employment with Iowa Beef Processors, Inc. (IBP). Vega suffered injuries to his right shoulder, right knee, left elbow, and lower back in four separate accidents during 1994 and 1996. In an award entered October 8, 1998, and an order nunc pro tunc entered October 19, 1998, the single judge of the Nebraska Workers' Compensation Court found as follows:

1. Vega injured his right shoulder on September 19, 1994, while "pulling fat" and experienced a 10-percent permanent functional impairment of his right arm as a result of the accident;

2. Vega injured his right knee on January 26, 1996, while kneeling down on a metal grate and experienced a 30-percent permanent functional impairment of his right leg as a result of the accident;

3. Vega injured his left elbow on March 4, 1996, while "pulling fat" and experienced a 6-percent permanent functional impairment of his left arm as a result of the accident; and

4. Vega injured his lower back on March 14, 1996, as a result of "twisting and pulling on the production line" and experienced a 50-percent loss of earning capacity for impairment to the body as a whole as a result of that accident.

As a result of the court's finding three compensable injuries to scheduled members (i.e., shoulder, knee, and elbow), as well as a 50-percent loss of earning capacity for impairment to the body as a whole regarding the back injury, the single judge

ordered IBP to pay Vega permanent partial disability benefits for each of the injuries, medical expenses, waiting-time penalties, attorney fees, and interest. In addition, the single judge approved vocational rehabilitation services for Vega and ordered the payment of temporary total disability benefits during the period of vocational rehabilitation. Vega was enrolled in classes pursuant to the vocational rehabilitation plan from February 16, 1998, through January 8, 1999.

On February 18, 1999, the parties stipulated that there was $48,654.77 due and owing on the award of October 8, 1998. The parties agreed, in the stipulation, that "[t]he issue before the Court is whether or not the defendants are entitled to credit, against amounts due and owing per [the October 8, 1998,] Award, for temporary total disability paid during vocational rehabilitation, starting on 2/16/98 through the current date."

On January 5, 2000, after some intervening proceedings that are not relevant to this appeal, Vega filed a motion for waiting-time penalties, attorney fees, and interest. Vega alleged that the award of October 8, 1998, was then final and that IBP continued to owe Vega $10,990.87 in past-due benefits.

In an order entered June 19, 2000, the single judge of the Workers' Compensation Court agreed with Vega. The single judge found that IBP had paid a lump sum of past-due benefits, but had taken credit for temporary total disability benefits paid while Vega was engaged in vocational rehabilitation. The court concluded that IBP's obligation to pay temporary total disability benefits during Vega's vocational rehabilitation was separate and independent of its obligation to pay permanent partial disability benefits awarded at the original hearing. Because IBP could not take credit for the temporary total disability benefits paid during Vega's vocational rehabilitation, the single judge determined that IBP still owed Vega $10,990.87. The court ordered that this amount be paid, as well as $5,495.44 in waiting-time penalties and interest, and awarded Vega $1,800 in attorney fees.

The single judge, in confirming the parties' calculations of the total amount owed pursuant to the October 8, 1998, award, also engaged in a discussion whether certain permanent partial disability benefits could be "stack[ed]" onto temporary total disability benefits up to the statutory maximum set forth in Neb. Rev. Stat.

§ 48-121.01 (Reissue 1998). The single judge stated that such benefits could be stacked up to the maximum rate, which was $409 per week in this case, but that benefits exceeding that amount could be deferred until after temporary total disability benefits were exhausted. See *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998). The single judge determined that $8,237.80 in permanent partial disability benefits should have been paid to Vega concurrently with the temporary total disability benefits he received during vocational rehabilitation and that any other suspended benefits should have been paid by the time that IBP presented Vega with the lump-sum payment of past-due benefits. Thus, the single judge concluded that at the time of the lump-sum payment, all the benefits awarded in the October 8, 1998, award were due and owing, and entered a further award.

IBP filed an application for review, arguing that the single judge had erred in concluding that IBP was not entitled to credit for the temporary total disability benefits paid while Vega was engaged in vocational rehabilitation. The review panel of the Workers' Compensation Court reversed the judgment of the single judge, finding that the single judge had erred in stacking Vega's permanent partial disability benefits and temporary total disability benefits up to the statutory maximum set forth in § 48-121.01 when determining the amount of benefits that were past due at the time of IBP's lump-sum payment to Vega. The review panel stated that "[i]f the trial court is correct in that [§] 48-121.01 and $409.00 is the appropriate amount, then the figures set forth in the further award of June 19, 2000, are correct and should be affirmed." The review panel concluded, however, that the appropriate limitation on Vega's total benefits was 66⅔ percent of Vega's wages at the time of injury, as set forth in Neb. Rev. Stat. § 48-121(1) (Reissue 1998). Since the single judge, according to the review panel, based his calculations on an erroneous assumption regarding the amount that was past due at the time of the lump-sum payment, the review panel reversed and dismissed the further award entered on June 19. Vega appeals.

ASSIGNMENT OF ERROR

Vega assigns, consolidated and restated, that the review panel of the Workers' Compensation Court erred in determining

that a worker entitled to receive both temporary total disability and permanent partial disability benefits cannot receive those benefits concurrently up to the maximum weekly rate set forth in § 48-121.01.

STANDARD OF REVIEW

[1] An appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Schwan's Sales Enters. v. Hitz*, 263 Neb. 327, 640 N.W.2d 15 (2002).

[2,3] The meaning of a statute is a question of law. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002).

ANALYSIS

[4,5] Before addressing the issue in this case, it is helpful to discuss two established principles in order to narrow the focus of our inquiry. We have long recognized that the workers' compensation statutes do not prohibit a worker from concurrently receiving statutory benefits for *separate injuries* arising out of *separate accidents*, so long as the combined payments do not exceed the maximum weekly rate allowed by statute. See, *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998); *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992); *Hansen v. Paxton & Vierling Iron Works*, 138 Neb. 589, 293 N.W. 415 (1940); *Peterson v. Borden's Produce Co.*, 125 Neb. 404, 250 N.W. 240 (1933); *Nelson v. Service Oil Co.*, 121 Neb. 762, 238 N.W. 525 (1931). The reasoning is that a worker should not be prohibited from receiving benefits for a current injury merely because that worker is receiving unrelated compensation for a separate injury to a separate part of the worker's body from a previous accident. See *Hansen, supra*. However, it is equally well settled that a worker may not simultaneously receive benefits for

temporary total disability during vocational rehabilitation and benefits for a whole body permanent partial disability (i.e., loss of earning power) arising out of the *same injury*. See, *Gibson v. Kurt Mfg.*, 255 Neb. 255, 583 N.W.2d 767 (1998); *Bindrum v. Foote & Davies*, 235 Neb. 903, 457 N.W.2d 828 (1990); *Thom v. Lutheran Medical Center*, 226 Neb. 737, 414 N.W.2d 810 (1987). This is because the effort at vocational rehabilitation is aimed at reducing the loss of earning power in a whole body permanent partial disability situation. See *Thom, supra*.

In the instant case, both of the above principles are in play, but neither the parties nor the Workers' Compensation Court articulated which of the particular permanent partial disability benefits could be paid concurrently with the benefits for temporary total disability during Vega's vocational rehabilitation. In other words, Vega was entitled to receive permanent partial disability payments for each of the three scheduled member injuries simultaneously with the temporary total disability payments during vocational rehabilitation (i.e., separate injuries to separate body parts from unrelated prior accidents)—so long as the combined payments did not exceed the maximum weekly rate allowed by statute. On the other hand, the permanent partial indemnity payments for the 50-percent loss of earning capacity (back injury) would have properly been suspended during the time that Vega received temporary total disability benefits for vocational rehabilitation. It should be noted that even though the parties did not draw such a distinction in the court below, the record reflects that all benefits set forth in the October 8, 1998, award were due and owing at the time of the lump-sum payment, if the single judge's interpretation of § 48-121.01 is correct.

With that in mind, we confine our analysis to the sole issue presented by the parties in this appeal: whether the single judge was correct in determining that the maximum weekly rate to which Vega was entitled to have his temporary total and permanent partial disability benefits combined was found in § 48-121.01, rather than the lesser rate in § 48-121(1). Section 48-121.01(1)(b) provides, in relevant part, that "[c]ommencing January 1, 1996, and each January 1 thereafter, the maximum weekly income benefit under sections 48-121 and 48-122 shall be one hundred percent, computed to the next higher whole dollar, of the state average

weekly wage . . . ." The single judge found that the maximum weekly income benefit available to Vega under § 48-121.01 was $409 per week, and neither party has contested this finding.

[6] As noted earlier, the propriety of stacking permanent partial disability and temporary total disability benefits was most recently addressed by this court in *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 581 N.W.2d 424 (1998), and in *Foreman v. State*, 240 Neb. 716, 483 N.W.2d 752 (1992). In both *Anderson* and *Foreman*, we determined that there was no prohibition in the workers' compensation statutes, other than the statutory maximum set forth in § 48-121.01, to prevent an injured worker from concurrently being paid permanent partial disability benefits arising out of a prior accident and temporary total disability benefits as a result of a subsequent injury.

The review panel in the instant case, however, citing *Anderson, supra*, concluded that Vega was not entitled to have his permanent partial disability and temporary total disability benefits stacked up to the $409 weekly maximum rate set forth in § 48-121.01. The review panel based its conclusion on § 48-121(1), which provides in relevant part:

> For total disability, the compensation during such disability shall be sixty-six and two-thirds percent of the wages received at the time of injury, but such compensation shall not be more than the maximum weekly income benefit specified in section 48-121.01 nor less than the minimum weekly income benefit specified in section 48-121.01[.]

The review panel interpreted *Anderson, supra*, "to only allow all benefits to be 'stacked' up to the maximum of the lesser of 66 2/3 percent of the average weekly wage pursuant to Section 48-121(1) or the maximum benefit level as set forth in Section 48-121.01 for high wage earners." Based on this interpretation of *Anderson*, the review panel concluded that the single judge had erred in his calculation of the amount of benefits past due at the time of IBP's lump-sum payment to Vega.

The review panel's conclusion, however, is inconsistent with both *Anderson, supra*, and *Foreman, supra*, and the workers' compensation statutory scheme. The review panel's reasoning was essentially that both §§ 48-121(1) and 48-121.01 set forth limitations on the amount of benefits available to an injured

worker and that benefits could only be stacked until reaching the lesser of the two limitations.

Under the review panel's reasoning, where an injured worker's wages are high enough that 66⅔ percent of the injured worker's wages at the time of injury is equal to or greater than the maximum weekly benefit level of § 48-121.01, then stacking is precluded because the worker's aggregate weekly benefits cannot exceed the statutory maximum. This was the situation in *Anderson, supra*. However, under the review panel's reasoning, where 66⅔ percent of an injured worker's wages at the time of injury is less than the maximum weekly benefit level set forth in § 48-121.01, stacking would *still* be precluded, because the amount of compensation for temporary total disability, pursuant to § 48-121(1), will always be 66⅔ percent of the injured worker's wages at the time of injury.

In other words, under the review panel's reasoning, there could be no circumstances in which temporary total disability and permanent partial disability benefits could be stacked. This result is inconsistent with our holding in *Anderson v. Omaha Pub. Sch. Dist.*, 254 Neb. 1007, 1011, 581 N.W.2d 424, 426 (1998), in which we said that "[t]here is no prohibition in the workers' compensation statutes, other than the statutory maximum of [§ 48-121.01], that would prevent Anderson from being paid concurrently for both her permanent partial disability and her temporary total disability." See, also, *Siliphet v. IBP, inc.*, 8 Neb. App. 48, 587 N.W.2d 895 (1999).

As in *Anderson, supra*, we observe that permanent partial disability benefits, arising out of a prior accident, and temporary total disability benefits paid while a worker is engaged in vocational rehabilitation, as a result of an unrelated accident, are two distinct forms of compensation, serving two separate purposes. *Anderson* holds, as the single judge correctly discerned, that the only statutory limitation on stacking of permanent partial disability and temporary total disability benefits is the maximum weekly income benefit set forth in § 48-121.01.

The review panel's conclusion is also inconsistent with the language of § 48-121(1). That section sets forth that the compensation shall be 66⅔ percent of an injured worker's wages at the time of injury "for total disability." Nothing in the language

of § 48-121(1), unlike § 48-121.01, purports to establish a limitation on the total amount of benefits that an injured worker may receive for two separate and distinct forms of compensation.

Instead, § 48-121(1) simply provides that "for total disability," the compensation shall be 66⅔ of the injured worker's wages at the time of injury, assuming that such compensation is not less than the minimum weekly income benefit set forth in § 48-121.01(2). This is a limitation on the compensation for total disability solely, and is not a limitation on the total weekly income benefit that an injured worker may receive when partial disability benefits are stacked with total disability benefits. That limitation, as the single judge correctly determined, is set forth in § 48-121.01.

The review panel found that if the single judge's determination of the maximum weekly income benefit was correct, then the single judge's calculations and conclusions were correct and should be affirmed. IBP has not cross-appealed from this determination and, thus, has not preserved in this court any alternative basis for affirming the judgment of the review panel. See *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000).

CONCLUSION

The single judge of the Workers' Compensation Court correctly determined that Vega's temporary total disability and permanent partial disability benefits could be stacked up to the maximum weekly income benefit set forth in § 48-121.01. The review panel of the Workers' Compensation Court erred as a matter of law in concluding otherwise. Therefore, we reverse the judgment of the review panel and remand the cause with directions to reinstate the further award entered by the single judge on June 19, 2000.

REVERSED AND REMANDED WITH DIRECTIONS.

McCORMACK, J., participating on briefs.

A-1 METRO MOVERS, INC., A CORPORATION DOING BUSINESS IN NEBRASKA, APPELLANT, V. MARY JANE EGR, TAX COMMISSIONER OF THE STATE OF NEBRASKA, AND THE STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEES.

METRO MOVING SERVICES, INC., A CORPORATION DOING BUSINESS IN NEBRASKA, APPELLANT, V. MARY JANE EGR, TAX COMMISSIONER OF THE STATE OF NEBRASKA, AND THE STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEES.

TRI CITIES MOVING SERVICES, INC., A CORPORATION DOING BUSINESS IN NEBRASKA, APPELLANT, V. MARY JANE EGR, TAX COMMISSIONER OF THE STATE OF NEBRASKA, AND THE STATE OF NEBRASKA, DEPARTMENT OF REVENUE, APPELLEES.

647 N.W.2d 593

Filed July 12, 2002. Nos. S-01-383 through S-01-385.

1. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
2. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
4. ____: ____. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
5. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
6. **Taxation.** The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies.
7. **Statutes.** A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose.

8. **Statutes: Legislature: Intent.** A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent.

Appeals from the District Court for Lancaster County: KAREN FLOWERS, Judge. Affirmed.

Kevin C. Siebert and Jane F. Langan, of Rembolt, Ludke & Berger, L.L.P., for appellants.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees.

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

MCCORMACK, J.

NATURE OF CASE

A-1 Metro Movers, Inc. (A-1); Metro Moving Services, Inc. (Metro); and Tri Cities Moving Services, Inc. (Tri Cities) (collectively the appellants), appeal from orders of the district court for Lancaster County. The district court sustained tax deficiency determinations against the appellants made by the Nebraska Department of Revenue. The court found that containers purchased by the appellants are subject to use tax and are not exempted by Neb. Rev. Stat. § 77-2702.23(2) (Reissue 1996).

BACKGROUND

The appellants are in the business of moving tangible personal property for their customers from a location within Nebraska to locations outside of Nebraska. The moving services provided by the appellants include providing containers, packing the customer's personal property into containers, loading the packed containers and other household goods onto moving vans, transporting the goods from a location in Nebraska to a location outside of Nebraska, unloading the containers and other household goods, unpacking the containers at the destination, and disposing of the containers. "Containers" include boxes, cartons, packing materials, and padding materials used by the appellants. The containers are not sold separately by the appellants from the packing and moving services they provide. The appellants purchase the

containers from vendors located outside of Nebraska. The containers are shipped by common carrier to the appellants' premises in Nebraska. The appellants do not pay sales or use tax on the purchase of the containers to any state at any time.

When purchased by the appellants, the boxes arrive flat and in bundles of like size. For the appellants to use the boxes, the bundles must be broken and the boxes must be opened up and assembled and shaped with tape. Once the boxes are taped into shape, the customer's personal property is packed inside, and packing material is placed inside to protect the personal property from damage.

The containers, once packed with the customer's belongings and marked, are loaded on a moving van along with other household goods for transportation to the agreed-upon destination. Upon arrival at the destination, the containers are unloaded from the moving van and taken into the destination location. The containers may then be opened up, and the personal property and packing materials are taken out, or the containers may be left for storage and/or unpacking by the customer. If unpacked by the appellants, both the containers and the packing materials are left for the customer to dispose of or are removed from the destination premises by the appellants and disposed of. The appellants do not reuse or resell the containers they remove from the customer's destination. Instead, all of the containers are left with the customer out of state or are disposed of out of state.

The department conducted audits for sales and consumer's use taxes of the books and records of the appellants over various periods of time. As a result of the audits, the department issued a notice of deficiency determination to each of the appellants. Each of the appellants timely filed petitions for redetermination in protest of the total amount of each deficiency.

The department sustained the tax deficiencies levied against the appellants. The department found that the containers and packing materials used by the appellants constitute a taxable sale and that the exemption in § 77-2702.23(2) was not applicable. The appellants petitioned for review in the district court. The district court made two distinct findings. First, the court found that collateral estoppel barred Metro and Tri Cities from litigating the issue of whether the containers were subject to use

tax. In 1998, Metro and Tri Cities appealed from tax deficiency determinations made by the department and the district court for Lancaster County ruled against Metro and Tri Cities. The court found that the issue determined in the 1998 cases was identical to the issue presented in this case. Second, the district court affirmed the decision of the department as to A-1, finding that the containers were purchased for the purpose of using them in Nebraska and that the exemption in § 77-2702.23(2) did not apply. These consolidated appeals followed, and we moved the cases to our docket.

ASSIGNMENTS OF ERROR

The appellants assign that the district court erred in (1) finding that the appellants' use of containers in interstate moves originating in Nebraska constitutes a sale of tangible personal property subject to Nebraska consumer's use tax and (2) finding that the appeals of Metro and Tri Cities are barred by the doctrine of collateral estoppel.

STANDARD OF REVIEW

[1-3] A judgment or final order rendered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Big John's Billiards v. Balka*, 260 Neb. 702, 619 N.W.2d 444 (2000). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.* An appellate court, in reviewing a district court judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Id.*

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

[5] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Id.*

ANALYSIS

[6] The issue presented in this case is whether the containers purchased and used by the appellants are subject to Nebraska use tax. Neb. Rev. Stat. § 77-2703(1) (Reissue 1996) imposes a sales tax "upon the gross receipts from all sales of tangible personal property sold at retail in this state." Section 77-2703(2) imposes a use tax on the "storage, use, or other consumption in this state of property purchased, leased, or rented from any retailer." The general theory behind the sales and use taxes is to impose a tax on each item of property, unless specifically excluded, at some point in the chain of commerce. If the item is purchased in Nebraska, the sales tax applies. If the item is purchased outside of Nebraska, the use tax applies. *Lackawanna Leather Co. v. Nebraska Dept. of Rev.*, 259 Neb. 100, 608 N.W.2d 177 (2000).

Section 77-2702.23 defines "use" and also provides for an exemption to that definition. This section states:

> (1) Use shall mean the exercise of any right or power over property incident to the ownership or possession of that property . . . .
>
> (2) Except for a transaction that is subject to sales tax under the Nebraska Revenue Act of 1967, use shall not include the keeping, retaining, or exercising of any right or power over property for the purpose of subsequently transporting it outside the state or for the purpose of being processed, fabricated, or manufactured into, attached to, or annexed to other property to be transported outside the state and thereafter used solely outside the state.

The appellants concede that the containers are used in Nebraska, for purposes of § 77-2702.23(1), when they are assembled, packed with customers' goods, and loaded onto moving vans for transport. However, the appellants argue that this use occurs "'for the purpose of subsequently transporting [the containers] outside the state.'" Brief for appellants at 9-10. The appellants alternatively argue that the containers, which are purchased in flat bundles, are used in Nebraska for the purpose of being processed or fabricated into containers to be transported outside the state and thereafter used solely outside the state.

The Rhode Island Supreme Court encountered a nearly identical situation in *Safeway Systems, Inc. v. Norberg*, 115 R.I. 127,

341 A.2d 47 (1975). The taxpayer was in the business of transporting furniture and other household goods. Nearly all of the taxpayer's moves were from points within Rhode Island to points outside of the state. The taxpayer purchased boxes and packing materials from out-of-state vendors, which it used to transport a customer's household goods. Upon completion of the move, the boxes and packing materials were never again used or returned to Rhode Island.

The taxpayer argued that the boxes and packing materials used in interstate moves were exempt from Rhode Island's use tax under a statutory exemption similar to our § 77-2702.23(2). The Rhode Island exemption read as follows:

> " 'Storage' and 'use' do not include the keeping, retaining, or exercising of any right or power over tangible personal property shipped or brought into this state for the purpose of subsequently transporting the same outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into, other tangible personal property to be transported outside the state and thereafter used solely outside the state."

(Emphasis omitted.) *Safeway Systems, Inc. v. Norberg*, 115 R.I. at 130-31, 341 A.2d at 49.

The Rhode Island Supreme Court interpreted the first portion of this exemption as applying only to goods brought into the state that thereafter will be used solely outside the state. *Id.* The court held that the exemption did not apply to the taxpayer's boxes and packing materials because those items were not used solely outside of Rhode Island. Instead, the boxes and packing materials were also used within the state when they were brought to a customer's home, filled with household goods, loaded onto moving trucks, and driven to the state border. The court also concluded that the taxpayer did not satisfy the second part of the statute exempting property " 'processed, fabricated, or manufactured into' "; " 'attached to' "; or " 'incorporated into' other tangible personal property." *Id.* at 132, 341 A.2d at 50.

[7,8] We find the reasoning of *Safeway Systems, Inc. v. Norberg, supra*, to be persuasive. Under the appellants' proposed construction of § 77-2702.23(2), the only inquiry needed

to decide if the exemption applies is whether a taxpayer's purpose is to transport the property outside the state. Such a construction ignores the degree of use of such property in Nebraska. We do not believe the Legislature intended such a result. A court must place on a statute a reasonable construction which best achieves the statute's purpose, rather than a construction which would defeat the statute's purpose. *Premium Farms v. County of Holt*, 263 Neb. 415, 640 N.W.2d 633 (2002). A sensible construction will be placed upon a statute to effectuate the object of the legislation rather than a literal meaning that would have the effect of defeating the legislative intent. *Fontenelle Equip. v. Pattlen Enters.*, 262 Neb. 129, 629 N.W.2d 534 (2001).

The appellants make considerable use of the containers in Nebraska. The containers are delivered to a customer's home, packed with household goods, and loaded onto the appellants' moving vans before beginning their interstate journey. That is, the appellants' purpose is not merely to transport the containers out of Nebraska, but to use the containers to transport property out of the State of Nebraska.

The appellants also do not satisfy the second portion of § 77-2702.23(2). Assuming that the appellants' act of shaping the purchased bundles into boxes is "processing" or "fabricating," such an act is not performed to transport the containers outside of the state. Rather, this act is performed to first use the containers in Nebraska prior to interstate transport.

The appellants argue that our decision in *J.C. Penney Co. v. Balka*, 254 Neb. 521, 577 N.W.2d 283 (1998), is controlling. We do not agree. The issue presented in that case was whether J.C. Penney exercised any right or power over catalogs shipped from out of state to Nebraska incident to the ownership or possession of that property in Nebraska. In other words, this court was asked to decide whether a "use" of such catalogs occurred in Nebraska, a point which has been conceded in this case. *J.C. Penney Co.* did not consider whether such use was nonetheless exempt from taxation under § 77-2702.23(2), and we believe it is inapplicable to this case.

Because we determine that the containers purchased and used by the appellants are subject to Nebraska use tax, we need not address their second assignment of error.

CONCLUSION

Section 77-2702.23(2) exempts property from use tax if a taxpayer exercises any right or power over that property for the purpose of subsequently transporting it outside the state or for the purpose of being processed, fabricated, or manufactured into; attached to; or annexed to other property to be transported outside the state and thereafter used solely outside the state. We hold that because the containers purchased and used by the appellants are not only used for the purpose of transporting the containers out of the state, but are also used in the state, the exemption of § 77-2702.23(2) does not apply. The decision of the district court is affirmed.

AFFIRMED.

IN RE PROPOSED AMENDMENT TO TITLE 291, CHAPTER 3, OF THE MOTOR CARRIER RULES AND REGULATIONS. NEBRASKA PUBLIC SERVICE COMMISSION, APPELLEE, V. A-1 AMBASSADOR LIMOUSINE, INC., DOING BUSINESS AS AMBASSADOR LIMOUSINE AND HAYMARKET LIMOUSINE, INTERESTED PARTY, APPELLANT, AND R & F HOBBIES, INC., DOING BUSINESS AS PRINCE OF THE ROAD, INTERESTED PARTY, APPELLEE.

646 N.W.2d 650

Filed July 12, 2002. No. S-01-433.

1. **Public Service Commission: Appeal and Error.** The appropriate standard of review for appeals from the Nebraska Public Service Commission is a review for errors appearing on the record.
2. **Judgments: Appeal and Error.** When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
3. ____: ____. Whether a decision conforms to law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
4. **Public Service Commission: Appeal and Error.** Neb. Rev. Stat. § 75-136 (Cum. Supp. 2000) authorizes appellate courts to review an order of the Nebraska Public Service Commission interpreting a rule or regulation pursuant to the commission's authority under Neb. Rev. Stat. § 75-118.01 (Reissue 1996).
5. ____: ____. In an appeal to the Supreme Court from an order of the Nebraska Public Service Commission, administrative or legislative in character, the only questions

to be determined are whether the commission acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made.

6. ____: ____. In reviewing a decision of the Nebraska Public Service Commission, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the commission if there is evidence in the record to support its findings.
7. ____: ____. If there is evidence to sustain the findings of the Nebraska Public Service Commission, an appellate court cannot substitute its judgment for that of the commission.
8. ____: ____. Determinations by the Nebraska Public Service Commission are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the commission was arbitrary or unreasonable.
9. **Public Service Commission.** The striking of the balance between the competing interests of legitimate competition and the protection of the public interest is a matter of legislative and administrative determination peculiarly resting in the judgment of the Nebraska Public Service Commission.
10. **Administrative Law: Words and Phrases.** A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion.
11. ____: ____. An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law.
12. **Words and Phrases.** A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change.

Appeal from the Nebraska Public Service Commission. Affirmed.

Elaine A. Waggoner, of Waggoner Law Office, for appellant.

Don Stenberg, Attorney General, and L. Jay Bartel for appellee Nebraska Public Service Commission.

John M. Boehm, of Butler, Galter, O'Brien & Boehm, for appellee R & F Hobbies, Inc.

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

MILLER-LERMAN, J.

NATURE OF CASE

A-1 Ambassador Limousine, Inc., doing business as Ambassador Limousine and Haymarket Limousine (A-1),

appeals an April 3, 2001, order of the Nebraska Public Service Commission (PSC) which, inter alia, defined the terms "limousine" and "limousine service" as contained in title 291, chapter 3, of the Motor Carrier Rules and Regulations, § 001. We affirm the order of the PSC.

STATEMENT OF FACTS

On January 9, 2001, the PSC, on its own motion, entered an order opening a docket "to conduct a review of existing Commission rules and regulations as they pertain to motor carriers in Title 291, Chapter 3, Motor Carrier Rules and Regulations." The PSC stated in the order that it found it necessary to address the definitions of "limousine" and "limousine service" because of "current ambiguity in the application of our existing granted authorities." The PSC noted that when the applicable rules were originally promulgated, limousines were presumed to be luxury class transportation used primarily for formal social functions. However, a need to define terms had arisen because (1) "holders of limousine authority have engaged a variety of vehicles to conduct their business under the granted authority including the use of regular sedans and vans" and (2) "the passengers being transported no longer are limited to persons seeking the benefits of luxury transportation." The PSC specifically noted that holders of and applicants for limousine authority were using or seeking to use limousine authority to transport clients of the Nebraska Department of Health and Human Services (DHHS).

The PSC noted in the January 9, 2001, order that it had adopted in its rules a limousine classification and had promulgated rules applicable to limousine operators. The PSC stated that it found it necessary to adopt concise definitions of "limousine" and "limousine service" in order to properly interpret the scope of authority granted to limousine certificate holders. The PSC therefore adopted the following definitions:

> **Definition of "limousine":** Limousine shall mean a luxury vehicle used to provide prearranged passenger transportation on a dedicated basis at a premium fare that has a seating of at least five and no more than fourteen persons behind the driver with a physical partition separating the driver seat from the passenger compartment. Limousine does not

include taxicabs, sport utility vehicle[s], vans, hotel or airport buses or shuttles, or buses. The term limousine does include transportation within the scope of authorities granted for "luxury limousines", "luxury limousine services", "luxury automobiles", "luxury or stretch limousines", "luxury sedan limousines", and "luxury type vehicles."

Definition of "limousine service": Limousine service shall mean the business of carrying passengers for hire by limousines providing service along a route under the control of the person who hired the vehicle and not over a defined regular route. Limousine service shall not be provided on a demand response basis.

Definition of "premium fare": Premium fare means a rate based on hourly rental of not less than one (1) hour at fifty dollars ($50.00) per hour with a minimum rental time of one hour. A mileage charge may be assessed for transportation of the vehicle for the time before and after the transportation service is provided and only in addition to the minimum hourly charge as provided by this definition.

The PSC specified that to the extent such definitions were in conflict with its findings in a September 8, 1999, order regarding the application of Running Horse Enterprises, LLC, for limousine authority (the Running Horse order), such findings in the Running Horse order were set aside and modified. In the Running Horse order, the PSC had stated that "limousine service shall mean a chauffeur-driven, non-metered passenger vehicle for hire including, but not limited to, full-sized sedans, extended-size sedans, passenger vans, and sports utility vehicles where the rate may be determined on an hourly, daily, weekly, or monthly rental or may be mileage-based."

The PSC also stated that the definitions in the January 9, 2001, order would become effective upon entry of the order and would be applied to all applications for limousine authority granted on or after that date. The PSC acknowledged that certain certificate holders with limousine authority, relying on the Running Horse order, would be operating outside the definition of the limousine authority in the January 9 order. The PSC stated that for those certificate holders, it would stay enforcement of the January 9 order for a period of 90 days in order to allow a

reasonable time for those certificate holders to comply with the definitions adopted in the order.

The PSC further indicated that the definitions in the January 9, 2001, order would become part of its overall effort to review, update, and recodify its existing rules on motor carriers. The PSC therefore gave notice that once approval to proceed was received from the Governor, it would propose amendments to title 291, chapter 3, to incorporate the definitions of "limousine," "limousine service," and "premium fare" set forth in the January 9 order. The PSC stated it would accept filed comments on the proposed amendments through February 2 and would set a public hearing on the proposed amendments once permission was received from the Governor to proceed with rulemaking. The PSC reiterated that the proposed amendments were part of its intended efforts to examine the entirety of the motor carrier rules and stated that when a final order adopting revisions to the rules was entered, it would include any revisions to the proposed amendments that were made as the result of public comments received.

The PSC concluded the January 9, 2001, order by ordering (1) that the definitions in the order were thereby adopted as proper policy interpretations of its motor carrier rules pursuant to its authority under state law, (2) that the definitions should not be enforced against holders of certificates granted prior to the order for a period of 90 days, and (3) that the proposed amendments to the motor carrier rules were open to public comment and interested parties could file initial comments on or before February 2.

On March 14, 2001, the PSC held a public hearing on the proposed amendments to the motor carrier rules and regulations. At the hearing, the PSC received into evidence written public comments which had been received from various interested parties, including holders of limousine certificates, holders of taxicab certificates, and DHHS. DHHS expressed concern that the proposed amendments would prohibit certain holders of limousine certificates from providing transportation to DHHS clients. DHHS' analysis indicated that for areas outside the Lincoln and Omaha metropolitan areas, the amendments would eliminate all carriers except for taxicab companies and two contract carriers from providing transportation for DHHS clients.

Various individuals spoke at the hearing, including attorneys representing DHHS; A-1; and R & F Hobbies, Inc., doing business as Prince of the Road (R & F Hobbies). The attorney for DHHS reiterated the concerns expressed in DHHS' written comments regarding the effect on transportation for DHHS clients.

The attorney for A-1 testified in opposition to the proposed definitions. A-1 holds a limousine certificate. The attorney for A-1 testified regarding statistics that over 50 percent of the business of the nation's top limousine services, and 60 percent of A-1's business, involved sedan-type transportation rather than the traditional stretch limousines. Such business would be eliminated under the definitions proposed by the PSC. The attorney for A-1 testified that approximately 40 to 45 percent of A-1's business came from providing transportation to DHHS clients. Although the Running Horse order had included a wide variety of vehicles in its definition of "limousine service," the attorney for A-1 testified that A-1 had not explicitly relied on the Running Horse order to determine it could provide transportation services to DHHS clients, but, rather, it had been informally advised by PSC personnel in approximately July 2000 that A-1 could provide such services under its existing certificate. The A-1 attorney indicated that A-1 had relied on such advisement. In addition, the attorney for A-1 raised concerns that the process by which the new definitions had been adopted did not comply with the Administrative Procedure Act or with due process requirements.

The attorney for R & F Hobbies testified in support of the proposed definitions of "limousine" and "limousine service." He testified that R & F Hobbies held a certificate with authority to provide passenger-van transportation. He further testified that the new definitions of "limousine" and "limousine service" would not eliminate transportation services to DHHS clients because R & F Hobbies and other carriers with proper certificates of authority were able to provide such services statewide.

Representatives of various taxicab companies testified in support of the definitions and asserted there was a need to end an expansion of the definition of "limousine service" by holders of limousine certificates. Representatives of limousine companies other than A-1 testified to express concern that the definitions

were too restrictive because they excluded luxury sedans and other luxury vehicles.

Following the hearing, the PSC entered an order on April 3, 2001, from which this appeal is taken by A-1. The PSC order stated that the PSC was focused on the objective of establishing interim policies prior to proceeding with formal rulemaking. The order had two purposes: (1) to interpret the scope of authority under existing rules as to those businesses that had been granted certificates and (2) to begin preparations for rulemaking regarding the definitions of various service categories and vehicles.

In regard to the definition of "limousine," the PSC stated in the April 3, 2001, order that from the written comments received and the testimony presented at the March 14 hearing, it was apparent that the definitions in the January 9 order should be clarified. The PSC determined the definition of "limousine" in the January 9 order was too restrictive given the growing trend in the limousine industry to use sedans and other types of vehicles for luxury transportation. The PSC reiterated its intention to limit "limousine service" to that "type of luxury transportation which has been traditionally associated with limousine transportation." The PSC found that the definitions in the January 9, 2001, order should be amended as follows:

> **Definition of "limousine":** Limousine shall mean a vehicle used to provide limousine service.
>
> **Definition of "limousine service":** Limousine service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle (ii) along a route under the control of the person who hired the vehicle and not over a defined regular route (iii) on a prearranged and not on a demand basis (iv) at a premium fare.
>
> **Definition of "premium fare":** Premium fare means a rate based on an hourly rental of not less than one hour at a scheduled rate which shall be set and periodically reviewed by the Commission and which shall include a minimum rental time of one hour. A mileage charge may be assessed for transportation of the vehicle only for the time before and after the transportation service is provided and only in addition to the minimum hourly charge as provided by this definition.

The PSC ordered that effective April 3, 2001, the scheduled rate for limousine service should not be less than $50 per hour with a 1-hour minimum charge required.

The PSC specifically noted its intention in establishing the definitions that limousine operators would not be allowed to provide transportation for clients of DHHS and other similar state and federal agencies. The PSC also noted that the new definition of limousine allowed for the use of luxury sedans and other types of luxury vehicles. The PSC stated that the changes to the definitions did not justify an extension of the deadline for enforcement of the January 9, 2001, order. The PSC stated that on April 10, all certificate holders would be expected to adhere to the policy articulated in the January 9 order and that current certificate holders affected by the policy could seek new, additional, and/or modified authority under the new categories of service recommended in the second section of the April 3 order. The PSC finally noted that "detailed refinements may still be needed in the future to fully address the problems described in our January 9 order" and that the forthcoming rulemaking process would allow the opportunity to make those adjustments.

In the second section of the April 3, 2001, order, the PSC stated that its rules expressly recognized categories of passenger service in addition to limousine service, including taxi, charter, and special party services. Additional descriptions of service had also been recognized by the PSC in authorities granted. Such descriptions had been developed to accommodate an evolving industry. The PSC particularly noted that the demand for service for DHHS clients had "dramatically changed the passenger service landscape in the State." The PSC therefore proposed the formal establishment of categories of service for "taxi service" and "open class service." The categories were defined as follows:

> **Taxi Service:** Taxi service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle, subject to the provisions of Rule 011.01D, (ii) along the most direct route between the points of origin and destination or a route under the control of the person who hired the vehicle and not over a defined regular route (iii) on a prearranged or demand basis (iv) at

> a metered, mileage-based or per trip fare, subject to the provision of Rule 011.01F, (v) commencing within, and/or restricted to, a defined geographic area.
>
> **Open Class Service:** Open class service shall consist of all of the following elements: (i) the business of carrying passengers for hire by a vehicle (ii) along the most direct route between the points of origin and destination or a route under the control of the person who hired the vehicle and not over a defined regular route (iii) on a prearranged or demand basis (iv) at a mileage-based or per trip fare.

The PSC then stated that it was considering the addition of various rules including a rule that would require a carrier to obtain a special designation as a carrier of clients of DHHS and other similar state and federal agencies and programs.

The PSC concluded the April 3, 2001, order by ordering (1) that the definitions of "limousine service," "premium fare," "taxi service," and "open class service" as defined within the order be adopted as proper policy interpretations of its motor carrier rules and regulations and (2) that the proposed amendments concerning taxi service and open class service be open to public comment and that initial comments be filed on or before April 20.

On April 5, 2001, A-1 filed a notice of appeal of the April 3 order. Various parties were certified as interested parties in the proceedings before the PSC. In addition to the appellee's brief filed by the PSC, an appellee's brief was filed by R & F Hobbies.

ASSIGNMENTS OF ERROR

A-1 alleges, restated, (1) that the PSC promulgated the April 3, 2001, order in excess of its authority and in violation of the Administrative Procedure Act; (2) that the order was arbitrary and capricious, not supported by competent evidence, an abuse of discretion, and contrary to law; and (3) that the order was promulgated without proper due process.

STANDARDS OF REVIEW

[1] The appropriate standard of review for appeals from the PSC is a review for errors appearing on the record. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000).

[2] When reviewing an order for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

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

ANALYSIS

Jurisdiction and Scope of Review.

The PSC and R & F Hobbies contend the April 3, 2001, order is not appealable by A-1. We do not agree.

Although we have stated that orders of the State Railway Commission, which is now the PSC, see *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991), are "interlocutory" and not final, where substantial rights of the parties remain undetermined and the cause is retained for further actions, we have also stated that " '[w]hether or not a decision is denominated an 'order,' it is not reviewable unless and until it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of an administrative process . . . .' " *Houck v. Beckley*, 161 Neb. 143, 150, 72 N.W.2d 664, 668 (1955) (quoting 73 C.J.S. *Public Administrative Bodies and Procedure* § 186 (1951)). The April 3, 2001, order defined the meaning of "limousine" and "limousine service" as used in the PSC's existing rules and regulations, and as a result of the April 3 order, A-1 was denied permission to transport certain individuals under the limousine certificate it held, which denial was contrary to permission previously accorded to A-1 by the PSC. The issue of the scope of A-1's authority under its certificate was not retained for further action, but instead, A-1 was directed to comply with the terms of the April 3 order.

[4] Neb. Rev. Stat. § 75-136 (Cum. Supp. 2000) generally provides for the review of orders of the PSC by this court. The April 3, 2001, order of the PSC was issued pursuant to Neb. Rev. Stat. § 75-118.01 (Reissue 1996), which authorizes the PSC "to determine . . . the scope or meaning of a certificate, . . . rule, or regulation." In *In re Petition of G. Kay, Inc.*, 219 Neb. 24, 361

N.W.2d 182 (1985), we concluded that § 75-136 authorized this court to review an order of the PSC interpreting a certificate pursuant to the PSC's authority under § 75-118.01. We logically conclude that § 75-136 also authorizes this court to review an order of the PSC, such as the April 3 order, interpreting a rule or regulation pursuant to the PSC's authority under § 75-118.01 where, as here, such order denied A-1 an existing benefit.

[5] Regarding the scope of this court's review of a PSC order pursuant to § 75-136, we have stated, "In an appeal to the Supreme Court from an order of the PSC, administrative or legislative in character, the only questions to be determined are whether the PSC acted within the scope of its authority and whether the order complained of is reasonable and not arbitrarily made." *In re Application of E. Neb. Non-stock Trucking Coop*, 243 Neb. 662, 664, 501 N.W.2d 712, 713-14 (1993). A review of the April 3, 2001, order shows it to be "administrative or legislative in character," and we therefore consider A-1's assignments of error to the extent they assert (1) that the PSC acted outside the scope of its authority and (2) that the order is unreasonable and arbitrary.

Scope of Authority.

The scope of the PSC's authority is defined in chapter 75 of the Nebraska Revised Statutes. Section 75-118.01 provides that the PSC "shall have original exclusive jurisdiction to determine the validity of a rule or regulation and the scope or meaning of a certificate, permit, tariff, rule, or regulation." In addition, Neb. Rev. Stat. § 75-304 (Reissue 1996) provides that the PSC

> may establish such just and reasonable classifications of groups of carriers, included in the terms common carrier and contract carrier, as the special nature of the services performed by such carriers require and adopt and promulgate such just and reasonable rules, regulations, and requirements, to be observed by the carrier so classified or grouped, as the commission deems necessary or desirable in the public interest and as are consistent with the provisions of sections 75-301 to 75-322.

In the April 3, 2001, order, the PSC, inter alia, adopted definitions of "limousine," "limousine service," and "premium fare"

as interpretations of those terms as used in its rules and regulations which classify groups of carriers. The actions taken by the PSC in the April 3 order were generally within its authority under § 75-304 to establish just and reasonable classifications of groups of carriers and, specifically, within its authority under § 75-118.01, to determine the meaning of its own rules and regulations establishing such classifications.

A-1 asserts that the PSC acted outside the scope of its authority because it adopted rules and regulations without following the rulemaking procedures required under the Administrative Procedure Act and without due process. We reject A-1's arguments. The January 9 and April 3, 2001, orders, by their terms, both indicate that rather than establishing new rules, such orders are preliminary steps in a formal rulemaking process being undertaken by the PSC. As part of that process, in the April 3 order, the PSC adopted interpretations of certain existing rules and regulations which refer to limousines and limousine service. The PSC, in the April 3 order, did not adopt new rules or regulations, but instead, interpreted existing rules and regulations pursuant to its authority under § 75-118.01. Although such interpretations might be incorporated into rules and regulations to be adopted at some point in the future, the January 9 and April 3 orders indicate that such a rulemaking process was ongoing and was not complete at the time those orders were issued. The April 3 interim order did not adopt rules or regulations, a fortiori, the PSC did not adopt rules or regulations in violation of the rulemaking procedures required under the Administrative Procedure Act.

A-1 also argues that the April 3, 2001, order was issued without due process. In the January 9 order, A-1 and other interested parties received notice of the PSC's proposed interpretations of "limousine" and "limousine service." A-1 and other interested parties were given the opportunity to participate in the March 14 hearing prior to the PSC's issuance of the April 3 order. A-1 participated in the hearing. Assuming without deciding that A-1 had a protected interest, such notice and hearing were sufficient to satisfy the due process required in connection with the PSC's authority to interpret its rules and regulations. See *Benitez v. Rasmussen*, 261 Neb. 806, 626 N.W.2d 209 (2001) (procedural due process requires that

parties deprived of liberty or property interests be provided adequate notice and opportunity to be heard).

We conclude that the PSC acted within the scope of its authority in the April 3, 2001, order. We therefore reject A-1's claims that the PSC acted outside the scope of its authority in issuing the April 3 order.

Unreasonable or Arbitrary.

Having determined the PSC acted within the scope of its authority, the only other question for this court to determine in this review of the PSC's April 3, 2001, order is "whether the order complained of is reasonable and not arbitrarily made." See *In re Application of E. Neb. Non-stock Trucking Coop*, 243 Neb. 662, 664, 501 N.W.2d 712, 714 (1993). We conclude that the April 3 order was reasonable and not arbitrarily made, and we reject A-1's claim to the contrary.

[6-9] In reviewing a decision of the PSC, it is not the province of an appellate court to weigh or resolve conflicts in the evidence or the credibility of the witnesses; rather, an appellate court will sustain the decision of the PSC if there is evidence in the record to support its findings. *In re Application of Neb. Pub. Serv. Comm.*, 260 Neb. 780, 619 N.W.2d 809 (2000). If there is evidence to sustain the findings of the PSC, an appellate court cannot substitute its judgment for that of the PSC. *Id.* Determinations by the PSC are a matter peculiarly within its expertise and involve a breadth of judgment and policy determination that will not be disturbed by an appellate court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. *Id.* The striking of the balance between the competing interests of legitimate competition and the protection of the public interest is a matter of legislative and administrative determination peculiarly resting in the judgment of the PSC. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

[10-12] A decision is arbitrary when it is made in disregard of the facts or circumstances and without some basis that would lead a reasonable person to the same conclusion. *In re Application of Neb. Pub. Serv. Comm., supra.* An action taken by an administrative agency in disregard of the facts or circumstances of the case and without some basis which would lead a

reasonable and honest person to the same conclusion is arbitrary and capricious as a matter of law. *Id.* A capricious decision is one guided by fancy rather than by judgment or settled purpose; such a decision is apt to change. *Id.*

Before issuing the April 3, 2001, order, the PSC had issued the January 9 order which stated proposed definitions for "limousine," "limousine service," and "premium fare." The January 9 order also stated that the PSC would take public comment on the proposed definitions, and on March 14, the PSC held public hearings to address, inter alia, the issues raised in the January 9 order. Various holders of limousine certificates, including A-1; various holders of taxicab certificates; and representatives of DHHS provided their comments on the issues either in written form, at the public hearing, or both. Certain limousine certificate holders stated that the definitions in the January 9 order were too restrictive because they eliminated the use of certain types of luxury vehicles from the definition of limousine service. A-1 and representatives of DHHS expressed concerns regarding the effect the definitions would have on the ability of holders of limousine certificates to provide transportation for DHHS clients. Certain taxicab certificate holders spoke in support of the definitions in the January 9 order and expressed concern that prior to the January 9 order, the definition of limousine service had been expanded beyond the original intent of the PSC rules and regulations creating the classification of limousine service and that such an expanded definition was harmful to the business of taxicab certificate holders. After considering the comments and testimony of the various interested parties, the PSC, in the April 3 order, modified its definitions from the January 9 order in a manner that, inter alia, included additional luxury vehicles within the scope of limousine service and excluded transportation of DHHS clients by newly defined limousine service.

Our review of the record in this case indicates that evidence in the record was adequate to sustain the findings and determinations made by the PSC in the April 3, 2001, order. The PSC was required to strike a balance between competing interests, and the striking of such balance was "a matter of legislative and administrative determination peculiarly resting in the judgment of the PSC." *In re Application of Jantzen*, 245 Neb. at 100, 511 N.W.2d

at 517. The PSC's policy determination will not be disturbed by this court in the absence of a showing that the action of the PSC was arbitrary or unreasonable. Considering the record before the PSC, the April 3 order of the PSC is not arbitrary or unreasonable. We therefore reject A-1's assignments of error claiming that the April 3 order was arbitrary and unreasonable.

CONCLUSION

We conclude that the PSC acted within the scope of its authority in issuing the April 3, 2001, order and that the order was reasonable and not arbitrarily made. We therefore reject A-1's assignments of error on appeal and affirm the order of the PSC.

AFFIRMED.

GLENDA L. PINKARD, FORMERLY KNOWN AS GLENDA L. BOLTON, APPELLANT, V. CONFEDERATION LIFE INSURANCE COMPANY ET AL., APPELLEES, AND ROSE BOLTON, PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM BOLTON, DECEASED, INTERVENOR-APPELLEE.

647 N.W.2d 85

Filed July 12, 2002. No. S-01-436.

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. **Divorce: Insurance.** The general rule is that divorce does not affect a beneficiary designation in a life insurance policy.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Benjamin M. Belmont, of Lustgarten & Roberts, P.C., for appellant.

Christian R. Blunk, of Berkshire & Blunk, for intervenor-appellee.

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

WRIGHT, J.

NATURE OF CASE

This is a declaratory judgment action involving two parties each claiming to be the beneficiary of an annuity contract. The Douglas County District Court found that the annuity benefits were payable to William Bolton's estate, and Glenda L. Pinkard, formerly known as Glenda L. Bolton (Pinkard), appeals.

SCOPE OF REVIEW

[1] 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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001).

FACTS

On May 16, 1989, Bolton was seriously injured when equipment he was operating rolled over on him. During Bolton's period of recovery, he and Pinkard were married. Because of Bolton's extensive injuries, Pinkard was appointed his guardian and conservator.

On March 15, 1991, the county court for Douglas County entered an order authorizing Pinkard to settle Bolton's workers' compensation claim. The settlement provided for an immediate payment of $75,000 and monthly payments of $1,900 commencing on April 1, 1991, for a period of 10 years certain. Under the terms of the order authorizing Pinkard to settle, Bolton could not assign or pledge any of the payments. The settlement was approved by both the Workers' Compensation Court and the Douglas County District Court as of April 15, 1991.

On November 3, 1992, Bolton's guardianship and conservatorship were voluntarily terminated. As a part of the termination, Pinkard agreed she would not have any access to or control over Bolton's money.

Pinkard filed for dissolution of marriage on January 22, 1993, and the parties entered into a property settlement agreement. Bolton was awarded as his sole and separate property all right, title, and interest in all pension plans, employee benefit plans, and 401K plans, including workers' compensation benefits, received by reason of his employment. Pinkard was awarded as her sole and separate property all right, title, and interest in all pension plans, employee benefit plans, and any other benefits received by reason of her employment.

As a part of the property settlement agreement, the parties executed a mutual release. The release provided that the parties accepted the benefit of the property settlement agreement in full and complete satisfaction of all financial claims. The property settlement agreement was incorporated into the decree of dissolution the same as if it had been fully set forth in the decree.

Bolton died on August 17, 1998, and his first wife, Rose Bolton, was appointed personal representative of his estate. The legal heirs of the estate are Bolton's children with the personal representative.

Pinkard commenced this action for declaratory judgment seeking the remaining balance of the annuity. She alleged that she was the designated beneficiary of the annuity. In her prayer for relief, Pinkard requested that the district court declare that she is the sole beneficiary of the annuity and that she should be paid all accrued benefits along with interest, attorney fees, and costs.

The personal representative intervened, alleging that the dissolution decree and the property settlement agreement between Bolton and Pinkard terminated Pinkard's rights in Bolton's workers' compensation benefits, including the annuity. The personal representative requested that the district court determine that the estate was the sole beneficiary of the annuity and all benefits payable thereunder.

Pinkard and the personal representative subsequently filed motions for summary judgment. In its order of April 2, 2001, the district court found that there were no genuine issues of material fact and that the estate was entitled to judgment as a matter of law. The court entered judgment in favor of the estate and ordered payment to the estate of the remaining proceeds of the annuity when

due. Pinkard's motion for summary judgment was overruled, and her petition was dismissed.

ASSIGNMENTS OF ERROR

Pinkard assigns as error that the district court erred (1) in finding as a matter of law that Bolton's estate was entitled to a judgment for the balance of the annuity payments, (2) in finding that she waived her interest in the annuity via the property settlement agreement in the dissolution decree, (3) in finding that she could not be a beneficiary under the annuity because such status was contrary to the county court's order authorizing settlement of the workers' compensation claim, and (4) in not granting her motion for summary judgment.

ANALYSIS

[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. *Nicholson v. General Cas. Co. of Wis.*, 262 Neb. 879, 636 N.W.2d 372 (2001). 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. *Kirwan v. Chicago Title Ins. Co.*, 261 Neb. 609, 624 N.W.2d 644 (2001).

Pinkard, as Bolton's guardian and conservator, entered into a settlement with his employer through its workers' compensation carrier, Travelers Insurance Company (Travelers). The county court order approving the settlement provided in relevant part:

> (b) Travelers Insurance Companies promises to pay Glenda L. Bolton as Conservator for William C. Bolton the sum of One Thousand Nine Hundred Dollars ($1,900.00) per month beginning on April 1, 1991 for the life of William C. Bolton (hereinafter referred to as Payments). Said Payments are guaranteed for ten (10) years notwithstanding the prior death of William C. Bolton.
>
> (i) In no event and under no circumstances whatsoever shall any of the Payments set forth in subparagraph (b) be

> accelerated and due prior to the aforementioned scheduled dates of payment, furthermore, in no event and under no circumstances shall any of the Payments bear interest prior to the aforementioned date of payment.
>
> (ii) In the event of the death of said William C. Bolton before receipt of the Payments set forth in subparagraph (b), said remaining guaranteed payments still owing will be paid to the Estate of said William C. Bolton as they become due and in accordance with subparagraph (i) above.
>
> (iii) Said William C. Bolton shall not be able to assign or pledge any of said Payments.

As a part of the settlement, Travelers purchased an annuity from Confederation Life Insurance Company that was subsequently assumed by Pacific Life Insurance Company and administered through Allstate Life Insurance Company. The annuity contract contained a schedule of benefits which listed Bolton as the payee, Travelers as the owner, and "Glenda Bolton" as the beneficiary. The schedule of benefits stated that Pinkard was Bolton's wife.

The dissolution decree incorporated a property settlement agreement which contained a mutual release providing as follows:

> In consideration of the above and foregoing property and promises received, each party agrees to accept the benefit of this Property Settlement Agreement in full and complete satisfaction of all financial claims, monetary demands, support, alimony, child support or property rights of any kind, including all claims that either may have as the widow or widower of the other party or otherwise; and all claims which he or she had, now has or might hereinafter have against the other in the event of his or her death as an heir at law, surviving spouse or otherwise; and each party waives any and all claims which he or she may have in any property now owned by the other or which may hereinafter be acquired by the other, except as hereinabove provided.

The property settlement agreement further provided that each party agreed to

> cooperate in the preparation and execution of all necessary documents to effectuate the terms of this Agreement. In the event either party fails to cooperate in the execution of any

> such documents to effectuate the transfer of any property, real or personal, to the other, within thirty (30) days from the date of the Decree of Dissolution herein, this document in conjunction with such a Decree shall act in place of those necessary signatures and act to transfer said property.

The district court determined that there were no genuine issues of material fact. The court concluded that Pinkard could not be a beneficiary because such status would be contrary to the order entered by the county court providing that in the event of Bolton's death, the remaining annuity payments would be paid to his estate.

The district court further found that the property settlement contained in the dissolution decree waived any and all claims Pinkard had or might have against the estate in the event of Bolton's death. The court stated that there could be no surprise or misconception as to what status Pinkard was waiving because she was aware of her status as beneficiary of the annuity prior to the divorce. The court concluded that the estate was entitled to judgment as a matter of law and dismissed Pinkard's petition.

[3] Pinkard first argues that the district court erred in finding that she waived her interest as the designated beneficiary of the annuity by executing the property settlement agreement. The general rule is that divorce does not affect a beneficiary designation in a life insurance policy. See *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). "This rule is based on the notion that the beneficiary's claim to the proceeds evolves from the terms of the policy rather than the status of the marital relationship." *Larsen v. Northwestern Nat. Life Ins.*, 463 N.W.2d 777, 779 (Minn. App. 1990).

Pinkard relies upon *Schultz v. Schultz*, 591 N.W.2d 212 (Iowa 1999), in which the decedent's widow and the ex-wife both claimed an interest in the proceeds of the decedent's individual retirement account (IRA). The ex-wife remained listed as a beneficiary of the decedent's IRA after the decree of dissolution had awarded it to the husband. The decedent remarried and died 5 years later without removing the ex-wife's name as the beneficiary on the IRA. The trial court found that the dissolution decree did not specifically address the ex-wife's status as a beneficiary and, therefore, did not terminate her expectancy interest.

In affirming the trial court's decision, the Iowa Supreme Court reasoned that since the dissolution decree did not contain any stipulation or agreement concerning the IRA, the ex-wife's interest had not been disposed of by the dissolution decree and that the proceeds therefore belonged to the ex-wife. The court noted that in previous Iowa cases, the focus of the inquiry had been on the language of the dissolution decree and whether there was any stipulation or agreement that governed the parties' property rights.

In *Lynch v. Bogenrief*, 237 N.W.2d 793 (Iowa 1976), the ex-spouse was awarded retirement system death benefits because the dissolution decree made no mention of the death benefits payable and therefore did not control the contingent interest of the ex-spouse. An opposite result was reached in *Sorensen v. Nelson*, 342 N.W.2d 477 (Iowa 1984), in which the provisions of the dissolution decree disposed of the life insurance policy proceeds. The parties had relinquished all rights not expressly provided for in the agreement, and the court held that such language evidenced the parties' intent to " 'wipe the slate clean.' " *Id.* at 481.

Applying the same rationale, we believe that the focus of the inquiry should be upon the language of the dissolution decree and any agreement which sets forth the intentions of the parties concerning property rights. If the dissolution decree and any property settlement agreement incorporated therein manifest the parties' intent to relinquish all property rights, then such agreement should be given that effect. We make no distinction among IRA's, life insurance proceeds, or other types of annuities that designate the beneficiary in the event of the death of the payee. Each case must be evaluated based upon the facts indicating the parties' intent.

When Bolton and Pinkard divorced, the property settlement agreement provided that Bolton would receive as his sole and separate property all right, title, and interest in his employee benefit plans, including workers' compensation benefits. The benefits of the property settlement agreement were in full and complete satisfaction of all claims that either party might have, including claims which might later arise in the event of one party's death. Each party waived all claims in property owned or later acquired

by the other. The parties agreed that if either party failed to effectuate the transfer of any property, the settlement agreement, in conjunction with the decree of dissolution, would act in place of those necessary signatures to transfer the property.

Thus, we conclude as a matter of law that Pinkard relinquished her expectancy interest as the beneficiary of the workers' compensation annuity. The decree of dissolution, which incorporated the property settlement agreement, terminated her interest as a beneficiary of the annuity.

Having determined that the decree of dissolution effectively disposed of Pinkard's interest as a beneficiary, we do not reach her other assignments of error.

CONCLUSION

There is no material issue of fact in dispute, and Bolton's estate is entitled to judgment as a matter of law. Therefore, we affirm the judgment of the district court.

AFFIRMED.

HENDRY, C.J., not participating.

GARY RICHMOND, APPELLANT, V.
KELLY CASE, APPELLEE.
647 N.W.2d 90

Filed July 12, 2002. No. S-01-475.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** 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. **Judgments: Records: Appeal and Error.** In order to provide meaningful appellate review of an assignment of error, an appellate court must be presented with a record that elucidates the factors contributing to the trial court's decision.
4. **Summary Judgment: Evidence: Proof.** The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. That party must therefore produce enough evidence to demonstrate his or her entitlement

to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion.

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 such evidence can be considered during appellate review of the motion.
6. **Records: Rules of the Supreme Court.** The procedure for preparation of the bill of exceptions is regulated by the rules of practice prescribed by the Nebraska Supreme Court.
7. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.

Appeal from the District Court for Kimball County: KRISTINE R. CECAVA, Judge. Reversed and remanded for further proceedings.

Monte L. Neilan, of Douglas, Kelly, Meade, Ostdiek, Bartels & Neilan, P.C., for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellee.

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

STEPHAN, J.

This is a civil action in which Gary Richmond sought declaratory and injunctive relief as well as money damages from Kelly Case, an employee of the Nebraska Department of Health and Human Services (DHHS). Richmond alleged that Case engaged in "the unauthorized practice of law" and deprived him of his constitutional rights under color of state law in obtaining the relinquishment of his parental rights to his minor daughter, A.C. Richmond appeals from an order of the district court for Kimball County entering summary judgment in favor of Case. We moved the appeal to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

RECORD

PLEADINGS

Richmond's operative first amended petition includes three separately designated "causes of action." In his first "cause of

action," Richmond alleged that on July 23, 1993, the county court for Kimball County, sitting as a juvenile court, placed A.C. in the temporary custody of DHHS. He further alleged that on or about June 1, 1995, A.C. was placed in the Omaha home of her maternal grandparents. Richmond then alleged that in September 1996, a petition was filed in the county court for Kimball County seeking to terminate his parental rights and that counsel was appointed for him for the first time on July 29, 1997.

Richmond alleged that Case, whom he identifies as a "case-worker" employed by DHHS, was assigned to the juvenile case in early August 1998. He alleged that Case contacted him to request a meeting, to which he agreed. Richmond alleged that during this meeting, he participated in a telephone conference call with Case, A.C., and A.C.'s maternal grandmother. He alleged that Case then advised and counseled him, made recommendations regarding his parental rights, and provided him with certain legal documents, despite the fact that Case was not a lawyer. Richmond further alleged that Case was aware that Richmond was then represented by appointed counsel but took such actions without the consent or knowledge of such counsel. Richmond alleged he had "an attorney-client relationship" with Case and that pursuant to her advice and counsel, he executed certain documents relinquishing his parental rights, which were subsequently filed in juvenile proceedings before the county court for Kimball County. Richmond alleged that he executed these documents in order to facilitate an "open adoption" by A.C.'s maternal grandparents, which adoption would allow him to visit A.C. after his parental rights had been terminated.

Richmond alleged that upon becoming aware of these events, his appointed counsel argued to the county court that Case had engaged in the unauthorized practice of law and moved to strike the relinquishment documents as violative of Neb. Rev. Stat. § 7-101 (Reissue 1997). Richmond alleged that this motion was overruled and that his appeal therefrom was dismissed "for lack of jurisdiction." He further alleged that the Kimball County attorney declined a request to prosecute Case under § 7-101. Richmond alleged that because he had executed the relinquishment forms, he lacked standing to participate in proceedings to terminate A.C.'s mother's parental rights and that the

relinquishment forms "may be presented, asserted, and relied upon, at any time, to the Plaintiff's great detriment, by those having interests and duties adverse to the Plaintiff." He prayed for relief consisting of a declaration that Case's conduct constituted the unauthorized practice of law and further prayed that the relinquishment forms he executed be declared null and void as the "fruit of the unauthorized practice of law." Richmond also sought injunctive relief to prevent Case from engaging in similar conduct directed toward him or other unspecified individuals.

In his second "cause of action," Richmond incorporated the foregoing allegations and further alleged that Case was negligent in advising him concerning his parental rights, resulting in injury and general damages. And finally, in his third "cause of action" Richmond alleged that Case's conduct violated his constitutional rights under color of state law, thus entitling him to compensatory and punitive damages, as well as other relief, pursuant to 42 U.S.C. § 1983 (2000).

Case filed an answer that included a general denial of the allegations of improper or unlawful conduct and two affirmative defenses: (1) that she "acted reasonably and within the scope of her employment with due regard [for] the best interests of [A.C.]" and (2) that she was entitled to "qualified immunity." On the same day Case filed her answer, Richmond interposed a pleading captioned "Plaintiff's Demurrer to Defendant's Affirmative Defenses," asserting "[f]ailure, as a matter of law, to state a defense."

Richmond's Motion for Summary Judgment

Richmond also filed a motion for partial summary judgment as to the issue of liability on his first "cause of action." The motion came on for hearing on March 7, 2000, along with four other pending motions, including Richmond's motion for attorney fees. Richmond's counsel appeared personally at the hearing, while Case's attorneys participated telephonically. It appears that this was the first evidentiary hearing conducted in the case, and it is at this point that significant deficiencies in the record began to develop.

Neb. Ct. R. of Prac. 5B(6)c (rev. 2000) specifies the manner in which evidentiary exhibits are to be identified, numbered, and retained in the bill of exceptions, providing in pertinent part:

> Exhibits are to be marked in numerical order, irrespective of the party producing them, and shall show the date on which they were marked. The sequential numbering of exhibits shall begin with the first hearing held in the case and continue until final disposition. The same number shall not be given to more than one exhibit in any case. If the pages of a multipage exhibit are not otherwise numbered, the reporter shall number the pages in sequence and shall in all instances mark such an exhibit so as to indicate the number of pages it contains.

The first exhibits offered by Richmond's counsel related to his motion for attorney fees and were numbered 34, 10, 10A, 10B, 30, and 32. These included Case's deposition, marked as exhibit 30; an affidavit of Richmond, marked as exhibit 32; an affidavit of Case dated February 7, 2000, marked as exhibit 10; and copies of what purport to be excerpts from a "Nebraska Health and Human Services Manual," marked as exhibits 10A and B. It appears that exhibits 10 and 10A and B were originally a single exhibit, but they were marked and identified separately for a reason that is not apparent from the record. The court received each of these exhibits and then took the motion for fees under advisement. At that time, the parties agreed to argue a portion of Richmond's demurrer in conjunction with his motion for partial summary judgment and then submit arguments on the remaining portion of the demurrer by brief.

Richmond then offered exhibits 33, 32, 36, 37, 30, 31, and 35 in support of his motion for partial summary judgment. Two of these exhibits, numbers 30 and 32, had previously been offered on the motion for attorney fees. The remaining exhibits included an affidavit of a friend of Richmond's, marked as exhibit 33; an affidavit of the Counsel for Discipline of the Nebraska State Bar Association, marked as exhibit 36; the deposition of the county court judge who presided over A.C.'s juvenile court proceedings, marked as exhibit 31; and two affidavits by Richmond's attorney, marked as exhibits 35 and 37. The court received exhibits 30 through 33 and 36, and took the objections to exhibits 35 and 37 under advisement.

In opposition to Richmond's motion for partial summary judgment, Case's counsel offered exhibit 10, which the court

identified as "the regs and guidelines," but which appears in the record as the aforementioned affidavit of Case dated February 7, 2000. Case's counsel also offered exhibit 11, another affidavit executed by Case on February 7, 2000, and exhibit 38, an affidavit executed by Case on February 25, 2000, which included four attachments designated A through D. The court received each of these exhibits. By order filed August 1, 2000, the district court overruled, without opinion, Richmond's demurrer and his motion for partial summary judgment without opinion.

CASE'S MOTION FOR SUMMARY JUDGMENT

On July 28, 2000, Case filed a pleading captioned "Motion for Summary Judgment Based on Qualified Immunity." A hearing on the motion was held on August 25. Richmond's counsel appeared personally, while Case's counsel again participated by telephone. Case's counsel identified 11 exhibits offered in support of the motion. However, the exhibits identified in the offer made on the record and those marked by the court reporter do not correspond. Counsel identified exhibit 1 as "an Affidavit of Kelly Case," but exhibit 1 is a document entitled "Relinquishment of Child by Parents." Counsel identified exhibit 2 as a document entitled "Relinquishment of the Child by Parent," but the document marked as exhibit 2 is entitled "Affidavit of Explanation on Nonconsent Form." Counsel identified exhibit 3 as "the Questionnaire for Relinquishment of Parental Rights," but exhibit 3 is entitled "Affidavit by Agency." Similarly, counsel identified exhibit 4 as an "Affidavit of Explanation [on] Nonconsent Form," but exhibit 4 in the bill of exceptions is entitled "Questionnaire for Relinquishment of Parental Rights." Counsel identified exhibit 5 as an "Affidavit by Agency," but, inexplicably, exhibit 5 in the bill of exceptions is a partially executed stipulation and order dealing with discovery issues in the case. Counsel identified exhibit 6 as "HHS Regulations 390 NAC 8-003 through 8-005," but the document in the bill of exceptions bearing that exhibit number is a copy of a letter from Richmond's counsel to Case's counsel. Similarly, exhibit 7 was identified as "HHS Section V on Voluntary Relinquishment," but exhibit 7 in the bill of exceptions is another letter between counsel. Exhibit 8 is identified as "Narrative of Kelly Case, the defendant perform-

ing her work," but appears in the bill of exceptions as "Plaintiffs [sic] First Set of Discovery Requests to Defendant." Case's counsel identified exhibit 9 as portions of the deposition of Case and exhibit 10 as portions of the deposition of the county judge, but exhibit 9 is a partially executed copy of a document entitled "Defendant's Answers to Interrogatories," and the only exhibit 10 appearing in the record is the affidavit of Case offered and received during the previous hearing. Finally, counsel identified exhibit 11 as "an Affidavit of Nancy Morris who is a Child Protective Service Worker." Exhibit 11 found in the bill of exceptions, however, is a deposition of Case marked and received at the March 7, 2000, hearing.

Rule 5B(6)c also provides in part:

> Ordinarily, exhibits or papers contained in the bill of exceptions should be placed in the record immediately following where they are ruled on by the court. If exhibits are frequently referred to in the testimony, they should be inserted in the record in such a manner as to be easily removed; for instance, by placing them in an attached envelope. If the exhibits are of such character or so numerous that to insert them in any volume containing testimony would make the volume cumbersome and difficult to handle while reading, then such exhibits should be contained in a separate volume. If exhibits are of such character that they cannot be inserted in a bound volume, then they should separately accompany the record.

With the possible exception of the two depositions, all of the exhibits were capable of being bound in the bill of exceptions "immediately following where they are ruled on by the court" in compliance with rule 5B(6)c. Instead, all of the exhibits were placed unbound in a manila envelope marked "Bill of Exceptions Envelope — Exhibits."

By order filed April 2, 2001, the district court granted Case's "Motion for Summary Judgment Based on Qualified Immunity" and dismissed the action. The order recites that the judge "reviewed the evidence submitted to the Court," but does not make specific reference to any item of evidence. The court concluded that Case acted "in accordance with the applicable statutes of the State of Nebraska and the regulations promulgated by her

employer" and that she "did not enter into the unauthorized practice of law."

ASSIGNMENT OF ERROR

Richmond assigns, restated, that the district court erred in granting Case's motion for summary judgment.

STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *McCarson v. McCarson*, 263 Neb. 534, 641 N.W.2d 62 (2002); *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002); *Shlien v. Board of Regents*, 263 Neb. 465, 640 N.W.2d 643 (2002). 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. *Smeal v. Olson*, 263 Neb. 900, 644 N.W.2d 550 (2002); *Polinski v. Sky Harbor Air Serv.*, 263 Neb. 406, 640 N.W.2d 391 (2002).

ANALYSIS

[3] In order to provide Richmond meaningful appellate review of his assignment of error, we must be presented with a record that elucidates the factors contributing to the district court's decision to grant summary judgment in favor of Case. See, *J.B. Contracting Servs. v. Universal Surety Co.*, 261 Neb. 586, 624 N.W.2d 13 (2001); *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Unfortunately, we are not presented with such a record here. Because of the discrepancies between the identification of exhibits offered in support of Case's motion for summary judgment and the exhibits which were actually marked by the court reporter, we cannot determine with any reasonable degree of assurance what evidence was actually before the district court when it decided the motion. For example, the depositions of Case and the county judge were offered as exhibits 9 and 10 at the August 25, 2000,

hearing on Case's motion for summary judgment. Exhibits 9 and 10 in the bill of exceptions, however, are other documents, not the depositions. The aforementioned depositions were marked as exhibits 30 and 31 at the prior hearing on March 7, but they are not shown in the bill of exceptions as being received on August 25. Also, the bill of exceptions reflects that exhibit 11, described as an affidavit of a Child Protective Services worker, was offered and received at the hearing on August 25. Again, however, exhibit 11 in the bill of exceptions is an affidavit of Case offered at the March 7 hearing, and although there is a copy of an affidavit of the Child Protective Services worker in the transcript, we find no such affidavit anywhere in the bill of exceptions. The district court's order granting the motion for summary judgment provides us no guidance because it makes no reference, either by exhibit number or substantive description, to specific evidentiary items considered and relied upon in reaching its judgment.

[4-6] The assigned error in the granting of Case's motion for summary judgment requires that we review the evidence offered in support of and in opposition to the motion. The party moving for summary judgment has the burden of showing that no genuine issue as to any material fact exists. That party must therefore produce enough evidence to demonstrate his or her entitlement to a judgment if the evidence remains uncontroverted, after which the burden of producing contrary evidence shifts to the party opposing the motion. *Smeal v. Olson, supra*; *Polinski v. Sky Harbor Air Serv., supra*. 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 such evidence can be considered during appellate review of the motion. *Morrison Enters. v. Aetna Cas. & Surety Co.*, 260 Neb. 634, 619 N.W.2d 432 (2000); *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000). The procedure for preparation of the bill of exceptions is regulated by the rules of practice prescribed by this court. *Shuck v. Jacob*, 250 Neb. 126, 548 N.W.2d 332 (1996).

[7] Because we cannot determine from this record what evidence Case presented in support of her motion for summary judgment, we cannot conclude that she met her burden of producing evidence that, if uncontroverted, would entitle her to judgment as

a matter of law. See *Morrison Enters. v. Aetna Cas. & Surety Co., supra.* We note that we are presented here with one issue of law which does not require evidentiary support, i.e., whether one may maintain a private cause of action for money damages against another based upon an alleged "unauthorized practice of law." This is an issue of first impression in this state which was neither briefed by the parties nor decided by the district court. Although it is an issue of law, we do not address it at this time based upon the principle that an appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Sydow v. City of Grand Island*, 263 Neb. 389, 639 N.W.2d 913 (2002); *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001); *Adams v. State*, 261 Neb. 680, 625 N.W.2d 190 (2001).

CONCLUSION

This court's rules governing the numbering of exhibits and the manner of their inclusion in the bill of exceptions are designed to provide an appellate court with a clear understanding of what documentary evidence was received and considered by a trial court with respect to a particular matter submitted for decision, thus facilitating meaningful appellate review. Because those rules were not followed, we are unable to conclude, under our standard of review, that Case made the requisite factual showing which would entitle her to summary judgment. Accordingly, the judgment of the district court is reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SUSAN R. TREMAIN, NOW KNOWN AS SUSAN R. TALLANT, APPELLEE, V. CHARLES L. TREMAIN II, APPELLANT.

646 N.W.2d 661

Filed July 12, 2002. No. S-01-790.

1. **Child Custody: Appeal and Error.** Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion.

2. **Child Custody.** Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action.
3. ____. In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state.
4. ____. After the custodial parent satisfies the court that he or she has a legitimate reason for leaving the state, the custodial parent must demonstrate that it is in the child's best interests to continue living with him or her.
5. **Child Custody: Appeal and Error.** The Nebraska Supreme Court conducts a de novo review on the record in child custody determinations.
6. **Modification of Decree: Child Custody: Proof.** The party seeking modification of child custody bears the burden of showing a change in circumstances.
7. **Modification of Decree: Words and Phrases.** A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
8. **Judges: Words and Phrases.** A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result.

Appeal from the District Court for Johnson County: DANIEL BRYAN, JR., Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Gregory D. Barton, of Harding, Shultz & Downs, for appellant, and, on brief, Charles L. Tremain II, pro se.

Louie M. Ligouri, of Ligouri Law Office, for appellee.

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

WRIGHT, J.

NATURE OF CASE

Charles L. Tremain II appeals from an order of the district court for Johnson County that denied his request to remove his children from the state and granted custody of the children to his ex-wife, Susan R. Tremain, now known as Susan R. Tallant.

SCOPE OF REVIEW

[1] Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination

will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002).

[2] Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id.*

FACTS

Charles and Susan were married in Nevada on February 16, 1992, and they have three children. A decree dissolving their marriage was entered on December 10, 1999.

In the dissolution decree, the district court awarded custody of the children to Charles, subject to a visitation schedule that included every other weekend, scheduled holidays, and 4 weeks in the summer. Both parties were restrained from removing the children from the state without the court's consent unless the other party gave written consent for a temporary removal. Based on her current income, Susan was directed to pay $50 per month in child support. Charles was directed to maintain health insurance for the children, with other medical expenses to be shared by Charles and Susan.

Susan appealed the custody determination to the Nebraska Court of Appeals, which affirmed the district court's order. See *Tremain v. Tremain*, No. A-00-067, 2000 WL 1673320 (Neb. App. Nov. 7, 2000) (not designated for permanent publication). The Court of Appeals found, upon its de novo review, that both Susan and Charles are fit parents, that the children have good relationships with both parties, and that each party can provide a suitable home for the children. The appellate court held that it could not find an abuse of discretion in awarding custody to Charles.

Following the divorce, Charles moved to Clay Center, Nebraska, where he earned $35,000 per year as a teacher and assistant coach for the Harvard public schools. Charles said he resigned the position in the spring of 2000 because he had philosophical differences with the principal and had been told his contract would not be renewed. He applied for more than 40 teaching positions but received no similar offers. He eventually took a job with a counseling center in the Hastings, Nebraska, area at a salary of $24,000 per year.

Charles married Jacque Jury on June 25, 2000. At the time of the marriage, she lived in Forest Grove, Oregon, and worked as a financial officer earning $83,000 per year. After the marriage, Jacque continued living and working in Oregon, while Charles and the children lived in Clay Center. The children attended Clay Center public schools in the fall of 2000.

In November 2000, Charles was offered a teaching position in Oregon that paid $43,500 per year. He did not tell Susan about the position. After Susan gave Charles permission to take the children to Oregon for an extended Thanksgiving holiday, he moved the children to Oregon and enrolled them in school.

In December 2000, Charles filed an application for permission to remove the children from Nebraska in which he explained that he originally sought teaching positions that would begin in January 2001. However, an Oregon school wanted him to report on November 21, 2000, and begin teaching in the first week of December. Susan filed an answer and cross-petition on January 16, 2001, in which she alleged that Charles was in contempt of court for removing the children from the state. She asked the district court to enter an order awarding her custody of the children. The court found Charles in contempt and directed him to return the children to Nebraska on or before January 15.

Charles terminated his teaching position in Oregon and returned with the children to Burchard, Nebraska, where he was able to obtain free housing from one of Jacque's relatives. He took temporary positions as a substitute teacher earning $60 per day.

After a hearing in March 2001, the district court temporarily placed the children in Susan's custody, and she enrolled the children in the Lewiston school district. Charles returned to Oregon and worked as a substitute teacher for $130 per day.

At the time of the hearing in May 2001, Charles had two interviews pending for teaching positions with starting base salaries of $47,500. Charles and Jacque were renting a five-bedroom home in Oregon. Jacque's 30-year-old daughter and a grandson also resided in the home. Jacque had been laid off when her employer downsized, but she eventually obtained a job in a real estate office in Seattle, Washington. The job was 3 hours away from Forest Grove, Oregon.

Susan married Michael Tallant in the summer of 2000. In May 2001, they were living in Liberty, Nebraska, in a two-story home with five bedrooms. Michael worked in Beatrice and earned a modest income. Susan was working as a painter and decorator. The district court found that her potential earning capacity was a minimum of $12,000 per year.

On June 11, 2001, the district court denied Charles' application to remove the children from the state and granted Susan's cross-petition for change of custody. The order included a visitation schedule that made provision for Charles' residing in either Oregon or Nebraska. Charles was ordered to pay Susan child support of $967 per month with a decreasing schedule as each child reaches the age of majority. Charles appeals.

ASSIGNMENTS OF ERROR

Charles asserts that the district court abused its discretion in placing the children in the temporary custody of Susan in March 2001, in granting permanent custody to Susan, in denying Charles permission to remove the children from Nebraska, and in basing its decision in substantial part on the court's opinion that women generally are natural nurturers. Charles also asserts that the court's finding of a material change in circumstances which justified transferring child custody is contrary to the law and the evidence.

ANALYSIS

The district court denied Charles' request to move the children to Oregon, finding that it was in the best interests of the children to award custody to Susan. This change of custody occurred just 18 months after the dissolution decree was entered by a different judge.

[3] In order to prevail on a motion to remove a minor child to another jurisdiction, the custodial parent must first satisfy the court that he or she has a legitimate reason for leaving the state. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). The district court found that Charles had not voluntarily given up his $35,000-per-year job in Harvard and that he was having trouble obtaining a similar job in Nebraska. The job he had taken in Oregon had a potential for increased salary compared to similar jobs in Nebraska. At the time of the hearing on Charles' request

to move the children, Charles no longer had a job in Oregon because he lost his teaching job when he was ordered to return to Nebraska. Jacque had not been able to find employment in Nebraska. The court found that although there was no evidence of a firm job offer, the evidence of present job interviews in Oregon, Charles' previous ability to obtain a job, and his marriage to Jacque met Charles' burden of showing a legitimate reason to leave Nebraska because Oregon offered Charles increased opportunities for enhanced income as a teacher.

[4] After the custodial parent satisfies the court that he or she has a legitimate reason for leaving the state, the custodial parent must demonstrate that it is in the child's best interests to continue living with him or her. See *id.* In order to determine whether it is in the children's best interests to continue living with Charles, the district court considered the factors spelled out in *Vogel*: (1) each parent's motives for seeking or opposing the move; (2) the potential that the move holds for enhancing the quality of life for the child and the custodial parent; and (3) the impact such a move will have on contact between the child and the noncustodial parent, when viewed in the light of reasonable visitation arrangements.

The district court found that neither party was seeking to frustrate the custodial rights of the other or acting in bad faith and that both parents cared about the children and were trying to do what was best, "even though it is apparent to me that these two people are not nice to each other." The court determined that each parent had valid reasons for their respective positions concerning removal of the children from the state.

The district court considered the potential that a move would enhance the quality of life for the children and Charles. The court weighed the factors set forth in *Farnsworth v. Farnsworth*, 257 Neb. 242, 597 N.W.2d 592 (1999), and concluded that Charles should not be allowed to move the children.

The district court also considered the impact the move would have on the children and Susan. Charles' testimony established that he was willing to allow extensive visitation during summer and school holidays and was willing to pay some of the expenses. The court found that Susan "is the type of parent that wants to be a major part of the children's lives." This fact weighed against relocation.

The district court found that Charles had not demonstrated that it is in the children's best interests to continue to live with Charles. The court said that the only factor that weighed in favor of relocation was the expectation of enhanced income and that it had not been shown by a preponderance of the evidence that it would be in the children's best interests to relocate.

From our de novo review, we conclude that it is not in the children's best interests to move to Oregon. The only factor which weighs in Charles' favor is the possibility of enhanced income, and this factor is not sufficient to carry the burden to establish that it is in the children's best interests to be moved to Oregon. We therefore affirm that portion of the district court's order denying Charles' request to move the children.

[5] We next address whether there was a material change in circumstances that would justify a change in custody. We consider this issue separate and apart from the request to move the children to Oregon. Child custody determinations are matters initially entrusted to the discretion of the trial court, and although reviewed de novo on the record, the trial court's determination will normally be affirmed absent an abuse of discretion. *Vogel v. Vogel*, 262 Neb. 1030, 637 N.W.2d 611 (2002). Ordinarily, custody of a minor child will not be modified unless there has been a material change in circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Id.* This court conducts a de novo review on the record in child custody determinations. See *id.*

[6,7] The party seeking modification of child custody bears the burden of showing a change in circumstances. *Id.* A material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *Sullivan v. Sullivan*, 249 Neb. 573, 544 N.W.2d 354 (1996). In *Vogel*, we stated that the removal of a child from the state, without more, does not amount to a change in circumstances warranting a change of custody. We recognized that a move, considered in conjunction with other evidence, may result in a change in circumstances that would warrant a modification of the decree. In this case, the request to move the children also resulted in a change in custody of the children.

[8] The district court found a material change in circumstances based in part on the "stability" of Charles. The court found that Charles' move to Oregon reflected instability, deceit, and poor judgment regarding the children's best interests. The question is whether the district court abused its discretion in finding a material change in circumstances based upon Charles' unilateral move to Oregon without the consent of Susan or the court. A judicial abuse of discretion requires that the reasons or rulings of the trial court be clearly untenable insofar as they unfairly deprive a litigant of a substantial right and a just result. *Vogel v. Vogel, supra.*

The district court stated that several questions were left unanswered, including whether Charles and Jacque would relocate to Nebraska if the court denied the request to remove the children. Susan's cross-petition alleged a material change in circumstances, which she claimed was the instability of the children's home and school based on Charles' employment decisions. The court found that while the stability issue alone did not demonstrate a material change in circumstances, a combination of events following the decree resulted in a material change in circumstances.

The district court based its decision, at least in part, on its finding that Susan, as a woman, is a better nurturer. That finding does not demonstrate a change in circumstances because Susan made the same claim during the dissolution proceedings, when she argued that she should be awarded custody because she is more nurturing than Charles. This claim was known to the court at the time of the dissolution decree and did not persuade the court to award custody to Susan at that time. Moreover, the record does not show that this circumstance has materially changed since the original decree granting custody to Charles.

The best interests of the children are this court's paramount concern. See *Smith-Helstrom v. Yonker*, 249 Neb. 449, 544 N.W.2d 93 (1996). The evidence was sufficient to support either parent as the custodial parent because both were found to be fit. In granting Susan's cross-petition for a change in custody, the district court apparently adopted her assertion that Charles had failed to provide stability for the children. The court found that Charles had moved the children to four separate school systems since the entry of the decree and that his job changes reflected

instability. However, Charles moved the children to Oregon because he had obtained a better job, and he quit that job and moved them back to Nebraska in response to the court's order. The children were temporarily placed in Susan's custody in March 2001 and apparently have remained there.

Although we have concluded that it is in the best interests of the children to remain in Nebraska, we are not persuaded that Susan has sustained her burden of showing a material change in circumstances that would justify a change in custody. The district court noted that "this was never a question of whether or not [Charles] was a fit parent or not." The court stated:

> It was a question of whether or not he opened the door on change of custody because he moved out of Nebraska. He would have never had custody taken out of his possession if it wasn't for the fact he wanted to create this material change of circumstances and take the kids out. The mere fact he's asking to transfer them, I think that's a material change, the custody issue being b[r]ought back into the forum.

The district court abused its discretion when it determined there had been a material change in circumstances that justified granting a change in custody. The court should have ascertained whether Charles would relocate to Nebraska in order to retain custody of the children. The issue was not resolved, and the evidence does not support a finding of a material change in circumstances.

CONCLUSION

That portion of the district court's order denying Charles' request to remove the children from Nebraska was not an abuse of discretion, and it is affirmed. However, that portion of the order granting custody to Susan based on a material change in circumstances is reversed, and the cause is remanded for further proceedings to determine the custody, support, and visitation arrangements should Charles choose to reside in Nebraska.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HENDRY, C.J., not participating.

HELEN VOLQUARDSON, PLAINTIFF, V. HARTFORD INSURANCE COMPANY OF THE MIDWEST, DEFENDANT.

647 N.W.2d 599

Filed July 12, 2002. No. S-01-972.

1. **Insurance: Contracts.** An insurance policy is a contract.
2. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute.
3. **Insurance: Contracts: Intent: Appeal and Error.** In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contract are clear, they are to be accorded their plain and ordinary meaning.
4. **Insurance: Contracts: Words and Phrases.** A contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. However, the fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous.
5. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
6. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
7. **Statutes: Legislature: Public Policy.** It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.
8. **Insurance: Liability: Public Policy.** It is against public policy to insure against liability for intentional acts.
9. **Insurance: Contracts: Words and Phrases.** The phrase "the insured" in an insurance policy denotes a several obligation, as distinguished from the joint obligation created by the phrase "an insured."
10. **Statutes.** Statutory interpretation presents a question of law.
11. **Statutes: Appeal and Error.** When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.
12. **Statutes.** A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute.
13. **Statutes: Legislature: Intent.** In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute.

14. ____: ____: ____. A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature.

Certified Questions from the U.S. District Court for the District of Nebraska. Judgment entered.

Ronald E. Temple, of Gatz, Fitzgerald, Vetter & Temple, for plaintiff.

Thomas H. Cellilli III and Michelle Dreesen Epstein, of Locher, Cellilli, Pavelka & Dostal, L.L.C., for defendant.

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

STEPHAN, J.

In a pending civil action captioned "Helen Volquardson, Plaintiff vs. Hartford Insurance Company of the Midwest, Defendant," No. 4:00CV3340, the U.S. District Court for the District of Nebraska certified six questions of state law to this court under the procedure established by Neb. Rev. Stat. §§ 24-219 through 24-225 (Reissue 1995). We accepted the certification request and hereby answer the certified questions, which concern the interpretation of two insurance policies issued by Hartford Insurance Company of the Midwest (the Hartford) to Helen Volquardson and William J. Volquardson.

UNCONTESTED FACTS

Pursuant to § 24-221, the U.S. District Court included in its certification request the following uncontested facts relevant to the certified questions of law: Helen is a resident of Cedar County, Nebraska, and is married to William. The Hartford is an insurer licensed and authorized to conduct business in the State of Nebraska.

The Volquardsons owned a residence, outbuildings, and a 1984 Mercury Lynx as joint tenants with rights of survivorship on July 30, 2000. The Volquardsons' residence and outbuildings were insured by a homeowner's policy issued by the Hartford, which specifically provided insurance coverage against peril of fire. The 1984 Mercury Lynx was insured by an automobile liability policy

also issued by the Hartford. Helen and William were named insureds under both policies, and both policies were in effect on July 30, 2000. In 1994, the Hartford had the contents of the Volquardsons' homeowner's policy approved by the director of the Department of Insurance for the State of Nebraska.

On July 30, 2000, at approximately 8:30 a.m., William intentionally set fire to the residence, its contents, the outbuildings, and the 1984 Mercury Lynx. All of the aforementioned property was completely destroyed by the fire. William set the fire as part of a suicide attempt.

Helen was in no way involved in setting fire to the property, nor did she have any actual or constructive knowledge that William was going to set the fire. Furthermore, there is no evidence to indicate that William's actions on July 30, 2000, constituted an act of abuse as that term is defined by Neb. Rev. Stat. § 44-7402(1) (Reissue 1998).

After the fire, Helen timely complied with all conditions precedent to coverage and then made claims against the insurance policies to recover for the destroyed property, but the Hartford refused to pay. On December 22, 2000, Helen filed a complaint in the U.S. District Court for the District of Nebraska alleging she was entitled to a judgment requiring the Hartford to pay her claims for property damage pursuant to the policies. The Hartford filed an answer in which it affirmatively alleged that the intentional acts exclusion in the homeowner's policy precluded coverage for the damage to the residence, its contents, and the outbuildings because William had intentionally burned the property. The Hartford also affirmatively alleged that part D of the insuring agreement in the automobile liability policy, which stated that the Hartford would pay for only "direct and accidental loss" to a covered automobile, prevented Helen from recovering for the damage to the 1984 Mercury Lynx.

The U.S. District Court also provided certain documents for our review and consideration in responding to the certified questions. These documents include the complaint and answer filed in the pending federal action, the two insurance policies issued by the Hartford and identified in the uncontested facts, and the 1943 New York Standard Fire Insurance Policy (1943 NYSFIP) certified by the State of Nebraska, Department of Insurance.

CERTIFIED QUESTIONS

The U.S. District Court certified the following six questions of state law for resolution by this court:

1. Is the language of the intentional acts exclusion in SECTION [I]-EXCLUSIONS, Paragraph 1.h.1. and 1.h.2 of Hartford's Homeowner's Policy ambiguous?

2. Is the intentional acts exclusion in SECTION [I]—EXCLUSIONS, Paragraph 1.h.1. and 1.h.2 of the Hartford's Homeowner's Policy contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude coverage against peril of fire to an innocent co-insured?

3. Does the intentional acts exclusion in SECTION [I]—EXCLUSIONS, Paragraph 1.h.1 and 1.h.2 of the Hartford's Homeowner's Policy comply with the provisions of §44-501(6), R.R.S. 1998, and provide the substantial equivalent of the minimum provisions of the 1943 New York Standard Fire Insurance Policy?

4. If the answer to Question No. 3 is "no," did the Director of Insurance of the State of Nebraska, pursuant to § 44-501(11), R.R.S. 1998, have the lawful authority in 1994 to approve the variations in Hartford's Homeowners policy notwithstanding its noncompliance with the 1943 New York Standard Fire Insurance Policy?

5. Is the language "direct and accidental loss" in the insuring agreement in PART D—COVERAGE FOR DAMAGE TO YOUR AUTO, Paragraph A. of Hartford's Auto Policy ambiguous?

6. Is the language "direct and accidental loss" in the insuring agreement in PART D—COVERAGE FOR DAMAGE TO YOUR AUTO, Paragraph A. of Hartford's Auto Policy contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude comprehensive coverage to an innocent co-insured?

ANALYSIS

INTRODUCTION

[1-3] Certain well-established principles of Nebraska law form the foundation for our resolution of the questions of law

certified by the U.S. District Court. An insurance policy is a contract. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000); Neb. Rev. Stat. § 44-102 (Reissue 1998). Parties to an insurance contract may contract for any lawful coverage, and the insurer may limit its liability and impose restrictions and conditions upon its obligation under the contract not inconsistent with public policy or statute. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000); *American Family Ins. Group v. Hemenway*, 254 Neb. 134, 575 N.W.2d 143 (1998). In an appellate review of an insurance policy, the court construes the policy as any other contract to give effect to the parties' intentions at the time the writing was made. Where the terms of a contact are clear, they are to be accorded their plain and ordinary meaning. *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001); *Callahan v. Washington Nat. Ins. Co., supra.*

QUESTION ONE

The first certified question asks this court to determine whether the intentional acts exclusion in the Volquardsons' homeowner's policy is ambiguous. The exclusion provides:

> **SECTION I — EXCLUSIONS**
>
> 1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:
>
> . . . .
>
> **h. Intentional Loss,** meaning any loss arising out of any act committed:
>
> (1) By or at the direction of an **insured**; and
>
> (2) With the intent to cause a loss.

Helen argues that the phrase "an insured" is ambiguous as to whether an innocent coinsured may recover despite the intentional act(s) of a coinsured, because the phrase does not exclude coverage for the intentional act(s) of "any insured." The Hartford argues that the language is not ambiguous and that the plain meaning of the exclusion negates coverage to Helen based upon the intentional acts of her husband, who is "an insured" under the policy.

[4,5] In Nebraska, a contract, such as an insurance policy, is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Callahan v. Washington Nat. Ins. Co., supra*. However, the fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Id.*; *Moller v. State Farm Mut. Auto Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). Moreover, while an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Callahan v. Washington Nat. Ins. Co., supra*; *American Family Ins. Group v. Hemenway, supra*.

This court has not previously determined whether the phrase "an insured" in an insurance policy clearly and unambiguously creates joint rights and obligations on the part of coinsureds, or whether the phrase is ambiguous and should therefore be construed in favor of a coinsured who does not participate in an excluded loss. Those courts which have addressed this issue have reached strikingly dissimilar conclusions. In *Michigan Millers Mut. Ins. Corp. v. Benfield*, 140 F.3d 915 (11th Cir. 1998), for example, the court held that the phrase "an insured" in the homeowner's policy under consideration was ambiguous because it did not clearly impose joint obligations on the part of coinsureds. In determining that an ambiguity existed, the *Benfield* court noted that the phrases "an insured" and "the insured" were used throughout the policy "with apparent interchangeability." *Id.* at 926. The same is true of the Hartford policy under consideration here.

In *McFarland v. Utica Fire Ins. Co.*, 814 F. Supp. 518, 525 (S.D. Miss. 1992), the court reasoned that because the intentional acts exclusion in the property insurance policy under review "with[held] coverage for 'an' act committed by 'an' insured, but not 'an' act committed by 'any' insured," the language was ambiguous and should therefore be construed to not bar an innocent coinsured from recovering. In *Brumley v. Lee*, 265 Kan. 810, 963 P.2d 1224 (1998), the Supreme Court of Kansas went even

further and concluded that the phrase "any insured" was also ambiguous. The *Brumley* court was interpreting a provision in a homeowner's policy that excluded coverage for bodily injury or property damage " 'expected or intended by any insured.' " 265 Kan. at 811, 963 P.2d at 1226. In its opinion, the *Brumley* court rejected the insurer's argument that use of the phrase "any insured" clearly created a joint obligation, reasoning that "[t]he words 'an' and 'any' are inherently indefinite and ambiguous" and "can and often do have the same meaning." 265 Kan. at 814, 963 P.2d at 1227.

Conversely, other courts have found no ambiguity in similar policy language. For example, the court in *Dolcy v. R.I. Joint Reinsurance Ass'n*, 589 A.2d 313 (R.I. 1991), examined language in a homeowner's policy to determine whether an innocent coinsured could recover for a fire loss caused by the intentional act of her spouse. The Supreme Court of Rhode Island first determined that the issue must be resolved by examining the policy language "to see whether the insureds' obligation to refrain from intentional destruction (arson) is joint rather than separate under the patent language of the contract." *Id.* at 315. The *Dolcy* court concluded that policy language stating that the carrier does " 'not insure against loss caused directly or indirectly by . . . an insured' " who commits the loss intentionally was an unambiguous pronouncement that no coverage was provided for a loss caused intentionally by any insured. 589 A.2d at 316.

The Supreme Court of Iowa employed similar reasoning in resolving questions certified to it by the U.S. District Court for the Southern District of Iowa in *Vance v. Pekin Ins. Co.*, 457 N.W.2d 589 (Iowa 1990). In the context of a claim by an innocent spouse to recover under a homeowner's policy for a fire loss intentionally caused by her husband, the *Vance* court examined a policy provision stating that coverage is excluded for " '[i]ntentional Loss . . . committed . . . by or at the direction of *an* insured.' " *Id.* at 592. Noting that the case turned on whether the word "an" was ambiguous, the court concluded that it was not, stating:

> The word "an" is a functional word used "before singular nouns when the referent is unspecified (for example, a man overboard)." *Webster's Ninth New Collegiate Dictionary* 45 (1985). The words "an insured" in the above exclusion

> means [sic] an unspecified insured who commits arson. In short, if any insured commits arson, all insureds are barred from recovering.

Id. at 593. Accord, *Bryant v. Allstate Ins. Co.*, 592 F. Supp. 39, 41 (E.D. Ky. 1984) (employing contract analysis and determining phrase "an insured" to be unambiguous and "clear as spring water"); *Utah Farm Bureau Ins. Co. v. Crook*, 980 P.2d 685 (Utah 1999) (holding phrase "an insured" in intentional acts of exclusion provision unambiguously barred innocent coinsured from recovering for damage to insured property caused by arson of coinsured); *Woodhouse v. Farmers Union Mut. Ins. Co.*, 241 Mont. 69, 785 P.2d 192 (1990) (same); *Allstate Ins v Freeman*, 432 Mich. 656, 443 N.W.2d 734 (1989) (interpreting "an insured" to unambiguously refer to "all" or "any insured" under homeowner's policy); *Farmers Insurance v. Hembree*, 54 Wash. App. 195, 773 P.2d 105 (1989) (holding "an insured" includes anyone insured under homeowner's policy).

As noted, it is well-settled Nebraska law that an insurance policy is a contract between the insurer and the insured, whose respective rights and obligations must be determined by application of contract principles. See, e.g., *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). The Hartford's homeowner's policy defines various losses for which no insurance is provided, including intentional losses "arising out of any act committed [b]y or at the direction of an **insured**." We conclude that this means, simply and unambiguously, that if a loss is caused intentionally by someone who is insured under the policy, it is not covered. Thus, in response to the first certified question, we find no ambiguity in the intentional acts exclusion found at section I exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy.

QUESTION TWO

The second certified question requires this court to determine whether the intentional acts exclusion, which we have now determined to be unambiguous, is nevertheless contrary to the public

policy of this state when applied to preclude coverage against peril of fire to an innocent coinsured. We understand this question to be separate and distinct from the issue of whether the exclusion complies with Neb. Rev. Stat. § 44-501 (Reissue 1998), which is the subject of the third certified question. Accordingly, in response to the second question, we consider whether Nebraska has an articulated public policy that specifically recognizes rights of an innocent coinsured with respect to application of an intentional acts exclusion in a homeowner's policy.

[6,7] "Public policy" is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). We have also noted that " '[i]t is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state.' " *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 157, 629 N.W.2d 494, 501 (2001), quoting *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994). The only Nebraska statute dealing specifically with innocent coinsureds in the context of property and casualty insurance is Neb. Rev. Stat. § 44-7406(6) (Reissue 1998), which was enacted in 1998 as part of the Unfair Discrimination Against Subjects of Abuse in Insurance Act. See 1998 Neb. Laws, L.B. 1035. The uncontested facts of this case include a statement indicating that there is no evidence of "abuse" as defined by the aforementioned act, and we therefore do not consider § 44-7406(6) in our analysis of this certified question.

[8] This court, like others, has stated that it is against public policy to insure against liability for intentional acts. See *Austin v. State Farm Mut. Auto. Ins. Co.*, 261 Neb. 697, 625 N.W.2d 213 (2001). See, also, *Ohio Cas. Ins. Co. v. Clark*, 583 N.W.2d 377 (N.D. 1998); *State Farm Fire & Cas. Co. v. Falley*, 23 Kan. App. 2d 21, 926 P.2d 664 (1996); *Nationwide Mut. Ins. Co. v. Finkley*, 112 Ohio App. 3d 712, 679 N.E.2d 1189 (1996); *Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 900 P.2d 619, 44 Cal. Rptr. 2d 370 (1995). In *Continental Ins. Co. v. Gustav's Stable Club, Inc.*, 211 Neb. 1, 12, 317 N.W.2d 734, 740 (1982), we stated: " 'The rule

as to partnerships or joint ventures is that innocent partners and joint venturers are also barred from recovery where the arson is perpetrated by a partner or a joint venturer.'" (Quoting *Erlin-Lawler Enterprises, Inc. v. Fire Ins. Exch.*, 267 Cal. App. 2d 381, 73 Cal. Rptr. 182 (1968).) However, we have never specifically considered the question of whether, in the context of homeowner's insurance, public policy would bar enforcement of an intentional acts exclusion against an innocent coinsured whose spouse commits the intentional act that results in loss.

Helen argues that this court's recent holding in *Allstate Ins. Co. v. LaRandeau*, 261 Neb. 242, 622 N.W.2d 646 (2001), indicates that Nebraska public policy requires an insurer to compensate an innocent coinsured in her situation. Although *LaRandeau* did involve a payment by an insurer to an innocent coinsured whose spouse had caused a fire loss, the issue of whether such payment was required by public policy notwithstanding an intentional acts exclusion was not presented. The insurer in *LaRandeau* voluntarily paid one-half of the loss to the innocent coinsured and then sought to recover that amount in a subrogation claim against the insured spouse who intentionally caused the loss. We held that the insurer had a right to do so, reasoning that the intentional act of arson was not covered under the homeowner's policy and that the insurer's right of subrogation served the legitimate purpose of placing ultimate responsibility for the loss upon the intentional wrongdoer. The holding in *LaRandeau* thus does not support Helen's position. We conclude that there is no public policy specifically articulated by Nebraska statutes or case law which would preclude application of the intentional acts exclusion at issue here to negate coverage against peril of fire to an innocent coinsured under the uncontested facts presented in this case.

Question Three

The third certified question asks this court to determine whether the intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy complies with the provisions of § 44-501 and provides the substantial equivalent of the minimum provisions of the 1943 NYSFIP. Section 44-501 reads in pertinent part:

> No policy or contract of fire and lightning insurance, including a renewal thereof, shall be made, issued, used, or delivered by any insurer or by any agent or representative thereof on property within this state other than such as shall conform as nearly as practicable to blanks, size of type, context, provisions, agreements, and conditions with the 1943 Standard Fire Insurance Policy of the State of New York, a copy of which shall be filed in the office of the Director of Insurance as standard policy for this state, and no other or different provision, agreement, condition, or clause shall in any manner be made a part of such contract or policy or be endorsed thereon or delivered therewith except as provided in subdivisions (1) through (11) of this section.
>
> . . . .
>
> (6) . . . The Director of Insurance may approve any form of policy which includes coverage against the peril of fire and substantial coverage against other perils without complying with the provisions of this section *if such policy with respect to the peril of fire includes provisions which are the substantial equivalent of the minimum provisions of the standard policy provided for in this section* and if the policy is complete as to all its terms without reference to any other document.

(Emphasis supplied.)

The 1943 NYSFIP referred to in § 44-501 exclusively utilizes the phrase "the insured." For example, the concealment and fraud exclusion in the policy provides:

> This entire policy shall be void if, whether before or after a loss, *the insured* has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of *the insured* therein, or in case of any fraud or false swearing by *the insured* relating thereto.

(Emphasis supplied.)

[9] In resolving the first certified question herein, we determined that the phrase "an insured" in the intentional acts exclusion in the Hartford's homeowner's policy created a joint obligation among coinsureds. Thus, if a loss is caused by the intentional act of an insured, an innocent coinsured would be precluded from

recovery under the plain language of the policy. Although we have not previously addressed the issue, other courts have determined that the phrase "the insured" in an insurance policy creates a several obligation which excludes coverage only as to the individual insured who committed the proscribed act. For example, in *Lane v. Security Mut. Ins. Co.*, 96 N.Y.2d 1, 5, 747 N.E.2d 1270, 1272, 724 N.Y.S.2d 670, 672 (2001), the Court of Appeals of New York held that the consistent use of the phrase "the insured" in that state's statutory standard fire insurance policy "delineates independent liabilities and obligations as to each insured to refrain from incendiary acts." See, also, *Watson v. United Services Auto. Ass'n*, 566 N.W.2d 683, 691 (Minn. 1997) (holding use of phrase "the insured" in Minnesota's standard fire insurance policy "evinces a general intent to compensate an innocent co-insured spouse despite the intentional acts of the other insured spouse"); *Fireman's Fund v. Dean*, 212 Ga. App. 262, 441 S.E.2d 436 (1994) (holding use of phrase "the insured" must be construed to provide several obligations to each coinsured); *Osbon v. National Union Fire Ins. Co.*, 632 So. 2d 1158 (La. 1994) (holding use of phrase "the insured" is singular and refers only to insured responsible for causing loss); *Ponder v. Allstate Ins. Co.*, 729 F. Supp. 60, 61 (E.D. Mich. 1990) (holding under Michigan law that standard policy which states that it is void " 'if . . . *the* insured has willfully concealed or misrepresented' " a material fact or circumstance means that "the policy is void only as to the fraudulent insured party, and that innocent insureds may still recover" (emphasis in original)). We have found no authority to the contrary and agree that the phrase "the insured" in an insurance policy denotes a several obligation, as distinguished from the joint obligation created by the phrase "an insured."

Next, we must determine whether the Hartford's homeowner's policy provided insurance coverage against peril of fire that was the "substantial equivalent" of the fire coverage provided by the 1943 NYSFIP. There is an obvious substantive difference between joint and several obligations of multiple insureds with respect to a coverage exclusion based upon conduct. Where the obligation is joint, commission of a proscribed act by one insured voids coverage as to all. However, where the obligation is several, the proscribed conduct defeats the policy

rights of the insured who committed the act but not those of an innocent coinsured.

The Hartford argues that we need not consider this difference here because the 1943 NYSFIP does not contain an intentional acts exclusion. It relies upon *Dolcy v. R.I. Joint Reinsurance Ass'n*, 589 A.2d 313 (R.I. 1991), and *Traders & General Ins. Co. v. Freeman*, 81 F. Supp. 2d 1070 (D. Or. 2000), to support its argument. In *Dolcy*, the court concluded that the phrase "any insured" in an intentional acts exclusion unambiguously created a joint obligation which barred recovery by an innocent coinsured. In a footnote, the court noted a "developing train of thought" indicating that a joint obligation can be judicially reformed to be several if shown to be inconsistent with a state's standard fire insurance policy. *Dolcy*, 589 A.2d at 314 n.1. However, the court noted that it need not consider reformation because the intentional acts exclusion was a "nonstatutory clause" and there was no argument that it was inconsistent with statutory requirements. *Id.*

In *Traders & General Ins. Co. v. Freeman, supra*, the court similarly determined that the phrase "any insured" in an intentional acts exclusion created a joint obligation. The court rejected an argument that the exclusion, so construed, was inconsistent with Oregon's statutory standard policy language by reasoning that the standard policy did not include an intentional acts exclusion. While other exclusions in the standard policy used the phrase "the insured," the federal court applying Oregon law determined that in the absence of express legislative direction, it could not conclude that the Oregon Legislature intended to impose a several obligation requirement with respect to an intentional acts exclusion. On this point, the court in *Traders & General Ins. Co.* cited *Lane v. Security Mut. Ins. Co.*, 256 A.D.2d 1100, 682 N.Y.S.2d 777 (1998), for the proposition that a statutory standard policy would not be extended to invalidate an intentional loss exclusion "when the standard policy was 'silent with respect to such an exclusion' and did not define the term 'insured.'" *Traders & General Ins. Co.*, 81 F. Supp. 2d at 1080. The *Lane* case was subsequently reversed, however, by the Court of Appeals of New York. See *Lane v. Security Mut. Ins. Co.*, 96 N.Y.2d 1, 747 N.E.2d 1270, 724 N.Y.S.2d 670 (2001). In that opinion, the court held that the standard policy's use of the phrase

"the insured" created a several obligation for coinsureds and that the intentional acts exclusion under review, which created a joint obligation for coinsureds by its use of the phrase "an insured," was not in conformity with the statutory requirement that fire policies offer the same level of coverage as the standard policy.

In *Watson v. United Services Auto. Ass'n*, 566 N.W.2d 683 (Minn. 1997), the Minnesota Supreme Court also held that an intentional acts exclusion utilizing the phrase "an insured" conflicted with the Minnesota standard fire insurance policy, notwithstanding the fact that the standard policy did not contain an intentional loss exclusion. The court reasoned that the standard policy did contain numerous exclusions based upon conduct of "the insured" and that the standard policy therefore indicated an intent to create several obligations on the part of coinsureds. It therefore held that insofar as the policy in question excluded coverage for an innocent coinsured, it conflicted with the standard policy and must be reformed. See, also, *Borman v State Farm*, 446 Mich. 482, 498, 521 N.W.2d 266, 273 (1994) (holding intentional acts exclusion covered same subject matter as concealment or fraud exclusion in standard policy and that its use of phrase " 'you or any other insured' " was inconsistent with phrase "the insured" in standard policy); *Osbon v. National Union Fire Ins. Co.*, 632 So. 2d 1158 (La. 1994) (holding intentional acts exclusion precluding recovery by innocent coinsured conflicted with that state's standard policy despite fact that standard policy did not include intentional acts exclusion, where standard policy utilized phrase "the insured").

We are persuaded by the reasoning of the Minnesota Supreme Court in *Watson*. Although the 1943 NYSFIP does not contain an intentional acts exclusion, it does provide for various circumstances in which coverage can be defeated by conduct of "the insured." The 1943 NYSFIP states that it shall be void if "the insured has wilfully concealed or misrepresented any material fact" or in the case of "any fraud or false swearing by the insured" relating to the policy. A loss is also excluded if caused by "neglect of the insured to use all reasonable means to save and preserve the property at and after a loss." The 1943 NYSFIP further provides that the insurer shall not be liable for loss occurring "while the hazard is increased

by any means within the control or knowledge of the insured." Thus, while there is no specifically designated intentional acts exclusion in the 1943 NYSFIP, it includes other provisions dealing generally with the insurer's right to void coverage based upon conduct of "the insured." In each instance, the standard policy uses language indicative of a several obligation whereby the insured bears the responsibility for his or her own conduct. We find no provision in the 1943 NYSFIP creating a joint obligation whereby the wrongful actions of one insured could prejudice the rights of an innocent coinsured. Accordingly, in response to the third certified question, we determine that the intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy does not comply with the provisions of § 44-501(6) because it does not provide the substantial equivalent of the minimum provisions of the 1943 NYSFIP.

QUESTION FOUR

Having reached this conclusion, we proceed to the fourth certified question, which asks this court to determine whether the Director of Insurance of the State of Nebraska, pursuant to § 44-501(11), had lawful authority in 1994 to approve the variations in the Hartford's homeowner's policy notwithstanding its noncompliance with the 1943 NYSFIP. Section 44-501(11) provides: "The Director of Insurance may approve any form of policy with variations in terms and conditions from the standard policy provided for in this section." There is obvious tension between this provision and § 44-501(6), which authorizes the Director of Insurance to authorize fire insurance policies which are the "substantial equivalent" of the 1943 NYSFIP.

We recognized but were not required to resolve this tension in *Spulak v. Tower Ins. Co.*, 257 Neb. 928, 601 N.W.2d 720 (1999). At issue there was an exclusion in a fire insurance policy, which the Director of Insurance approved on July 14, 1988. We held that because the exclusion had the effect of reducing the coverage afforded under the 1943 NYSFIP, the Director of Insurance lacked authority to approve it under the "substantial[ly] equivalent" language of § 44-501(6). Moreover, we held that the district court erred in determining that the approval was pursuant to

§ 44-501(11) because that section did not become effective until after the date of approval.

[10-12] In the present case, both § 44-501(6) and (11) were in effect when the Hartford's homeowner's policy was approved by the Director of Insurance in 1994. Whether § 44-501(11) authorizes the Director of Insurance to approve an exclusion which reduces fire insurance coverage below the minimum provisions of the 1943 NYSFIP requires interpretation of § 44-501. Statutory interpretation presents a question of law. *In re Interest of Sabrina K.*, 262 Neb. 871, 635 N.W.2d 727 (2001); *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001); *Hunt v. Trackwell*, 262 Neb. 688, 635 N.W.2d 106 (2001). When construing a statute, an appellate court must look to the statute's purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it. *Rodriguez v. Monfort, Inc., supra*. A court must attempt to give effect to all parts of a statute, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of a court to read anything plain, direct, and unambiguous out of a statute. *In re Interest of Sabrina K., supra*; *Rodriguez v. Monfort, Inc., supra*; *Hatcher v. Bellevue Vol. Fire Dept.*, 262 Neb. 23, 628 N.W.2d 685 (2001).

[13,14] If read literally to give the Director of Insurance authority to approve a fire insurance policy form without regard to whether it provides the minimum coverage afforded under the 1943 NYSFIP, § 44-501(11) would nullify the requirement in § 44-501(6) that in order to be approved, the policy forms must provide the "substantial equivalent" of the fire coverage provided by the standard policy. Indeed, if § 44-501(11) is to be given the expansive interpretation urged by the Hartford, every provision of § 44-501 except subsection (11) would be rendered meaningless. In the absence of clear legislative intent, the construction of a statute will not be adopted which has the effect of nullifying another statute. *Keller v. Tavarone*, 262 Neb. 2, 628 N.W.2d 222 (2001); *Bergan Mercy Health Sys. v. Haven*, 260 Neb. 846, 620 N.W.2d 339 (2000). A court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature. *State ex rel. Stenberg v. Moore*, 258

Neb. 199, 602 N.W.2d 465 (1999); *In re Estate of Nelson*, 253 Neb. 414, 571 N.W.2d 269 (1997). We find it necessary to examine the legislative history of § 44-501(11) to determine its potentially nullifying effect on the rest of the provisions of § 44-501.

The provision now codified at § 44-501(11) was included in L.B. 92, which was enacted in 1989. 1989 Neb. Laws, L.B. 92. According to the Introducer's Statement of Intent, L.B. 92 was the work product of a task force appointed to conduct an interim study "on the necessity, feasibility and desirability of rewriting, updating and reorganizing Nebraska's insurance statutes." Committee on Banking, Commerce and Insurance, 91st Leg., 1st Sess. (Jan. 23, 1989). The statement of intent relates that the stated purpose of L.B. 92 was "to modernize and restructure Nebraska's insurance laws and to eliminate obsolete and redundant provisions in Chapter 44 of the Nebraska Revised Statutes."

In the introducer's opening remarks at a committee hearing on L.B. 92, he stated:

> The basic purpose of the task force was to revise and update Nebraska insurance law *not with an idea of making controversial alterations but simply to replace obsolete language, rearrange confusing language, update standards which over time have grown inadequate and which need to be raised or altered.* It has had the general obligation to make our law more readable, more contemporaneous, and to reduce unnecessary duplicative actions which over time have sprung up in our insurance law.

(Emphasis supplied.) Committee on Banking, Commerce and Insurance Hearing, 91st Leg., 1st Sess. 2 (Jan. 23, 1989). The introducer of the bill then discussed "some of the most critical" amendments embodied in the bill, *id.*, but did not discuss the provision which became § 44-501(11). He expressed the view that the proposed amendments "do not operate in anyway [sic] to harm the consumer." *Id.* at 5.

The Director of Insurance testified that L.B. 92 was just "sort of the clean-up bill." *Id.* at 7. There was no substantive discussion of the amendment to § 44-501 during the committee hearing or floor debate on L.B. 92. The only legislative history relative to the current § 44-501(11) is found in a 13-page synopsis of L.B. 92 summarizing 261 amendments included in the bill. Item No. 107

on this list reads: "[A]mend 44-501 to authorize the director to approve policy forms which deviate from the New York Standard Fire Policy." Statement of Intent, Committee on Banking, Commerce and Insurance, 91st Leg., 1st Sess. (Jan. 23, 1989). While this statement obviously makes clear that the purpose of § 44-501(11) is to give the Director of Insurance the power to approve policy forms that deviate from the 1943 NYSFIP, it says nothing about the Legislature's intent to repeal the remainder of § 44-501 by implication. In the absence of any indication of such an intent, we conclude that § 44-501(11) must be read in pari materia with § 44-501(6) to authorize the Director of Insurance to approve fire insurance policy forms differing from the 1943 NYSFIP only if the provisions are the substantial equivalent of the minimum provisions of the 1943 NYSFIP. Consequently, in response to the fourth certified question, we conclude that the Director of Insurance did not have lawful authority in 1994 to approve the variations in the Hartford's homeowner's policy because such variations were not the substantial equivalent of the minimum provisions of the 1943 NYSFIP.

QUESTION FIVE

In the fifth certified question, we are asked to determine whether the phrase "direct and accidental loss" in part D, paragraph A, of the Hartford's automobile policy is ambiguous. We understand this question, in its fullest scope, to be asking this court to determine whether Helen is entitled to coverage under the automobile policy.

Part D, paragraph A, of the automobile policy provides:

> We will pay for direct and accidental loss to **your covered auto** or any **non-owned auto**, including their equipment, minus any applicable deductible shown in the Declarations. If loss to more than one [sic] **your covered auto** or **non-owned auto** results from the same **collision**, only the highest applicable deductible will apply. We will pay for loss to **your covered auto** caused by:
>
> 1. Other than **collision** only if the Declarations indicate that Other than Collision Coverage is provided for that auto.
>
> 2. **Collision** only if the Declarations indicate that Collision Coverage is provided for that auto.

> If there is a loss to a **non-owned auto**, we will provide the broadest coverage applicable to any [sic] **your covered auto** shown in the Declarations.

(Emphasis in original.)

The policy declarations page lists four covered automobiles, including a 1984 Mercury Lynx GS which is shown to have "other than collision" coverage only. The insuring agreement in part D also provides:

> Loss caused by the following is considered other than **collision**:
>
> 1. Missiles or falling objects;
> 2. Fire;
> 3. Theft or larceny;
> 4. Explosion or earthquake;
> 5. Windstorm;
> 6. Hail, water or flood;
> 7. Malicious mischief or vandalism;
> 8. Riot or civil commotion;
> 9. Contact with bird or animal; or
> 10. Breakage of glass.

The policy does not define the phrase "direct and accidental loss." We have defined the term "accident" in the context of liability insurance as " 'an unexpected happening without intention or design.' " *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 851, 317 N.W.2d 375, 379 (1982), quoting 45 C.J.S. *Insurance* § 829 (1946). More recently, in the context of uninsured motorist coverage, we stated:

> In its ordinary sense, "accident" means "a happening that is not expected, foreseen, or intended." Webster's New World College Dictionary 8 (3d ed. 1996). The term, in its ordinary sense, has no reference to anyone's perspective. Instead, it refers to an unexpected, unintended, or unforeseen happening, regardless of the perspective from which it is viewed. As such, intentional acts by definition cannot be accidents.

Austin v. State Farm Mut. Auto Ins. Co., 261 Neb. 697, 702, 625 N.W.2d 213, 217 (2001). We further noted that because uninsured motorist coverage operates as a substitute liability policy, the term "accident" should be defined in the same manner.

Unlike the uninsured motorist provision at issue in *Austin*, however, the comprehensive automobile coverage at issue here includes language which requires consideration of the perspective from which an event is deemed to be an accident. The specific perils included in the insuring agreement for "direct and accidental loss" caused by "other than collision" include such forces as earthquake, windstorm, and hail, which, by their nature, are not intended or foreseen. Also specifically covered, however, are losses caused by crimes against property such as theft, larceny, and vandalism, which are intentional acts on the part of the perpetrator but are unexpected and unforeseen by the victimized property owner. Thus, the phrase "accidental loss," read in context with the other provisions of the comprehensive coverage, may encompass damage to an insured vehicle caused by the intentional acts of third persons. See 11 Lee R. Russ & Thomas F. Segalla, Couch on Insurance 3d § 156:20 at 156-35 (1998).

Nevertheless, while the phrase "direct and accidental loss" in this policy is more expansive than the term "accident" in the uninsured motorist policy at issue in *Austin*, it is not ambiguous. The only reasonable interpretation of the aforementioned phrase is that an insured can recover for property damage caused either by truly unforeseen events *or by the intentional act of a third party.* Therefore, a determination of whether Helen is entitled to coverage depends upon a subsequent analysis of whether the Hartford's automobile policy imputes William's intentional acts to Helen, or whether the policy considers William's intentional acts to be those of a third party with respect to Helen. In other words, to determine whether Helen is entitled to recovery, we must also decide whether the automobile policy creates joint or several obligations.

In the definitions section of the automobile policy, the following is provided: "**A.** Throughout this policy, **you** and **your** refer to: **1.** The **named insured** shown in the Declarations; and **2.** *The spouse if a resident of the same household.*" (Emphasis supplied.) This definition unequivocally indicates that the term "your" refers jointly to Helen and William, who were spouses residing in the same household. Therefore, part D, paragraph A, of the automobile policy's insuring agreement for "direct and accidental loss to ***your* covered auto**" (emphasis supplied) can only reasonably be read to apply to both Helen and William

jointly. As such, William's actions were not those of a third party, but, for purposes of the automobile policy, those of both Helen and William. Consequently, because the loss was not caused by the intentional act of a third party, but, rather, by an insured under the policy, Helen does not have coverage.

QUESTION SIX

The sixth and final certified question asks this court to determine whether the phrase "direct and accidental loss" in the insuring agreement in part D, paragraph A, of the Hartford's automobile policy is contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude comprehensive coverage to an innocent coinsured. We conclude, for the reasons articulated in our discussion of the second certified question, that such an application would not be contrary to public policy.

CONCLUSION

To summarize, we respond to the certified questions of law as follows:

1. The language of the intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy is not ambiguous.

2. The intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy is not contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude coverage against peril of fire to an innocent coinsured.

3. The intentional acts exclusion in section I, exclusions, paragraph 1h(1) and (2), of the Hartford's homeowner's policy does not comply with the provisions of § 44-501(6) in that it does not provide the substantial equivalent of the minimum provisions of the 1943 NYSFIP.

4. The Director of Insurance of the State of Nebraska, pursuant to § 44-501(11), did not have lawful authority in 1994 to approve the variations in the Hartford's homeowner's policy notwithstanding its noncompliance with the 1943 NYSFIP.

5. The language "direct and accidental loss" in the insuring agreement in part D, paragraph A, of the Hartford's automobile policy is not ambiguous.

6. The language "direct and accidental loss" in the insuring agreement in part D, paragraph A, of the Hartford's automobile policy is not contrary to the public policy of Nebraska, as expressed by statute and case law, when applied to preclude comprehensive coverage to an innocent coinsured.

Pursuant to Neb. Rev. Stat. § 24-225 (Reissue 1995), this opinion stating the law governing the certified questions shall be sent by the clerk under the seal of the Nebraska Supreme Court to the U.S. District Court for the District of Nebraska and to the parties.

JUDGMENT ENTERED.

DLH, INC., DOING BUSINESS AS COACHES SPORTS BAR & GRILL, APPELLEE, V. THE LANCASTER COUNTY BOARD OF COMMISSIONERS ET AL., APPELLANTS.

648 N.W.2d 277

Filed July 19, 2002. No. S-01-557.

1. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its conclusion independently of the conclusion reached by the trial court.
2. **Political Subdivisions: Administrative Law: Words and Phrases.** In general, the terms "resolution" and "regulation" are not synonymous.

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

Gary E. Lacey, Lancaster County Attorney, and David W. Johnson, Jr., for appellants.

K.C. Engdahl, of Raynor, Rensch & Pfeiffer, for appellee.

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

STEPHAN, J.

The Lancaster County Board of Commissioners, its individual members, and Lancaster County (collectively the Board) appeal from an order of the district court for Lancaster County granting declaratory relief in favor of DLH, Inc. The district court held that resolution No. 3557, adopted by the Board in

1980, was not a "valid and subsisting ordinance or regulation" within the meaning of Neb. Rev. Stat. § 53-134(6) (Cum. Supp. 2000), which pertains to revocation of liquor licenses by the governing bodies of political subdivisions.

FACTS

This case was submitted to the district court on stipulated facts. DLH holds a valid and current Nebraska liquor license authorizing the sale of alcoholic liquor on its premises. DLH permits dancers to perform on its licensed premises nude, topless, and wearing G-strings. The premises are located within the corporate boundaries of and are under the jurisdiction of Lancaster County. The Board is a local governing body within the meaning of the Nebraska Liquor Control Act, Neb. Rev. Stat. §§ 53-101 to 53-1,121 (Cum. Supp. 2000).

On December 16, 1980, the Board adopted resolution No. 3557. The resolution refers to § 53-134 as authority for its adoption and resolves that "the following rules shall apply to all premises licensed to sell liquor under the jurisdiction of [Lancaster County]." Included in the "rules" is a prohibition against a licensee's allowing any live person to appear nude. Nudity is defined as "the showing of the human male or female genitals, pubic area or buttocks or the human female breast including the nipple or any portion of the breast below the nipple with less than a full opaque covering."

On August 3, 2000, the Board issued a cease and desist order requesting that DLH conform its business to the requirements of resolution No. 3557. On August 9, the Board issued a "Notice of Hearing for Revocation or Suspension of Liquor License" on DLH. On August 24, the Board found that DLH had violated resolution No. 3557 and voted to refer the violation to the Nebraska Liquor Control Commission (Commission). On October 3, the Board requested that the Commission conduct a formal revocation hearing. All of the actions undertaken and adopted by the Board were in reliance upon § 53-134(6). On October 19, the Commission voted to suspend DLH's liquor license and scheduled a November 3 revocation hearing.

DLH filed an amended petition for declaratory relief on October 26, 2000, naming the Board as defendants. The petition

alleged that a dispute had arisen between the parties concerning the applicability, validity, and enforceability of resolution No. 3557. The petition prayed for a declaratory judgment that resolution No. 3557 was not a valid and subsisting ordinance or regulation as defined in the Nebraska Liquor Control Act and an order permanently enjoining the Board from undertaking any future revocation or enforcement action based upon resolution No. 3557.

In an amended order dated April 12, 2001, the district court found that the resolution was not a "valid and subsisting ordinance or regulation duly enacted, adopted, and promulgated relating to alcoholic liquor" within the meaning of § 53-134(6). The court reasoned that the plain language of § 53-134 gave the Board power to take certain action relating to liquor licenses by resolution but specifically did not grant the power to revoke liquor licenses on the basis of a resolution. The district court also rejected the Board's argument that resolution No. 3557 should be considered a regulation, despite the absence of any evidence regarding the manner in which it was adopted. The Board filed this timely appeal, which we removed to our docket on our own motion pursuant to our authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

ASSIGNMENTS OF ERROR

The Board assigns that the district court erred (1) in finding that resolution No. 3557 cannot be the basis by which it acts to revoke a liquor license when the district court did not address the issue of whether it was a valid regulation; (2) in finding that resolution No. 3557 was not a valid regulation or binding law because the Board did not follow other procedures, including the holding of a public hearing, when DLH did not sustain the burden of showing otherwise in attacking the validity of the resolution as a regulation; and (3) in considering that the Board offered no evidence that the resolution had become a regulation or actually was a regulation when DLH had the burden of showing the regulation was not valid.

STANDARD OF REVIEW

[1] In an appeal from a declaratory judgment, an appellate court, regarding questions of law, has an obligation to reach its

conclusion independently of the conclusion reached by the trial court. *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001); *Continental Western Ins. Co. v. Conn*, 262 Neb. 147, 629 N.W.2d 494 (2001).

ANALYSIS

The primary issue presented in this appeal is whether a violation of resolution No. 3557, if proved, could serve as a lawful basis for the Board to revoke a liquor license. In its brief, DLH argues that a county has no legal authority or basis to regulate sales of alcoholic beverages. The Board relies upon § 53-134 as the legal authorization for resolution No. 3557. At all times relevant to this action, that statute provided in relevant part:

> The local governing body of any city or village . . . and the local governing body of any county with respect to licenses not within the corporate limits of any city or village but within the county shall have the following powers, functions, and duties with respect to retail, bottle club, and craft brewery licenses:
>
> (1) To cancel or revoke for cause retail, bottle club, or craft brewery licenses to sell or dispense alcoholic liquor issued to persons for premises within its jurisdiction, subject to the right of appeal to the commission;
>
> (2) To enter or to authorize any law enforcement officer to enter at any time upon any premises licensed under the Nebraska Liquor Control Act to determine whether any provision of the act, any rule or regulation adopted and promulgated pursuant to the act, or any ordinance, resolution, rule, or regulation adopted by the local governing body has been or is being violated and at such time examine the premises of such licensee in connection with such determination;
>
> (3) To receive a signed complaint from any citizen within its jurisdiction that any provision of the act, any rule or regulation adopted and promulgated pursuant to the act, or any ordinance, resolution, rule, or regulation relating to alcoholic liquor has been or is being violated and to act upon such complaints in the manner provided in the act;
>
> (4) To receive retail license fees, bottle club license fees, and craft brewery license fees as provided in section 53-124

and pay the same, after the license has been delivered to the applicant, to the city, village, or county treasurer;

(5) To examine or cause to be examined any applicant or any retail licensee, bottle club licensee, or craft brewery licensee upon whom notice of cancellation or revocation has been served as provided in the act, to examine or cause to be examined the books and records of any applicant or licensee, and to hear testimony and to take proof for its information in the performance of its duties. For purposes of obtaining any of the information desired, the local governing body may authorize its agent or attorney to act on its behalf;

(6) To cancel or revoke on its own motion any license if, upon the same notice and hearing as provided in section 53-134.04, it determines that the licensee has violated any of the provisions of the act *or any valid and subsisting ordinance or regulation duly enacted, adopted, and promulgated relating to alcoholic liquor.*

(Emphasis supplied.) § 53-134.

Subsections (2) and (3) of this statute permit certain actions by local governing bodies based upon potential violations of resolutions, as well as violations of ordinances, rules, and regulations. Subsection (6) governing license revocation is worded differently. It authorizes a local governing body to cancel or revoke a liquor license if it determines that the licensee has violated the act "or any valid and subsisting ordinance or regulation duly enacted, adopted, and promulgated relating to alcoholic liquor."

[2] Absent anything to the contrary, statutory language is to be given its plain and ordinary meaning, and a court will not look beyond the statute or interpret it when the meaning of its words are plain, direct, and unambiguous. *No Frills Supermarket v. Nebraska Liq. Control Comm.*, 246 Neb. 822, 523 N.W.2d 528 (1994). In addition, a county, like all political subdivisions, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is to be strictly construed. *Enterprise Partners v. County of Perkins*, 260 Neb. 650, 619 N.W.2d 464 (2000). In general, the terms "resolution" and "regulation" are not synonymous. A regulation is a "rule or order, having legal force, issued by an administrative agency or a local government." Black's Law

Dictionary 1289 (7th ed. 1999). A "resolution," on the other hand, is a "formal expression of an opinion, intention, or decision by an official body or assembly." *Id.* at 1313. See, also, *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985) (distinguishing resolution from ordinance). Therefore, on its face, the statute does not permit revocation of a license based upon a violation of a resolution.

In its first assignment of error, however, the Board argues that the district court erred in not addressing the issue of whether resolution No. 3557 "contained a valid regulation." Brief for appellant at 4. Relying upon *Enterprise Partners, supra*, the Board contends that a county has general authority to enact regulations by resolution. In *Enterprise Partners*, we considered whether a county board could regulate livestock confinement facilities located within the county. We stated that "[a] county board may by resolution make regulations as may be necessary to promote the health, safety, and welfare of its public if it has adopted a comprehensive development plan," but concluded that because no such plan had been adopted, the regulations were invalid. *Id.* at 659, 619 N.W.2d at 470. This reference to the county's authority to regulate by resolution was derived from Neb. Rev. Stat. § 23-174.10 (Reissue 1997), cited and quoted in *Enterprise Partners*, which states that "[i]n any county which has adopted county zoning regulations, the county board, by resolution, may make regulations as may be necessary or expedient to promote the public health, safety, and welfare . . . ." Here, the Board has directed us to no analogous statutory authority to regulate by resolution with respect to liquor licenses. In the absence of such authority, resolution No. 3557 cannot be deemed to be a regulation on its face, and the Board's first assignment of error is thus without merit.

In rejecting the claim that resolution No. 3557 was in fact a regulation, the district court reasoned that the Board offered no evidence that it held a public hearing and followed other procedures which would have been required in order to promulgate a resolution having the force of law. In its second and third assignments of error, the Board contends that the district court should have required DLH to prove that resolution No. 3557 was not a valid regulation, rather than requiring the Board to establish its

validity. The Board bases this argument upon *County of York v. Tracy*, 5 Neb. App. 240, 558 N.W.2d 815 (1996), and *Gas 'N Shop v. City of Kearney*, 248 Neb. 747, 539 N.W.2d 423 (1995), which hold that a zoning ordinance or regulation will be presumed valid in the absence of clear and satisfactory evidence to the contrary.

The resolution under consideration here does not pertain to zoning and, as we have noted, there is no statute which permits a county to regulate by resolution in the field of liquor license revocation. We agree with the district court that on its face, resolution No. 3557 is only what it purports to be, namely, a *resolution* by the county board that certain rules shall apply to holders of retail liquor licenses. As such, it cannot be transformed into a regulation by a claimed presumption of validity. A presumption that a resolution is a valid regulation would arise only if there were some legal authority for regulating by resolution, as in the case of a county board resolution that adopts zoning regulations. See, Neb. Rev. Stat. § 23-172 (Reissue 1997); § 23-174.10. Because it was not entitled to a presumption that resolution No. 3557 was a valid *regulation*, the Board was required to present evidence in support of its contention that the resolution was adopted in compliance with all legal requirements for adoption of a regulation. The stipulated facts provide no basis for this claim, and the Board's second and third assignments of error are therefore without merit. Because we agree with the district court that resolution No. 3557 is not a regulation within the meaning of § 53-134(6), we do not reach DLH's argument that the Board lacked legal authority to regulate with respect to the sale of alcoholic beverages within Lancaster County.

CONCLUSION

For the reasons discussed herein, we conclude that on the record presented, the district court did not err in entering a declaratory judgment that "Resolution No. 3557 does not constitute a valid and subsisting ordinance or regulation" within the meaning of § 53-134(6). The judgment of the district court is affirmed.

AFFIRMED.

SPAGHETTI LIMITED PARTNERSHIP, A NEBRASKA LIMITED PARTNERSHIP, APPELLANT, V. GLENN WOLFE, DOING BUSINESS AS WOLFE ANTIQUES, APPELLEE, AND HOCKENBERGS EQUIPMENT & SUPPLY CO., INC., A NEBRASKA CORPORATION, GARNISHEE-APPELLEE.

647 N.W.2d 615

Filed July 19, 2002. No. S-01-591.

1. **Garnishment: Appeal and Error.** Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong.
2. **Statutes: Appeal and Error.** Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
3. **Garnishment.** Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy.
4. **Garnishment: Statutes.** Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes.
5. **Garnishment: Statutes: Legislature.** Because garnishment is a creature of statute, garnishment proceedings are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature.
6. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
7. **Words and Phrases.** As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion.
8. **Statutes: Words and Phrases.** Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective.
9. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute.
10. **Garnishment: Pleadings: Liability.** In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue.
11. **Judgments: Debtors and Creditors: Garnishment.** The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee.
12. **Garnishment: Liability: Service of Process: Time.** A garnishee's liability is to be determined as of the time of the service of the summons in garnishment.

Appeal from the District Court for Douglas County: GERALD E. MORAN, Judge. Affirmed in part, and in part reversed and remanded with directions.

W. Patrick Betterman and Dave J. Skalka, of Law Offices of W. Patrick Betterman, for appellant.

Michael L. Smart, of White, Wulff & Smart, for garnishee-appellee.

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

GERRARD, J.

Appellant, Spaghetti Limited Partnership (Spaghetti), brought this garnishment action in aid of execution of a judgment pursuant to Neb. Rev. Stat. § 25-1056 (Cum. Supp. 2000). Spaghetti had obtained a $55,879.98 judgment against Glenn Wolfe, doing business as Wolfe Antiques (Wolfe). Believing that Wolfe was performing work for the garnishee-appellee, Hockenbergs Equipment & Supply Co., Inc. (Hockenbergs), Spaghetti requested that the district court issue a garnishment summons upon Hockenbergs. Hockenbergs did not answer the garnishment summons and interrogatories issued by the district court. Spaghetti initiated a hearing to determine Hockenbergs' liability. The district court found that Hockenbergs' failure to answer the garnishment interrogatories was inadvertent and that the garnishee had rebutted the presumption of full indebtedness at the hearing, and ordered that Hockenbergs pay $396 to Spaghetti. Spaghetti now appeals.

BACKGROUND

On February 23, 2001, the district court entered a judgment in favor of Spaghetti and against Wolfe for the sum of $55,879.98. Under the belief that Wolfe worked for Hockenbergs, Spaghetti requested that the district court issue a garnishment summons upon Hockenbergs for the full amount of the judgment against Wolfe. The district court issued a summons and order of garnishment and interrogatories to Hockenbergs as garnishee on March 7. Hockenbergs received the garnishment summons and interrogatories on March 12. Section 25-1056(1) dictates that Hockenbergs should have answered within 10 days, i.e., by March 22.

On March 27, 2001, Spaghetti filed an application to determine garnishee liability, alleging that Hockenbergs failed to respond to the interrogatories and requesting a hearing on the matter. The district court issued an order finding that Hockenbergs failed to answer the garnishment interrogatories by March 22 and scheduling a hearing for April 24 to determine Hockenbergs' liability.

Hockenbergs received a copy of the order and filed a "Response of Garnishee" on April 11, 2001, claiming that it misplaced the interrogatories "through inadvertence and error" and thus did not answer. Hockenbergs filed an offer to confess judgment in the amount of $395.31. Spaghetti filed a motion to strike Hockenbergs' response, claiming that the response was irrelevant pursuant to Neb. Rev. Stat. § 25-833 (Reissue 1995) or, in the alternative, frivolous pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1995), because Hockenbergs did not comply with the statutory requirements for garnishment proceedings. The district court sustained Spaghetti's motion to strike.

At the April 24, 2001, hearing, the district court received evidence to determine the amount of liability that existed from Hockenbergs to Spaghetti. Thomas Schrack, Jr., president of Hockenbergs, testified that Wolfe was employed by Hockenbergs at one time, but Wolfe had quit by the time of the hearing. Schrack, Jr., testified that his father, Thomas Schrack, Sr., received the garnishment summons several days after Wolfe informed him that he was filing for bankruptcy. When Schrack, Sr., opened the summons and saw "Spaghetti Limited Partnership against Glenn Wolfe" written on the first page, he gave the summons and interrogatories to Wolfe. The Schracks did not see the interrogatories again until they were contacted by Spaghetti's attorney, at which time they retrieved the interrogatories from Wolfe. Schrack, Jr., further testified that after initially receiving the garnishment interrogatories, Hockenbergs issued Wolfe two paychecks in the amounts of $739.50 and $841.74. Schrack, Jr., stated that he represented to Spaghetti's counsel that Hockenbergs was prepared to tender 25 percent of Wolfe's disposable earnings, i.e., $395.31, a figure apparently reached after applying the wage exemption of Neb. Rev. Stat. § 25-1558(1)(a) (Reissue 1995).

The district court found at the hearing that Hockenbergs' failure to answer the interrogatories was inadvertent and due to a misunderstanding and that Hockenbergs' "explanation [was] credible." Pursuant to Hockenbergs' offer to confess judgment, the district court found that Hockenbergs owed Spaghetti $396. The district court entered judgment via written order on May 3, 2001, restating its finding that Hockenbergs' failure to timely answer the garnishment interrogatories was inadvertent and entering judgment in the amount of $396 in favor of Spaghetti and against Hockenbergs.

Spaghetti appeals. We moved this case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals.

ASSIGNMENTS OF ERROR

Spaghetti assigns, restated, that the district court erred in (1) determining that the presumption of indebtedness in Neb. Rev. Stat. § 25-1028 (Reissue 1995) is a rebuttable evidentiary presumption, (2) determining that the garnishee's failure to timely answer the garnishment interrogatories was excusable, (3) determining that the garnishee had rebutted the presumption of indebtedness, and (4) applying § 25-1558(1)(a) in entering judgment.

STANDARD OF REVIEW

[1] Garnishment is a legal proceeding. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997).

[2] Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002).

ANALYSIS

Garnishment in aid of execution is a legal remedy unknown at common law and strictly governed by statute. See *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). Generally, in cases where a court enters judgment in favor of a creditor, the judgment

creditor may, as garnishor, request that the court issue a summons of garnishment against any person or business owing money to the judgment debtor. See, Neb. Rev. Stat. § 25-1011 (Reissue 1995); § 25-1056. As garnishee, the person or business owing money to the judgment debtor must answer written interrogatories furnished by the garnishor to establish whether the garnishee holds any property or money belonging to or owed to the judgment debtor. See § 25-1056. Upon establishing through pleadings and trial that the garnishee holds property or credits of the judgment debtor, the garnishee must then pay such amounts to the court in satisfaction of the garnishor's judgment against the judgment debtor, subject to certain statutory exceptions with regard to wages. See, *id.*; Neb. Rev. Stat. §§ 25-1026 to 25-1031.01 (Reissue 1995); § 25-1558.

Presumption of Indebtedness

Spaghetti assigns, first, that the district court erred in finding that the presumption of indebtedness in § 25-1028 is a rebuttable evidentiary presumption. Section 25-1028 states:

> If the garnishee fails to answer, as required by section 25-1026, he shall be presumed to be indebted to the defendant in the full amount of the claim of plaintiff. Upon notice to the garnishee given within such time and in such manner as the court shall direct, judgment may be entered for such amount as the court may find due from the garnishee.

Spaghetti argues that the word "presumed" in the above statute does not, standing alone, create a rebuttable evidentiary presumption. Spaghetti asserts that because Hockenbergs did not timely respond to the interrogatories or file an appropriate answer, Hockenbergs cannot rebut the presumption of indebtedness in § 25-1028 and that the district court should have taken all the allegations in Spaghetti's pleading to be true and rendered judgment in the sum of $55,879.98 against Hockenbergs.

[3-5] Garnishment is a legal, not equitable, remedy unknown at common law and is a purely statutory remedy. *Gerdes, supra.* Being in derogation of common law, garnishment statutes are strictly construed and demand compliance with all prerequisites before any remedy is available under such statutes. *Id.* Because garnishment is a creature of statute, garnishment proceedings

are necessarily governed by statutory provisions and specifications. Courts may not allow garnishment proceedings to follow any course other than that charted by the Legislature. *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996).

[6] Because § 25-1028 does not indicate whether the presumption of indebtedness is rebuttable, we must resort to statutory interpretation. Statutory interpretation presents a question of law, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *First Data Corp. v. State*, 263 Neb. 344, 639 N.W.2d 898 (2002). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *City of Omaha v. Kum & Go*, 263 Neb. 724, 642 N.W.2d 154 (2002).

[7] First, § 25-1028 states that after a garnishee fails to answer, the garnishee "*shall* be presumed to be indebted" to the garnishor. (Emphasis supplied.) As a general rule, the word "shall" is considered mandatory and is inconsistent with the idea of discretion. *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985). Thus, the plain and ordinary meaning of "shall be presumed to be indebted" in § 25-1028 is that a presumption of indebtedness for the full amount of the claim of the plaintiff-garnishor arises when the garnishee fails to answer as required by statute.

[8] Second, § 25-1028 states that "judgment *may* be entered for such amount as the court *may* find due from the garnishee." (Emphasis supplied.) Generally, the word "may" when used in a statute will be given its ordinary, permissive, and discretionary meaning unless it would manifestly defeat the statutory objective. *State ex rel. Scherer v. Madison Cty. Comrs.*, 247 Neb. 384, 527 N.W.2d 615 (1995). See, also, Neb. Rev. Stat. § 49-802(1) (Reissue 1998) ("[w]hen the word may appears, permissive or discretionary action is presumed"). Thus, § 25-1028 does not trigger automatic liability on the part of the garnishee, but instead, permissively allows the court to move forward in resolving the litigation according to its judgment.

Additionally, the Nebraska rules of evidence support our conclusion that § 25-1028 creates a rebuttable presumption. Neb. Rev. Stat. § 27-301 (Reissue 1995) states that "[i]n all cases not

otherwise provided for by statute or by these rules a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." Thus, § 25-1028 places the burden on Hockenbergs to show the nonexistence of the presumed indebtedness—a rebuttable presumption of indebtedness. Because no statute or evidentiary rule provides otherwise, the district court appropriately gave Hockenbergs the opportunity to rebut the presumption of indebtedness.

[9] In construing a statute, appellate courts are guided by the presumption that the Legislature intended a sensible rather than absurd result in enacting the statute. *Green v. Drivers Mgmt., Inc.*, 263 Neb. 197, 639 N.W.2d 94 (2002). It would be absurd to conclude that if a garnishee fails to respond to garnishment interrogatories, an irrebuttable presumption of indebtedness arises—this would potentially saddle an inadvertently unresponsive garnishee with liability far in excess of the actual amount that a garnishor could have received had the garnishee properly answered. Interpreting § 25-1028 to raise a rebuttable presumption of indebtedness serves a dual purpose: it gives the garnishee incentive to answer the interrogatories so as to avoid raising the presumption while allowing the garnishor the benefit of such a presumption should the garnishee fail to answer, yet it provides appropriate due process of law to a garnishee that innocently and inadvertently fails to answer.

We conclude that § 25-1028 creates a rebuttable presumption of indebtedness, and Spaghetti's assignment of error on this ground is without merit.

Failure to Answer Garnishment Interrogatories

Spaghetti assigns, second, that the district court erred in determining that Hockenbergs' failure to answer the garnishment interrogatories was excusable. Spaghetti asserts that the trial court does not have the authority to excuse a failure to timely file answers to interrogatories.

At a hearing or trial on a garnishor's application to determine garnishee liability, the trier of fact (in this case, the district court) is entitled to receive evidence from the garnishee with regard to liability, even if the garnishee has not appropriately

answered the garnishment interrogatories. Neb. Rev. Stat. § 25-1010 (Reissue 1995) provides that upon the filing of an affidavit containing the necessary allegations, the court may direct the clerk of the court to issue a summons and order requiring the garnishee to answer written interrogatories. The garnishee is then required to answer under oath all the interrogatories put to the garnishee. § 25-1026. If the garnishee's answers are not satisfactory to the garnishor, the garnishor may file an application for determination of the garnishee's liability. See *Torrison v. Overman*, 250 Neb. 164, 549 N.W.2d 124 (1996). The application for determination of liability and the answers of the garnishee are the pleadings upon which trial of the issue of liability of the garnishee shall be had. § 25-1030. See *Torrison, supra.*

In this case, the district court hearing on Spaghetti's application to determine Hockenbergs' liability constituted the trial of garnishment liability, as prescribed by statute. Section 25-1030.02, in pertinent part, sets forth parameters for the garnishment trial:

> The trial of the determination of the liability of the garnishee shall be conducted the same as in a civil action. If it shall appear upon the trial of the liability of the garnishee that the garnishee was (1) indebted to the defendant, or (2) had any property or credits of the defendant, in his possession or under his control at the time of being served with the notice of garnishment, he shall be liable to the plaintiff, in case judgment is finally recovered by plaintiff against the defendant, to the full amount thereof, or to the amount of such indebtedness or property held by the garnishee.

[10] In a garnishment proceeding, the answers to interrogatories and the application to determine garnishee liability are the only pleadings for disposition of the liability issue. *Gerdes v. Klindt*, 253 Neb. 260, 570 N.W.2d 336 (1997). Accordingly, the district court in this case did not permit Hockenbergs' "Response of Garnishee" beyond the due date of the interrogatories and sustained Spaghetti's motion to strike. The district court instead allowed the garnishee to present evidence at the hearing on Spaghetti's motion to determine garnishee liability, in keeping with its correct determination that Hockenbergs was

entitled to rebut the presumption of indebtedness arising from its failure to answer the interrogatories.

In *NC+ Hybrids v. Growers Seed Assn.*, 219 Neb. 296, 363 N.W.2d 362 (1985), this court determined that a trial court has no authority in garnishment proceedings to permit, notwithstanding Neb. Rev. Stat. § 25-822 (Reissue 1995), a garnishor to file an application to determine liability beyond the 20-day time period provided by statute. Based on this proposition, Spaghetti argues that the court cannot excuse an untimely filing of answers to interrogatories. *NC+ Hybrids* is distinguishable from the instant case, however; it was not necessary to interpret the statute at issue in *NC+ Hybrids*, as the statute unambiguously required that the garnishor file the application for determination of liability within the 20-day statutory period.

We explained our determination in *NC+ Hybrids*, 219 Neb. at 300, 363 N.W.2d at 365, as follows:

> In view of the nature of garnishment demanding an expeditious disposition of proceedings, *it is reasonable that the Nebraska Legislature sought to protect a garnishee from often unnecessary and sometimes oppressive litigation.* . . . To achieve prompt disposition the Legislature has specified a relatively short time for counteraction by a judgment creditor or garnisher in the event of any dissatisfaction with a garnishee's disclosure contained in answers to interrogatories, namely, a written application filed within 20 days . . . .

(Emphasis supplied.)

As emphasized above, an essential element guiding the decision in *NC+ Hybrids, supra*, was the Legislature's intent to procedurally protect the garnishee. In this case, we have already determined that Hockenbergs is entitled to rebut the presumption of indebtedness in § 25-1028. Hockenbergs' failure to answer the interrogatories raised this presumption, but the hearing to determine garnishee liability still provided Hockenbergs with an opportunity to be heard in a prompt and fair proceeding. After receiving notice of Spaghetti's application to determine garnishee liability, Hockenbergs was entitled to present evidence at the trial to rebut the presumption raised by its failure to answer interrogatories.

The procedure in this case conformed to the statutory garnishment scheme set forth by the Legislature. The district court made a factual finding that Hockenbergs' failure to timely answer the interrogatories was inadvertent. To the extent factual issues are involved, the findings of a garnishment hearing judge have the effect of findings by a jury and, on appeal, will not be set aside unless clearly wrong. *Farr v. Designer Phosphate & Premix Internat.*, 253 Neb. 201, 570 N.W.2d 320 (1997). The district court did not clearly err in finding Hockenbergs' failure to timely answer the garnishment interrogatories to be excusable at the hearing to determine liability.

[11] Under the circumstances in this case, Hockenbergs cannot be liable to Spaghetti for the full judgment of $55,879.98, despite Spaghetti's assertions. The claim of a judgment creditor garnishor against a garnishee can rise no higher than the claim of the garnishor's judgment debtor against the garnishee. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995). Although Hockenbergs' initial failure to answer the interrogatories may have potentially subjected it to a judgment in the full amount of Spaghetti's claim against Wolfe, Hockenbergs' appearance at the hearing to determine liability defeated this claim. Thus, the most Spaghetti can garnish is the amount owed to Wolfe by Hockenbergs at the time of the service of summons in garnishment. See *id.*

Rebutting Presumption of Indebtedness

Third, Spaghetti assigns that the district court erred in finding that Hockenbergs rebutted the presumption of indebtedness. With regard to factual issues, the findings of a garnishment hearing judge will not be set aside on appeal unless clearly wrong. See *Farr, supra.*

Spaghetti asserts that Hockenbergs did not present evidence to rebut the presumption of its indebtedness for the full amount of Spaghetti's judgment against Wolfe. At the hearing to determine liability, Thomas Schrack, Jr., testified as to the amounts of Wolfe's paychecks after receipt of the garnishment summons and stated that Hockenbergs did not have any other funds subject to garnishment. Spaghetti argues that this testimony was vague and speculative to the point that it failed to rebut the presumption that

Hockenbergs owes the full amount of the judgment against Wolfe. The court, however, did not receive any evidence contrary to Schrack, Jr.'s testimony. We conclude that the evidence submitted was sufficient to rebut the presumption of indebtedness for the full amount demanded by Spaghetti. Spaghetti's contention to the contrary is without merit.

APPLICATION OF § 25-1558(1)(a) IN ENTERING JUDGMENT

Finally, Spaghetti assigns that the district court erred in applying § 25-1558(1)(a), the wage protection statute, to the sum it found due from Hockenbergs. Hockenbergs argues that the wage exemption applies and that contrary to Spaghetti's construction of the law, the judgment creditor's debts do not become the debt of the garnishee merely because a garnishment interrogatory has been served.

Section 25-1558 states, in pertinent part:

> (1) Except as provided in subsection (2) of this section, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subject to garnishment shall not exceed the lesser of the following amounts:
>
> (a) Twenty-five percent of his disposable earnings for that week;
>
> . . . .
>
> (4) For the purposes of this section:
>
> . . . .
>
> (b) Disposable earnings shall mean that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

[12] Spaghetti argues that the trial court erroneously reached the sum it found due from Hockenbergs by applying this statute, because Hockenbergs had already paid the wages to Wolfe and § 25-1558 is intended to protect the judgment debtor, not the garnishee. Spaghetti urges that it is entitled to the full amount of the wages Hockenbergs owed Wolfe as of the date the garnishment summons were served. A garnishee's liability is to be determined as of the time of the service of the summons in garnishment. *Davis Erection Co. v. Jorgensen*, 248 Neb. 297, 534 N.W.2d 746 (1995). According to testimony by Schrack, Jr., Hockenbergs

paid Wolfe two separate paychecks in the amounts of $739.50 and $841.74, respectively, following the service of the garnishment summons; the record is not clear as to what amount Hockenbergs actually owed Wolfe at the time Hockenbergs received the garnishment summons on March 12, 2001.

In the instant case, we encounter a situation in which Hockenbergs paid Wolfe after the service of the garnishment summons and interrogatories, because Hockenbergs did not know that Wolfe's wages had been garnished. Spaghetti asserts that the protection § 25-1558 provides to debtor wage earners is personal to the debtor and cannot be utilized for the garnishee's benefit. Under Spaghetti's argument, the exemption would not apply to Wolfe's wages, as Wolfe is already in possession of the garnished wages, and the wage exemption is in place for the protection of the debtor, not the garnishee. We agree.

The purpose of the wage exemption defense in garnishment proceedings is to protect the judgment debtor from garnishment of his or her wages; it may not be raised by the garnishee against the judgment debtor. See, e.g., *Jefferson Bank v. J. Roy Morris*, 432 Pa. Super. 546, 639 A.2d 474 (1994). A reasonable reading of § 25-1558 leads us to conclude that the wage exemption provisions are intended to protect the debtor, not the garnishee—i.e., the Legislature intended to protect judgment debtors and their families from destitution and/or bankruptcy in the event of wage garnishment. In the instant case, Hockenbergs disbursed wages to Wolfe after the garnishment summons had been served (unbeknownst to Hockenbergs); thus, Hockenbergs should not be entitled to utilize an exemption in place for the benefit of Wolfe, when Wolfe himself will receive no benefit from the exemption.

Other jurisdictions have similarly interpreted their wage exemption statutes to achieve the purpose of protecting the debtor. See, e.g., *In re Marriage of Eklofe*, 586 N.W.2d 357 (Iowa 1998); *Wilmington Trust Co. v. Barron*, 470 A.2d 257 (Del. Super. 1983); *Cadle Co. v. G & G Associates*, 757 So. 2d 1278 (Fla. App. 2000).

Hockenbergs cannot claim a wage exemption pursuant to § 25-1558(1)(a) on behalf of Wolfe, because Hockenbergs has already paid Wolfe the wages in question. The district court, therefore, erred in awarding Spaghetti only $396. The proper

amount due to Spaghetti is the amount of wages that Hockenbergs owed Wolfe at the time of the garnishment summons, without exempting the amount that would have been eligible had Hockenbergs still held the amount that it owed Wolfe. The record indicates that the amount owed is no less than $739.50 but not more than $1,581.24. Because we cannot ascertain the exact amount from the record before us, however, we must remand this cause to the district court solely for a determination of the amount of wages Hockenbergs owed Wolfe as of March 12, 2001—the date that the garnishment summons and interrogatories were served on Hockenbergs.

CONCLUSION

For the reasons stated above, we affirm the judgment of the district court insofar as it determined that the presumption in § 25-1028 is a rebuttable presumption, that Hockenbergs' failure to answer the garnishment interrogatories was excusable, and that Hockenbergs did, in fact, rebut the presumption.

We reverse the district court's judgment, however, insofar as it applied § 25-1558(1)(a) to the amount Hockenbergs owes Spaghetti. Therefore, we remand this cause to the district court to determine the amount owed by Hockenbergs to Wolfe on the date that the garnishment summons and interrogatories were served on Hockenbergs; that amount shall be the amount to be garnished by Spaghetti from Hockenbergs.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

IN RE ESTATE OF WANDA KRUMWIEDE, DECEASED. JEREMY KRUMWIEDE, PERSONAL REPRESENTATIVE OF THE ESTATE OF WANDA KRUMWIEDE, DECEASED, APPELLEE, V. WILHELM KRUMWIEDE, FORMER PERSONAL REPRESENTATIVE OF THE ESTATE OF WANDA KRUMWIEDE, DECEASED, APPELLANT.

647 N.W.2d 625

Filed July 19, 2002. No. S-01-730.

1. **Decedents' Estates: Appeal and Error.** In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
3. **Decedents' Estates: Appeal and Error.** In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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.
4. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
5. **Judgments: Collateral Estoppel.** Under the doctrine of collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.
6. **Collateral Estoppel: Proof.** The doctrine of collateral estoppel is not applicable in a subsequent proceeding when the burden of persuasion is different.
7. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned.
8. **Statutes: Appeal and Error.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
9. **Statutes.** It is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute.
10. **Decedents' Estates: Criminal Law: Words and Phrases.** An acquittal on a charge of murder is the absence of a conviction for purposes of Neb. Rev. Stat. § 30-2354 (Reissue 1995).

Appeal from the County Court for Burt County: DANIEL J. BECKWITH, Judge. Affirmed.

David A. Domina and James F. Cann, of Domina Law, P.C., for appellant.

John D. Feller and Sam Houston, of Feller & Houston, for appellee.

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

HENDRY, C.J.

INTRODUCTION

Wilhelm Krumwiede petitioned the Burt County Court pursuant to Neb. Rev. Stat. § 30-2207 (Reissue 1995) to declare his wife, Wanda Krumwiede, legally dead and appoint him as personal representative of Wanda's estate. After Wilhelm was informally appointed, Jeremy Krumwiede, son of Wanda and Wilhelm, filed an objection pursuant to Neb. Rev. Stat. § 30-2354 (Reissue 1995), which is Nebraska's homicide probate statute. Determining that Wilhelm intentionally and feloniously killed Wanda, the court removed Wilhelm as personal representative and appointed Jeremy as successor personal representative. Wilhelm appealed, and we moved the case to our docket pursuant to our authority to regulate the caseloads of this court and the Nebraska Court of Appeals. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

FACTUAL BACKGROUND

Wanda Krumwiede was last seen alive on Tuesday, June 13, 1995, between 8:30 and 9 p.m., walking through her neighborhood in Lyons, Nebraska.

In December 1994, 6 months prior to her disappearance, Wanda had filed for divorce from Wilhelm after over 20 years of marriage. The couple had two children of the marriage, Jacinda Romano and Jeremy, and a son, Jarrod Krumwiede, who was born to Wanda from a previous marriage and adopted by Wilhelm. At the time of Wanda's disappearance, Wilhelm had moved out of the couple's home in Lyons and was living nearby. Wanda was living in the home and renting out a portion of the residence to a lodger.

On June 13, 1995, Wanda worked her normal shift at the Safeco Market and had lunch with her sisters. Wanda told her sisters that she was looking forward to babysitting Jarrod's two young sons that weekend and that she was excited that

Jacinda was going to have a new baby. At about 7 p.m., Wanda called Jarrod from her home and spoke with him about the upcoming visit.

The next day, June 14, 1995, was Wanda's regular day off from work. Jeremy telephoned Wanda at home but was unable to reach her. He became concerned and called Jacinda. On June 15, Wanda did not show up for work. Jacinda eventually contacted Wanda's sister, Mardelle Connealy, on Friday, June 16, and asked her to check on Wanda. Mardelle and her husband went to Wanda's home that same day. They found both of Wanda's vehicles in the garage. There was no sign of a disturbance at the house, and Wanda was not there.

Law enforcement officials conducted an investigation, but Wanda was never located, nor was a body ever discovered. Based on evidence uncovered during the investigation, Wilhelm was charged with first degree murder.

Wilhelm's first trial in 1997 ended in a mistrial. The mistrial was granted prior to the State's completing its case in chief. The basis for the mistrial was Wilhelm's allegation that the State had failed to disclose certain photographs during pretrial discovery. A second trial on the first degree murder charge commenced in 1998. At the close of the State's evidence, Wilhelm made a motion for a directed verdict. The court sustained the motion, finding that "[t]he evidence adduced by the State against the Defendant is insufficient as a matter of law to permit submission of First Degree murder or lesser-included offenses to the jury" and, further, that "[t]he Information filed against the Defendant, including all lesser-included offenses, is dismissed with prejudice, and the Defendant is acquitted." The court did not set forth specific findings in support of its directed verdict.

On June 28, 2000, Wilhelm filed a petition for informal probate seeking appointment as personal representative and a determination of Wanda's death pursuant to § 30-2207(3). Wilhelm was informally appointed as personal representative on July 18. Thereafter, Jeremy filed an objection to the appointment, asserting that under § 30-2354, Wilhelm was not entitled to appointment or to any benefits from Wanda's estate. Section 30-2354 states in relevant part:

(a) A surviving spouse, heir or devisee who feloniously and intentionally kills or aids and abets the killing of the decedent is not entitled to any benefits under the will or under this article . . . .

. . . .

(e) A final judgment of conviction of felonious and intentional killing or aiding and abetting therein is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing or aiding and abetting therein, the court may determine by a preponderance of evidence whether the killing or aiding and abetting therein was felonious and intentional for purposes of this section.

A hearing was held on Jeremy's objection in May 2001. The evidence presented at the hearing consisted of numerous exhibits, the testimony of several witnesses, and the record of the proceedings from the 1997 criminal trial. A number of witnesses testified at the 1997 criminal trial. We recount only that portion of the testimony from the various witnesses which is most salient for purposes of this appeal.

Jeremy's 1997 testimony disclosed that on June 12, 1995, the day before Wanda's disappearance, she took him out to dinner and shopping and that they had had a pleasant time:

[Jeremy:] If anything, she was happier than she usually is.

Q Did you have any indication that she might leave?

A None at all.

Q Did you have any idea that you would never see her again?

A None at all.

Q Jeremy, do you believe your mother would just up and leave without telling anybody?

A There's no way she would have done that.

Q And why do you say that?

A She loved us.

Q What things were important to your mother?

. . . .

[Jeremy:] Her family was very important to her, especially through the time that she was going through. She wanted us to be happy.

Q Had she ever taken off without notice before?
A No.

. . . .

Q Has your mother ever taken any kind of extended trip without letting you know where she was going?

A Never. We always knew where she was at. We always knew where we could find her.

Jarrod's 1997 testimony also showed that Wanda seemed happy when she talked with him the evening of June 13, 1995, about the upcoming visit with her two grandsons and that she gave no indication that she might leave. Jarrod further stated that Wanda would not leave without telling anyone because "She was — She was too close to us. She — not me, but the whole family, her grandkids. She wouldn't have left."

Jacinda also testified at the 1997 trial. She said that she and Wanda would talk on the telephone at least twice a week and see each other once every couple of weeks. She described Wanda as "a very good grandmother. She was very close, very doting." Jacinda testified that Wanda would not leave without telling her friends and family because "She just always was considerate. She wanted people to know where she was. If one of us kids were to look for her, we would know where she was."

Joey Brehmer, one of Wanda's neighbors, testified at the 1997 trial that he saw Wilhelm between 6 and 8 p.m. on June 13, 1995, running down the street in a direction away from Wanda's house. Brehmer was mowing his grass at the time. Brehmer stated that he noticed Wilhelm was wearing normal work clothes, not a jogging suit. As Brehmer watched, Wilhelm stopped and walked for a bit, then started running again. Brehmer had never seen Wilhelm run previously.

Cheryl Huffman testified that she worked as a postal clerk at the Lyons post office. She stated that she had known Wanda all her life. She said she saw Wanda on June 13, 1995, between 8:30 and 9 p.m., walking by Burlington Park in Lyons. Huffman was driving out of town with her husband when she saw Wanda and waved to her. Wanda waved back.

Brenda Wheaton testified at the 1997 trial that she was a resident of Lyons and that around 8:30 on the evening of Thursday, June 15, 1995, she was in downtown Lyons and drove through

dark smoke coming across Main Street. She was concerned that something might be on fire, so she drove around the block to see if she could locate the source of the smoke. She observed the smoke coming from the smokestack of Wilhelm's shop. Wilhelm, a self-employed carpenter, used the shop for his work. The shop was a "quonset" building with a wood-burning furnace-type heating stove in the center. As Wheaton drove by the shop, she saw Wilhelm get into his truck, then get out and go back into the building. She further testified that she had lived in the community for over 30 years and had never seen "any burning or smoke" coming from Wilhelm's shop in the summertime, noting that June 15 was a warm day.

Lyons police officer James Buck also testified at the 1997 trial. He stated that he saw smoke coming from Wilhelm's shop around midnight on June 15, 1995.

Investigator Bruce Motley, a law enforcement officer involved in the investigation of Wanda's disappearance, testified at the 1997 trial that on June 23, 1995, he and other officers searched Wilhelm's shop, including the contents of the stove. After removing the ashes from the stove, Motley examined the stove's interior and discovered a piece of an eyeglass frame wedged inside the stove. The eyeglass piece was in a little groove or crack between the fire bricks, about two-thirds of the distance between the back of the stove and the opening. There were also burned pieces of paper in the stove, some of which were identified by another investigator as the remains of a wedding announcement from the Krumwiede's 1969 wedding.

Mary Lauritzen's testimony at the 1997 trial revealed that she was the office manager for Family Vision Center in West Point, Nebraska. She testified that in August 1994, Wanda came in for a regular eye examination and was diagnosed as "need[ing] glasses." She further explained that because Wanda "hadn't worn glasses before" they "spent a lot of time talking about the type of lenses." Wanda then purchased a pair of "no-line bifocal" glasses, style No. GY 552, and color code 5079, for $340. Lauritzen stated that as far as she was aware, Wanda had never lost or damaged the glasses and, further, that the glasses were still under warranty in June 1995. The warranty provided that any broken parts would be replaced at no cost for 1 year.

Lauritzen also testified that the piece of eyeglass frame found in the stove of Wilhelm's shop was style No. GY 552. She indicated that they had sold only two sets of eyeglasses of this frame style, one to Wanda and one to another customer. Wanda purchased only one pair of glasses from Family Vision Center.

Wanda's sister Mardelle testified at the 1997 trial that she saw Wanda wearing these glasses on June 13, 1995. Several witnesses recognized pictures of the GY 552-style eyeglasses as the style Wanda wore.

Shelly Howard, a criminal analyst for the State of Nebraska, testified at the 1997 trial that her investigation determined only 25 pairs of GY 552 eyeglasses had been sold to consumers by the manufacturer. Of those 25 pairs, only 8 were color code 5079.

Dr. Reena Roy, a forensic serologist, testified at the 1997 trial that she examined Wilhelm's pickup for forensic evidence. She stated that her examination revealed small bloodstains on the exterior of the pickup around the driver's-side door and in the tailgate area on the lining of the interior of the "topper door." The stains were small, spatter-like drops or smears. In the area around the tailgate, DNA from the bloodstains in Wilhelm's pickup matched bloodstains contained on several pairs of women's underwear collected from the clothes hamper at Wanda's home. No DNA analysis was made of the bloodstains around the driver's-side door.

Officer Donald Shepherd's testimony at the 1997 trial disclosed that a person named "Nolan Lasovich" contacted law enforcement in the summer of 1995, stating that he had possibly seen Wanda on June 20, 1995, at a lounge in Council Bluffs, Iowa. Lasovich, who was thereafter shown a photographic lineup by Shepherd, identified two photographs as resembling the woman he saw on June 20. The first was a photograph of a female who was not Wanda. Regarding this photograph, Lasovich stated that the woman's hairstyle and facial features resembled the woman he saw on June 20. The second was a photograph of Wanda. With respect to this photograph, Lasovich indicated that the woman's hairstyle as depicted in the photograph resembled that of the woman he saw on June 20.

Linda Vetick, Wanda's hairdresser, testified at the 1997 trial. She stated that Wanda's hairstyle, prior to June 6, 1995, was full

and bouffant, with a lot of height or "poofiness." However, on June 6, Linda cut about 1½ to 2 inches of hair from the top of Wanda's head and trimmed the sides, generally changing Wanda's hairstyle to "really short and real wispy . . . that real modern, wispy look." The photograph of Wanda identified by Lasovich showed her with a bouffant hairstyle.

The State also called Don Slotsky, then-president of Northwestern Iowa Credit Bureaus, Inc., during the 1997 trial. Slotsky testified that his company was in the business of providing credit reports and processing check verifications. He explained that in 1997, he had been asked by the State to run a credit report for Wanda. He then proceeded to testify regarding the contents of the credit report. According to Slotsky, the report showed that Wanda had four lines of credit: First Card, Citibank, Bank One, and J.C. Penney Company. He testified that according to the credit report, there was no activity on any of the accounts after June 1995. The Citibank and First Card accounts were never used and were closed in 1996. The J.C. Penney account was shown as open but not active, with no balance owing. The Bank One account showed that the account was paid off in June 1995, and the account was closed.

Ray Earl Peterson, an acquaintance of Wilhelm and Wanda, testified at the probate hearing in 2001. He stated that his testimony at the probate hearing was consistent with his testimony in 1997 and 1998. Peterson related at the probate hearing that the Sunday prior to Wanda's disappearance, he spoke with Wilhelm after church about the upcoming divorce. Wilhelm told Peterson that the upcoming week was "property settlement week." However, the evidence showed that no proceedings regarding the divorce were scheduled for that week. Peterson described Wilhelm as "quite agitated" about the situation, saying with a clenched jaw that he "was going to make sure and not lose his house." Wilhelm's manner was intense enough that Peterson responded by telling Wilhelm "more or less" that "'"No property is worth injuring anyone."'"

Wilhelm also testified at the probate hearing and, in addition, offered his affidavit which was received into evidence. Regarding the fire in his shop, Wilhelm stated that on June 13, 1995, Wanda left a bag of trash in his pickup for him to burn. He

burned it in the shop stove that same day. He testified that Wanda would often leave mail and other items for him in his pickup, including any trash she wanted burned. He also testified that throughout the marriage, they had used the shop stove to burn personal papers and similar items.

Wilhelm further explained that on June 13, 1995, at around 5 p.m., he returned an automobile he had been using to its owner in Lyons and walked back to his shop. His walk took him to within a block of the family home. He stated that he walked for a while and jogged for a while because that "was my way of transportation to get back to my shop . . . I was running for exercise and was on my way back to the shop."

According to Wilhelm, he then returned to his shop and continued working until about 9 p.m. At 9 p.m., he went to see a friend, staying about 10 to 15 minutes. Wilhelm then drove to see another friend, but no one was home. Wilhelm then drove to his brother's home, arriving about 10 p.m. Wilhelm helped his brother change a tire on a tractor, which took at least 3 hours, then went to bed. On June 14, 1995, he awoke at approximately 6 a.m. and went into Lyons for breakfast. At approximately 9 a.m., he left for a jobsite in Winner, South Dakota, returning to Lyons the following day.

Wilhelm testified that he did not kill Wanda and that he had no idea as to her whereabouts.

Jeremy testified at the probate hearing. He said that he had often helped his father in the shop and had never seen his father burn any papers in the stove. Jeremy further stated that his father did not typically use the stove in the summertime.

On cross-examination, Jeremy acknowledged that he was aware that around 10 p.m. on June 13, 1995, someone observed an unknown vehicle in Wanda's driveway, occupied by two unknown men. Jeremy further acknowledged that Wanda had been diagnosed as an alcoholic in 1986, while hospitalized for an unrelated surgery. Jeremy stated that he had never seen Wanda take a drink after the diagnosis and that he had no explanation for the fact that beer was found in Wanda's refrigerator after she disappeared.

Mardelle also testified at the probate hearing. She stated that Wanda set out her trash every week at the curb, where it was

picked up by the city. She further agreed that Wanda had been diagnosed as an alcoholic in 1986 and that she had not seen Wanda take a drink since her diagnosis.

Among the exhibits received at the probate hearing was a receipt for the rental of a post office box in Wanda's name, signed by a postmaster with what appears to be the last name of "Webster." The receipt bears the stamp of the Lyons post office and is dated November 14, 1996. The receipt was also admitted at the 1997 trial. The foundation for admission of the receipt was provided by Huffman, a Lyons postal employee, who simply testified that the document was "a receipt for [a post office] box fee payment." No other evidence was offered at either the 1997 criminal trial or the probate proceedings regarding the circumstances surrounding the post office box receipt.

Slotsky again testified at the probate hearing. He reiterated and further explained his testimony concerning Wanda's credit card accounts based on his company's 1997 credit report. Slotsky explained the process used to obtain Wanda's credit information, stating that the 1997 report was drawn from a computer data bank located in Chicago and maintained by a company named "Trans Union." Slotsky further explained that the various "credit grantor[s]" provided information to Trans Union and that Trans Union then stored this information in its computer system. To produce Wanda's credit report, Slotsky drew the information from Trans Union's databank.

Slotsky testified that according to the 1997 report, Wanda's Bank One, Citibank, and First Card accounts were all marked "closed by consumer." He further testified that the Bank One account was "closed by consumer" in June 1995, while the First Card and Citibank accounts were closed in 1996, after Wanda's disappearance.

Slotsky stated that it appeared the Bank One account was a joint-contractual account with more than one authorized user, while the Citibank and First Card accounts appeared to be individual liability accounts, with Wanda as the only authorized user. However, he was not certain about this information, which was gleaned from letter codes contained in the 1997 report. He further stated that the Bank One account at one time had a balance of $11,000, which had been paid off. The Citibank and

First Card accounts were never used. When asked "whether anyone, other than Wanda Krumwiede would have been authorized to close these accounts," Slotsky responded "None of these accounts specifically state that there is joint liability on them. And therefore I cannot tell whether or not the party might have had any co-liability or be also authorized to close the account." He also stated that credit card companies in general would "not be real demanding" regarding proof of identity when closing an account. No one from Bank One, Citibank, First Card, or J.C. Penney testified regarding these accounts.

Finally, the affidavit of Lasovich was offered and received at the probate hearing. In his affidavit, dated April 5, 2001, Lasovich averred that he remained "convinced the women [sic] I saw in the hotel and described to the police was the same woman described in the missing person report I saw on television." Lasovich described this woman as "having a 'poofy' dark, out of date hairstyle."

The court entered its order on June 11, 2001, finding:

> Wanda Krumwiede was last positively identified as being alive on June 13, 1995 at approximately 9:00 p.m. . . .
>
> Wanda Krumwiede filed for divorce in December, 1994. Wilhelm Krumwiede did not want the divorce nor the loss of the house he purchased prior to marriage and maintained in his own name only. Evidence shows that an identifiable piece of Wanda Krumwiede's only pair of glasses was found in the wood burning stove of Wilhelm Krumwiede, on property controlled by him. Small amounts of dried blood belonging to Wanda Krumwiede were found on the back tailgate of Wilhelm Krumwiede's pickup. These findings of fact in conjunction with the extensive evidentiary record before the court is proof by a preponderance of the evidence that Wilhelm Krumwiede intentionally and feloniously killed his wife, Wanda Krumwiede.

The court then sustained Jeremy's objection, removed Wilhelm as personal representative of Wanda's estate, and appointed Jeremy as successor personal representative. Wilhelm appeals.

ASSIGNMENTS OF ERROR

Wilhelm asserts, renumbered and rephrased, that the probate court erred in (1) determining that the directed verdict in the

1998 criminal trial did not bar application of Nebraska's homicide probate statute to Wilhelm based on either issue preclusion, the "legal effect" of the directed verdict, or the language of § 30-2354; (2) finding that Jeremy had proved by a preponderance of the evidence that Wilhelm intentionally and feloniously killed Wanda, in that such findings "are arbitrary, capricious, or unreasonable"; and (3) determining Wilhelm should be removed as personal representative and Jeremy appointed as successor personal representative.

STANDARD OF REVIEW

[1-3] In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993). In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id.* In reviewing the judgment awarded by the probate court in a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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.*

[4] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *In re Estate of Mecello*, 262 Neb. 493, 633 N.W.2d 892 (2001).

ANALYSIS

Wilhelm initially suggests that the standard of review for errors appearing on the record in probate proceedings "has not been explained" and that this court should "review this case *de novo* on the facts, and make independent determinations on legal issues," similar to the standard of review employed in parental termination cases. Brief for appellant at 32-33. We disagree.

This court has previously held that in probate proceedings which do not raise "equitable matters," an appellate court reviews the decision of the county court for errors appearing on the record and does not conduct a de novo review of the facts. *In re Estate of Watkins, supra.*

In *In re Estate of Watkins*, 243 Neb. at 587, 501 N.W.2d at 295, we set forth the standard of review as follows:

> In the absence of an equity question, an appellate court, reviewing probate matters, examines for error appearing on the record made in the county court. . . .
>
> "In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. In reviewing a judgment awarded in a bench trial of a law action, an appellate court does not reweigh evidence, but considers the evidence in the 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."

(Citations omitted.) Quoting *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992). See, also, *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993) (claim of fraud in probate proceedings, being matter of equity, reviewed de novo on appeal).

It is also the case that "[o]n a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below." *In re Estate of Mecello*, 262 Neb. at 504, 633 N.W.2d at 901. Accordingly, in the present appeal, which does not involve any equitable claims, we review the probate court's findings of fact under a "clearly erroneous" standard of review, considering the evidence in the light most favorable to Jeremy, who is entitled to every reasonable inference deducible from the evidence. See *In re Estate of Watkins, supra*. On questions of law, we reach a conclusion independent of the determination of the probate court. See *In re Estate of Mecello, supra*.

FIRST ASSIGNMENT OF ERROR

COLLATERAL ESTOPPEL

[5,6] Wilhelm contends in his first assignment of error that "Issue Preclusion Rules Apply To . . . *Neb Rev Stat* § 30-2354" and that as such, his acquittal "forecloses any proceedings against him" under § 30-2354, Nebraska's homicide probate statute. Brief for appellant at 29. Under the doctrine of collateral

estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *Woodward v. Andersen*, 261 Neb. 980, 627 N.W.2d 742 (2001). However, this court has also held that the doctrine of collateral estoppel is not applicable in a subsequent proceeding when the burden of persuasion is different. *State v. Young*, 249 Neb. 539, 544 N.W.2d 808 (1996); *State v. Yelli*, 247 Neb. 785, 530 N.W.2d 250 (1995). See, also, *Congleton v. Sansom*, 664 So. 2d 276 (Fla. App. 1995) (acquittal on criminal charges based on insanity does not foreclose same evidence from meeting lesser civil standard under homicide probate statute); *Matter of Estate of Congdon*, 309 N.W.2d 261 (Minn. 1981) (collateral estoppel not applicable in proceedings under homicide probate statute regarding daughter's prior acquittal of murder and conspiracy charges). The burden of persuasion in § 30-2354 is "by a preponderance of evidence." This is a different burden of persuasion than in a criminal trial. Accordingly, this argument is without merit.

LEGAL IMPACT OF DIRECTED VERDICT IN CRIMINAL TRIAL

Wilhelm further argues in conjunction with his first assignment of error that the directed verdict in the 1998 criminal case constituted "absolute proof from a previous murder prosecution that the district court concluded no homicide had been committed," and accordingly "the very same evidence" before the probate court was not legally "sufficient to prove 'felonious' and 'intentional' killing by the greater weight of the evidence." Brief for appellant at 26-27. Wilhelm contends that the probate court must give conclusive effect to the directed verdict in Wilhelm's second criminal trial because the district court had to find a " 'complete failure' " of the evidence on an essential element of the crime charged, or that the evidence was so doubtful in character and lacking in probative value that a finding of guilt on such evidence could not be sustained. *Id.* at 27. See, *State v. Canady*, 263 Neb. 552, 641 N.W.2d 43 (2002); *State v. Johnson*, 261 Neb. 1001, 627 N.W.2d 753 (2001).

Wilhelm's contention is that because he was acquitted of killing Wanda as the result of the directed verdict in the 1998 trial, the probate court is legally precluded from reaching a different

conclusion on the same evidence in that the probate court had "no new inculpatory evidence," and "the very same evidence" submitted at the second criminal trial was before the probate court. Brief for appellant at 26-27. Wilhelm then asserts that "where a district judge dismisses a criminal prosecution upon the State's rest, the court has, by definition, found a failure of proof by the greater weight of the evidence." *Id.* at 27.

However, we cannot reach the merits of Wilhelm's argument as it relates to the directed verdict because this court cannot determine from this record whether, as Wilhelm asserts, the "inculpatory" evidence submitted at the 1998 criminal trial was "the very same evidence" before the probate court. *Id.* at 26-27. The order of the district court directing a verdict for Wilhelm states that the evidence upon which the directed verdict was granted was presented to the court between January 12 and 16, 1998. The only criminal record before this court is from the first criminal trial, which took place from August 18 through August 22, 1997, ending in a mistrial. Aside from the witnesses who testified at the probate hearing that their evidence was the same in the two previous criminal trials, the record does not show what evidence was presented at the 1998 criminal trial.

The only identifiable portion of the 1998 criminal trial contained in the record is the order of the district court directing a verdict. The record does not disclose either a list of witnesses for the State in the 1998 trial or the content of their testimony. Additionally, while there are stipulations in the record, none of these stipulations address whether the evidence at the 1997 trial was "the very same evidence" offered in the 1998 trial. While Wilhelm's counsel asserted at oral argument that exhibits 15 through 78 submitted at the probate hearing were common to both the 1997 and 1998 trials, this assertion, which cannot be determined from the record, would still not establish that these exhibits represent all of the evidence from the 1998 trial.

[7] Wilhelm has failed to present either this court or the probate court below with a record demonstrating that the evidence adduced by the State in the 1998 trial was "the very same evidence" adduced by Jeremy in the 2001 probate proceeding. It is incumbent upon the party appealing to present a record which supports the errors assigned. *J.B. Contracting Servs. v. Universal*

Surety Co., 261 Neb. 586, 624 N.W.2d 13 (2001); *In re Application of SID No. 384*, 259 Neb. 351, 609 N.W.2d 679 (2000). Such presentation is necessary because "[m]eaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision." *J.B. Contracting Servs.*, 261 Neb. at 593, 624 N.W.2d at 19-20, citing *Van Ackeren v. Nebraska Bd. of Parole*, 251 Neb. 477, 558 N.W.2d 48 (1997). Accordingly, this argument is without merit.

LEGAL INTERPRETATION OF § 30-2354

[8] Finally, Wilhelm argues under his first assignment of error that the dismissal of the criminal case against him forecloses application of § 30-2354, based on the language of § 30-2354. This issue presents a question of law regarding the interpretation of a statute. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Henery v. City of Omaha*, 263 Neb. 700, 641 N.W.2d 644 (2002).

Section 30-2354 became operative in 1977 as part of Nebraska's Uniform Probate Code and was enacted virtually verbatim from the Uniform Probate Code, § 2-803. Section 30-2354(e) states that a conviction for felonious and intentional killing, or aiding and abetting in such killing, is "conclusive for purposes of this section." The statute goes on to state that "[i]n the absence of a conviction," the statute will apply when the preponderance of the evidence shows that the decedent was killed intentionally and feloniously. Wilhelm argues that the plain language of § 30-2354 limits the applicability of the statute to two situations: (1) where there has been a conviction or (2) where "there has been no prosecution against the one who would otherwise inherit." Brief for appellant at 31. Wilhelm contends that § 30-2354 "does not address circumstances where there is a judgment of acquittal" and that the "logical interpretation of [§ 30-2354] is to conclude that acquittal judgments, like are [sic] produced in the district court in a criminal case, preclude its invocation." *Id.* We disagree.

[9] The plain language of § 30-2354 requires simply the "absence of a conviction." Wilhelm would have us read into the

statute an additional requirement, the absence of a prosecution ending in acquittal. However, it is not within the province of the courts to read a meaning into a statute that is not there or to read anything direct and plain out of a statute. *Daniels v. Allstate Indemnity Co.*, 261 Neb. 671, 624 N.W.2d 636 (2001); *Nelson v. City of Omaha*, 256 Neb. 303, 589 N.W.2d 522 (1999). The statute on its face is designed to apply to killings which result in the conviction of the wrongdoer, and to killings in the "absence of a conviction."

Our reading of the plain meaning of § 30-2354 is supported by the comment to § 2-803 of the Uniform Probate Code, which states in relevant part:

> While conviction in the criminal prosecution under this section is treated as conclusive on the matter of succession to the murdered person's property, acquittal does not have the same consequences. This is because different considerations as well as a different burden of proof enter into the finding of guilty in the criminal prosecution. Hence it is possible that the defendant on a murder charge may be found not guilty and acquitted, but if the same person claims as an heir or devisee of the decedent, he may in the probate court be found to have feloniously and intentionally killed the decedent and thus be barred under this section from sharing in the estate. An analogy exists in the tax field, where a taxpayer may be acquitted of tax fraud in a criminal prosecution but found to have committed fraud in a civil proceeding.

Unif. Probate Code § 2-803, comment, 8 U.L.A. 460 (1998). Compare *United States v. Real Estate Boards*, 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950) (relying on federal tax cases to hold that directed verdict in criminal price-fixing trial did not bar civil suit, where civil suit was based solely on record made in criminal trial).

[10] The plain unambiguous language of § 30-2354 does not support Wilhelm's argument. We determine that Wilhelm's acquittal of criminal liability for the murder of Wanda is the "absence of a conviction" for purposes of § 30-2354 and that the probate court was not bound by the directed verdict granted in Wilhelm's 1998 criminal trial.

SECOND ASSIGNMENT OF ERROR

In his second assignment of error, Wilhelm argues that the probate court erred in finding that Jeremy had proved by a preponderance of the evidence that Wilhelm killed Wanda. Wilhelm also contends that the findings of the county court were arbitrary, capricious, or unreasonable.

In reaching its conclusion that Wilhelm had intentionally and feloniously killed Wanda, the court found, inter alia, that (1) Wilhelm did not want the divorce; (2) Wilhelm did not want to lose the house he purchased prior to the marriage; (3) a portion of Wanda's only pair of eyeglasses was found in Wilhelm's shop stove after Wanda's disappearance, on property controlled by him; and (4) small amounts of dried blood belonging to Wanda were found on Wilhelm's truck.

These findings by the probate court were not clearly erroneous. The testimony of Peterson and others showed that Wilhelm did not want the divorce and did not want Wanda to receive the family home in the divorce proceedings. Testimony and physical evidence also supported the probate court's finding that a portion of Wanda's only pair of eyeglasses was found in Wilhelm's shop stove shortly after her disappearance. Forensic evidence further supported the probate court's finding that traces of Wanda's blood were found on Wilhelm's pickup after Wanda's disappearance.

Wilhelm argues that there is "no proof that Wanda was killed, and certainly not that she was killed by [Wilhelm]." Brief for appellant at 22. The record shows otherwise. The eyeglasses and bloodstains, as noted by the probate court, are evidence that Wanda was murdered, and this evidence was directly linked to Wilhelm through his pickup and shop stove.

Additionally, the fact that Wanda abruptly and without explanation disappeared sometime after 9 p.m. on June 13, 1995, and has not been seen by any of her family, friends, or acquaintances since that time is further evidence supporting the county court's finding. This evidence is particularly significant given the unrefuted testimony regarding Wanda's love for her children and grandchildren and her ongoing involvement in their lives.

Wilhelm asserts that evidence adduced in the probate hearing shows that Wanda was alive after June 13, 1995. This evidence

includes Lasovich's affidavit in which he states that he "remain[s] convinced" that he saw Wanda on June 20, 1995, and describes the woman he saw as "having a 'poofy' dark, out of date hairstyle." However, Vetick testified that on June 6, she changed Wanda's hairstyle to "really short and real wispy . . . that real modern, wispy look."

Wilhelm also points to the testimony of Slotsky that Wanda's Citibank and First Card credit accounts were closed "by the consumer" in 1996, after Wanda disappeared. However, Slotsky testified that he could not determine, based on the information provided by Trans Union, whether Wanda or someone else closed the accounts. There is also no evidence in the record from a representative of First Card or Citibank regarding their specific procedures for closing inactive accounts. In particular, regarding the First Card account, Slotsky testified:

> Q Over to the right [of the credit report] it says, "Account closed by consumer"?
>
> A Correct.
>
> Q Does that mean that someone would have to actually contact them to close that account?
>
> A That would indicate that the cardholder or the account holder actually contacted the creditor and affirmatively said to close this account.
>
> Q Are you familiar with that process for that specific cardholder — or for that card company?
>
> A Only, generically, not specifically, no.
>
> Q So, you wouldn't know what process they use to verify whether an individual was who they represented themselves to be?
>
> A Oh, no. I would expect just general industry knowledge that they would not be real demanding about identification. If someone says, "I'm the consumer," maybe had the account number — it's not something that's going to be terribly damaging to anyone. If I call up and cancel your credit cards and you try to use it, you get mad and call the credit company and work it out. You haven't been harmed. So, yeah, I would — It would surprise me to learn that a credit grantor would go to extensive identity verification procedures for that.

While Wilhelm would have us conclude that Wanda herself closed these two accounts in 1996, the record, construed in the light most favorable to Jeremy, does not support such a finding.

Wilhelm further contends that there was beer in Wanda's refrigerator after she disappeared, indicating she may have "relapsed into alcoholism." Brief for appellant at 26. However, those witnesses who testified regarding Wanda's alcoholism, including Wilhelm, stated that they had never seen Wanda take a drink after she was diagnosed in 1986.

Wilhelm also relies on the receipt for the rental of a post office box in Wanda's name, taken out in 1996 in Lyons. However, there is no supporting evidence indicating who actually rented the post office box or the procedures required to rent the box. Although the name "Wanda Krumwiede" is handwritten in printed letters on the receipt as the "*Name of Customer*" renting the box, there was no other evidence offered to establish who filled out the receipt, whether the handwriting on the receipt was Wanda's, or whether Wanda normally signed her name as it appeared on the receipt. The only evidence regarding the receipt was provided by Huffman, who testified in the 1997 criminal trial:

> Q Could I show you Exhibit No. 112, please? . . .
>
> . . . .
>
> Q . . . [D]o you recognize that as a document of the kind that you'd use at the postal — at the post office?
>
> A Yes.
>
> Q And what is that particular kind of form used for?
>
> A It's for a post office — when we pay our post office box fees.
>
> Q It's a box —
>
> A It's a receipt.
>
> Q A receipt for the box fee payment?
>
> A (Witness nodded affirmatively.)

As with the credit report, Wilhelm would have us conclude that the post office box receipt shows that Wanda was alive in 1996. However, given the state of the record as to the manner in which the receipt was obtained, this piece of evidence, considered in the light most favorable to Jeremy, does not support Wilhelm's contention.

Finally, Wilhelm argues that the record supports several alternative theories to explain Wanda's disappearance, including the possibility that Wanda relapsed into alcoholism and suddenly left, that Wanda was abducted by the two unknown men seen in her driveway on June 13, 1995, or that Wanda was killed by someone other than Wilhelm. However, these theories do not explain why Wanda's only pair of eyeglasses, which she was wearing on the day she disappeared and which were still under warranty at the time, were found burned in Wilhelm's shop stove, along with a 1969 wedding announcement. These theories also do not explain Wanda's bloodstains on the interior of Wilhelm's pickup.

The issue before us on appeal is not whether there was evidence to support Wilhelm's claim of innocence, but whether the record shows that the probate court's findings are clearly erroneous. See *In re Estate of Watkins*, 243 Neb. 583, 501 N.W.2d 292 (1993). Based upon our review of the record, we cannot conclude that the probate court was clearly erroneous in finding that Jeremy met his burden in showing by a preponderance of the evidence that Wilhelm intentionally and feloniously killed Wanda. As such, the court also did not err in removing Wilhelm as personal representative and appointing Jeremy as successor personal representative.

CONCLUSION

The decision of the probate court is affirmed.

AFFIRMED.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. WILLIAM P. RICKABAUGH, RESPONDENT.

647 N.W.2d 641

Filed July 19, 2002. No. S-01-941.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

On August 20, 2001, formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, William P. Rickabaugh. Respondent's answer disputed certain allegations. His answer admitted other allegations, but pled a defense to those allegations. A referee was appointed and heard evidence. The referee filed a report on March 8, 2002. With respect to both counts I and II, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility. The referee made no finding as to whether respondent had violated his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended disbarment. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

Respondent was admitted to the practice of law in Nebraska on September 14, 1992. He has practiced law in Douglas County.

The substance of the referee's findings may be summarized as follows: In regard to count I, respondent advised Randall Davis and his business associate David Mutum (the clients) regarding collective bargaining agreements but failed to inform them that he was not qualified, either by experience or training, to give such advice. Respondent also represented the clients and their companies as defendants in a lawsuit concerning the collective bargaining agreements which was filed in federal court. Respondent failed to inform the clients that he was not qualified, either by experience or training, to handle the representation of a lawsuit in federal court. Respondent failed to keep the clients advised of developments in the case, including settlement negotiations, and failed to review settlement documents with the clients or to explain to them the import of such documents.

In regard to count II, respondent created fictitious pleadings and forged a judge's signature in an attempt to persuade Davis that respondent had filed a lawsuit and obtained a judgment in favor of one of Davis' companies against another company. The referee rejected respondent's asserted defense that he had created the fictitious pleadings to appease Davis in order to prevent

possible unspecified violence by Davis. Respondent could not identify any specific threat of violence which had been made.

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules, "DR 1-102, DR 6-101, and DR 7-102 as set forth in the Relator's Formal Charges." The specific provisions alleged in the formal charges are in regard to count I, Canon 1, DR 1-102(A)(1), violating a disciplinary rule, and DR 1-102(A)(4), dishonesty; Canon 6, DR 6-101(A)(1), handling matter not competent to handle, DR 6-101(A)(2), handling matter without adequate preparation, and DR 6-101(A)(3), neglect; and Canon 7, DR 7-102(A)(3), concealing or failing to disclose facts, and DR 7-102(A)(5), false statement. In regard to count II, the charges are DR 1-102(A)(1), violating a disciplinary rule, DR 1-102(A)(4), dishonesty; DR 1-102(A)(5), conduct prejudicial to administration of justice; DR 1-102(A)(6), conduct adversely reflecting on fitness to practice; DR 6-101(A)(3), neglect; and DR 7-102(A)(5), false statement. We understand the referee's statement to be a finding that these specific provisions were violated. With respect to the sanction which ought to be imposed for the foregoing violations, the referee recommended disbarment.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra.* To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by

clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), (5), and (6); DR 6-101(A)(1), (2), and (3); and DR 7-102(A)(3) and (5). Although the referee made no finding in this regard, we conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of

any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent handled legal matters which he knew or should have known he was not competent to handle, without associating with a lawyer who was competent to handle the matters, and without adequately preparing himself to handle the matters. Respondent failed to keep his clients informed of the progress of the pending matters and negotiated and entered into a settlement agreement on behalf of the clients without the clients' knowledge. In addition, respondent knowingly made false statements of fact by representing to his client that he had filed a lawsuit and gained a favorable judgment on behalf of the client. In perpetrating this falsehood, respondent went so far as to create fictitious pleadings and to forge the signature of a judge. Respondent's asserted defense to count II was not believed by the referee, and respondent was unable to provide specific evidence to substantiate his claimed defense.

Respondent does not appear to have established factors to mitigate his breach of disciplinary rules, although the referee noted that he was generally cooperative with respect to the disciplinary proceeding. Respondent admitted the allegations of count II, and in regard to count I, according to an exhibit in the record, respondent admitted to the clients that his handling of the collective bargaining agreement matter amounted to "attorney malpractice." Respondent eventually paid the litigation settlement and other costs on behalf of the clients.

With respect to the seriousness of respondent's offenses, we conclude that the manner in which respondent mishandled the matters discussed above, especially the forging of a judge's signature, amount to conduct that was prejudicial to the administration of justice. See, e.g., *State ex rel. NSBA v. Ebersold*, 253 Neb. 19, 567 N.W.2d 307 (1997) (disbarring attorney where attorney falsely indicated judge had signed decree when in fact judge had not). We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be disbarred.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred, and we therefore order him disbarred from the practice of law in the State of Nebraska, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

McCORMACK, J., not participating.

JOSEPH AND ANTOINETTE WASIKOWSKI ET AL., APPELLEES AND CROSS-APPELLANTS, V. THE NEBRASKA QUALITY JOBS BOARD, A NEBRASKA ADMINISTRATIVE AGENCY, ET AL., APPELLEES AND CROSS-APPELLANTS, AND NEBRASKA BEEF, INC., A NEBRASKA CORPORATION, AND NEBRASKA BEEF LTD., A NEBRASKA LIMITED PARTNERSHIP, APPELLANTS AND CROSS-APPELLEES.

648 N.W.2d 756

Filed July 26, 2002. No. S-00-573.

1. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
2. **Appeal and Error.** On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below.
3. **Actions: Equity: Public Meetings: Appeal and Error.** Actions for relief under the Nebraska public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases.
4. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
5. **Administrative Law.** The Administrative Procedure Act applies only to agencies authorized by law to make rules and regulations.

6. **Rules of the Supreme Court: Appeal and Error.** A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained.
7. **Judgments: Final Orders: Appeal and Error: Words and Phrases.** Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order.
8. **Appeal and Error.** An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered.
9. ____. An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief.
10. **Judgments: Appeal and Error.** A proper result will not be reversed merely because it was reached for the wrong reason.
11. **Jurisdiction: Appeal and Error.** When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court.
12. **Actions: Taxation: Injunction.** A resident taxpayer, without showing any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes.
13. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not passed upon by the trial court.
14. **Public Meetings: Notice: Waiver: Time.** Any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later date.
15. ____: ____: ____: ____. A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given.
16. **Public Meetings: Statutes: Words and Phrases.** The "public interest" mentioned in Neb. Rev. Stat. § 84-1410 (Reissue 1999) is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities.
17. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning.
18. **Public Meetings: Statutes.** Public meetings laws are broadly construed so as to obtain the objective of openness in favor of the public.
19. ____: ____. The Nebraska public meetings laws are a statutory commitment to openness in government.
20. **Public Meetings: Legislature.** The Legislature has made a policy determination that most of the information in applications under the Quality Jobs Act should be kept confidential, without exception or limitation.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed in part, and in part reversed and remanded with directions to dismiss.

William M. Lamson, Jr., and Robert A. Mooney, of Lamson, Dugan & Murray, L.L.P., for appellants.

Patricia A. Knapp, and D. Milo Mumgaard, of Nebraska Appleseed Center for Law in the Public Interest, for appellees Joseph and Antoinette Wasikowski et al.

Don Stenberg, Attorney General, and L. Jay Bartel for appellees Nebraska Quality Jobs Board et al.

Kermit A. Brashear and Mary P. Galligan for amici curiae Greater Omaha Chamber of Commerce and Nebraska Chamber of Commerce and Industry.

Amy A. Miller for amicus curiae American Civil Liberties Union Foundation of Nebraska.

Vincent M. Powers, of Vincent M. Powers & Associates, for amicus curiae Common Cause Nebraska.

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

GERRARD, J.

The Nebraska Quality Jobs Board (the Board); Board members E. Benjamin Nelson, David Heineman, and Dennis Jorgensen; the Nebraska Department of Revenue and the State Tax Commissioner, M. Berri Balka (collectively the State defendants); and Nebraska Beef, Inc., and Nebraska Beef, Ltd., appeal from the district court's order (1) voiding the Board's approval of Nebraska Beef, Ltd.'s application for wage benefit tax credits under the Quality Jobs Act and (2) ordering that Nebraska Beef, Ltd., return all credits to the State because the Department of Revenue failed to promulgate regulations as required under the Quality Jobs Act. The resident taxpayer plaintiffs cross-appeal the district court's determination that the plaintiffs waived all rights to contest the Board's alleged violation of the public meetings laws.

I. FACTUAL BACKGROUND

The Nebraska Legislature enacted the Quality Jobs Act (the Act), Neb. Rev. Stat. § 77-4901 et seq. (Reissue 1996, Cum. Supp. 2000 & Supp. 2001), to encourage new and existing businesses to

relocate to and expand in Nebraska, and to provide appropriate inducements to encourage them to do so if it aided in the economic and population growth of the state and created better jobs for state citizens. § 77-4902. The Act provides that companies may apply for a wage benefit credit; upon the Board's approval of such application, the company enters into a written project agreement with the State. § 77-4928(4) and (7).

Nebraska Beef, Inc., is a Nebraska corporation with its principal place of business in Omaha, Nebraska. Nebraska Beef, Ltd., is a Nebraska limited partnership with its principal place of business in Omaha, and is owned by Nebraska Beef, Inc. Although not originally named as a defendant, the parties agreed at trial to add Nebraska Beef, Ltd., as a party defendant. The two entities are referred to hereafter as "Nebraska Beef."

On October 13, 1995, Nebraska Beef filed an application for wage benefit credits under the Act. As set forth in the Act, the Board determines whether to approve an application by majority vote, based on the Board's determination of whether the project will enable the State to accomplish the purposes of the Act. The Board is an administrative state government entity created pursuant to the Act; the members of the Board are the Governor, the State Treasurer, and the chairperson of the Nebraska Investment Council. § 77-4908. At all times relevant to this action, the Board members were Nelson, Governor; Heineman, State Treasurer; and Jorgensen, chairperson of the Nebraska Investment Council.

The Board met on August 14, 1996, to consider Nebraska Beef's application for wage benefit credits. The Board convened a closed session, after which it voted unanimously to request an Attorney General's opinion addressing certain questions regarding the Act. The Board stated that the closed session was necessary to "consider confidential information that should be maintained confidential so that obviously competitors don't learn more about [Nebraska Beef's] business than they are able to find out in the ordinary way." The Board took no other action on Nebraska Beef's application at the August 14 meeting.

Various Nebraska newspapers published notice of the Board's next scheduled meeting. On November 25, 1996, the Board met again to resume consideration of Nebraska Beef's application.

Plaintiff Antoinette Wasikowski appeared at the meeting and read a letter in opposition to the Board's granting Nebraska Beef's application. Wasikowski also submitted into the record two letters opposing Nebraska Beef's application. The Board reconvened in closed session "to consider confidential information as permitted by law" in reviewing Nebraska Beef's application, after an uncontested and unanimous vote to do so. Upon returning from closed session, a majority of the Board voted to approve Nebraska Beef's application. Based on the Board's approval of the application, the State and Nebraska Beef entered into a Quality Jobs Act project agreement, executed on June 2, 1998, by a general partner of Nebraska Beef, Ltd., and Balka, State Tax Commissioner.

II. PROCEDURAL BACKGROUND

1. Rules and Regulations Petition—Case No. 558-163

On July 15, 1997, resident Nebraska taxpayers Joseph and Antoinette Wasikowski, Janet Bonet, Wayne Weston, Fay Maloley, and Rodney Krogh (collectively the plaintiffs) filed a petition in the Lancaster County District Court contesting the Board's decision to approve Nebraska Beef's application. The case was assigned as docket 558, page 163 (case No. 558-163). The petition included as defendants the Board; Board members Nelson, Heineman, and Jorgensen; the Nebraska Department of Revenue; Balka, State Tax Commissioner; and Nebraska Beef, Inc.

After the district court sustained demurrers to the plaintiffs' first petition, the plaintiffs filed an amended petition. The first cause of action, brought pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1994 & Cum. Supp. 1998), alleged that the Department of Revenue failed to promulgate rules and regulations as required by the Quality Jobs Act. As relief, the plaintiffs requested a declaration that the department had a mandatory obligation to implement rules and regulations and that because the department failed to do so, the Board's approval of Nebraska Beef's application was null and void. Further, the plaintiffs requested an injunction enjoining the Board from approving wage benefit tax credit applications until the department implemented rules and regulations.

Under the second cause of action, the plaintiffs alleged that pursuant to the Uniform Declaratory Judgments Act, Neb. Rev. Stat. §§ 25-21,149 to 25-21,164 (Reissue 1995), the Board acted without statutory authority, without factual foundation in the record, and without proper rules and regulations in place, violating the Due Process Clauses of the Nebraska and U.S. Constitutions. On the second cause of action, the plaintiffs requested a declaratory judgment voiding the Board's approval of Nebraska Beef's application, and an injunction enjoining Balka, his successors in interest, or anyone acting on his behalf, from executing an agreement between Nebraska Beef and the State of Nebraska.

2. Public Meetings Laws Petition—Case No. 562-086

On October 10, 1997, the plaintiffs filed another petition against the Board in the Lancaster County District Court, assigned as docket 562, page 86 (case No. 562-086). The petition named as defendants Board members Nelson, Heineman, and Jorgensen, and Nebraska Beef. The petition alleged that the Board acted in violation of public meetings laws by conducting closed sessions at its meetings. The plaintiffs requested that the district court void any action taken by the Board, including its November 25, 1996, decision to approve Nebraska Beef's application.

3. District Court Consolidated Order

Based upon a stipulation by the parties, the district court consolidated cases Nos. 558-163 and 562-086. Trial took place in January 2000, and the district court entered its orders on May 1, 2000. After considering motions for a new trial filed by the State defendants and Nebraska Beef, the district court amended its May 1 order in each case. In its amended orders, the district court first determined that it had jurisdiction to hear the case because the Board's decision was a "contested case" within the meaning of the APA, § 84-917.

Next, the district court considered the plaintiffs' public meetings laws claims. The district court concluded that the August 14, 1996, closed session was not in substantial violation of the public meetings laws because the reasons given for closed session "seem[ed] valid" and the Board did not take any final action.

Additionally, although the district court intimated that the closed session at the November 25, 1996, meeting might have been improper, it determined that Antoinette Wasikowski (hereafter Wasikowski) waived any claim on this ground because she attended the meeting but did not object to a closed session. Thus, the district court concluded that the plaintiffs' complaint under the public meetings laws failed.

The district court next considered the plaintiffs' cause of action stated pursuant to the Uniform Declaratory Judgments Act. Sovereign immunity defeated claims against the Board and the Department of Revenue; thus, the district court analyzed this cause of action with regard to the individual defendants only. The district court determined that the allegation that the Board acted without statutory authority in approving Nebraska Beef's application failed because although Nebraska Beef was "already operating" in Nebraska when it received the tax credits, this fact was not dispositive; the district court found that the Board takes other factors into account under § 77-4928(4) in reviewing a wage benefit credit application.

The district court lastly considered the plaintiffs' cause of action pursuant to the APA and concluded that the Board's approval of the application was invalid as a violation of the plaintiffs' due process rights because (1) the Department of Revenue had not promulgated rules or regulations prior to the Board's approval of the application and (2) § 77-4932 mandates such rules and regulations. The district court rejected the defendants' equitable estoppel, laches, and waiver defenses. In conclusion, the district court declared the wage benefit credits given to Nebraska Beef void and ordered Nebraska Beef to return the wage benefit credits to the State.

The State defendants and Nebraska Beef appeal to this court; the plaintiffs cross-appeal. Pursuant to Neb. Ct. R. of Prac. 2B (rev. 2000), we granted Nebraska Beef and the State defendants' petition to bypass the Nebraska Court of Appeals.

III. ASSIGNMENTS OF ERROR

Nebraska Beef assigns that the district court erred in (1) reversing the decision of the Board granting wage benefits to Nebraska Beef because (a) the decision of the Board was not a

"contested case" within the meaning of the APA and (b) the case did not involve an "agency" subject to the act, the court did not have jurisdiction under § 84-917, and the plaintiffs waived any right to contest the absence of regulations by failing to raise the issue at the Board's meeting; (2) determining that the Board's lack of regulations resulted in a violation of the plaintiffs' due process rights; and (3) expanding the scope of its authority under the APA by ordering that Nebraska Beef repay credits received pursuant to a facially valid agreement, as well as granting relief not requested or mandated.

On cross-appeal, the State defendants incorporate and adopt Nebraska Beef's three assignments of error. Further, the State defendants assign that the district court erred (1) in finding that it had jurisdiction under § 84-917 of the APA to consider the plaintiffs' claim that the Board's approval of Nebraska Beef's application for wage benefit tax credits was void because the Department of Revenue had not adopted rules and regulations and (2) in finding that the absence of rules and regulations promulgated by the Department of Revenue prior to the Board's approval of Nebraska Beef's application violated the APA and that the department's failure to adopt rules and regulations required the court to void the Board's approval of Nebraska Beef's application.

On cross-appeal, the plaintiffs assign that the district court erred in (1) determining that Wasikowski waived her right to challenge closed sessions by the Board by attending the meeting on November 25, 1996, and failing to object; (2) determining that Wasikowski, by failing to object at the Board's meeting on November 25, waived the rights of the other plaintiffs to challenge closed sessions by the Board; (3) ruling that the Board had not committed a substantial violation of the public meetings laws by holding a closed session on August 14, 1996, to discuss the merits of granting wage benefit tax credits to Nebraska Beef; and (4) failing to void the Board's decision to grant Nebraska Beef wage benefit tax credits after finding that the Board substantially violated the public meetings laws by holding a closed session on November 25 to discuss the merits of granting those tax credits.

IV. STANDARD OF REVIEW

[1] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Kansas Bankers Surety Co. v. Halford*, 263 Neb. 971, 644 N.W.2d 865 (2002).

[2] On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002).

[3,4] Actions for relief under the public meetings laws are tried as equitable cases, given that the relief sought is in the nature of a declaration that action taken in violation of the laws is void or voidable. Thus, the approach taken is that such cases are tried and reviewed by the appellate courts as equity cases. *Hansmeyer v. Nebraska Pub. Power Dist.*, 6 Neb. App. 889, 578 N.W.2d 476 (1998), *aff'd* 256 Neb. 1, 588 N.W.2d 589 (1999). In an appeal of an equitable action, an appellate court tries factual questions de novo on the record, provided that where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Caruso v. Parkos*, 262 Neb. 961, 637 N.W.2d 351 (2002); *Hansmeyer, supra.*

V. ANALYSIS

This appeal requires consideration on two distinct grounds: (1) the consequences of the Department of Revenue's failure to promulgate rules and regulations for the Board prior to the Board's approval of Nebraska Beef's application for wage benefit tax credits and (2) the Board's alleged violations of the public meetings laws, which occurred when the Board convened closed sessions to consider Nebraska Beef's application.

1. Department of Revenue's Failure to Promulgate Rules and Regulations Prior to Board's Approval of Nebraska Beef's Application

(a) Jurisdiction: "Contested Case" under APA

Nebraska Beef and the State defendants assign that the district court erred in finding that the plaintiffs' petition constituted

a "contested case" under the APA. The APA defines a "contested case" as a proceeding before an agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing. § 84-901(3). Section 84-917 outlines the process by which an aggrieved party can pursue an appeal of a final decision in a contested case.

The district court found the Board's decision to be a "contested case" within the definition of the APA. The district court relied on our statement in *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998), that a proceeding becomes a contested case when a hearing is required. See, also, *Central Park Pharm. v. Nebraska Liq. Cont. Comm.*, 216 Neb. 676, 344 N.W.2d 918 (1984). We determined in *Stoneman, supra*, that when an administrative body acts in a quasi-judicial manner, due process requires notice and an opportunity for a full and fair hearing at some stage of the agency proceedings. Further, *Stoneman* stated that the exercise of discretion to grant or deny a license, permit, or other type of action is a quasi-judicial function. *Id.* The district court compared the Board's proceedings to the Department of Banking and Finance's approval of a banking application in *Stoneman, supra*, and *First Fed. Sav. & Loan Assn. v. Department of Banking*, 187 Neb. 562, 192 N.W.2d 736 (1971), and a Liquor Control Commission decision to approve a liquor license. Thus, the district court concluded that the Board's decision was a contested case under the APA.

[5] The Board, however, is not an agency subject to the APA. Section 84-901(1) defines an agency as a board, commission, department, officer, division, or other administrative office or unit of the state government authorized by law to make rules and regulations. The district court determined that because the Board was not specifically excluded from the APA under § 84-901(1), it is an entity covered by the APA and all provisions therein. This court has recognized, however, that the APA applies only to agencies authorized by law to make rules and regulations. See *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994). In *Hoiengs*, for example, this court determined that the Public Employees Retirement Board was not an agency subject

to the APA because the act creating the retirement board did not grant the authority to make rules and regulations. See *id.*

The Board does not have this rulemaking authority; the Act provides that the Department of Revenue, in consultation with the Governor and the Department of Economic Development, shall adopt and promulgate all rules and regulations to carry out the purposes of the Act. See § 77-4932. The Department of Revenue is clearly an agency subject to the APA. We conclude, however, that because the Board does not promulgate rules and regulations, and because Nebraska Beef's application submission to the Board does not involve a quasi-judicial "contested case" requiring review pursuant to § 84-917, the Board is not an agency subject to the APA. The district court did not have jurisdiction under the APA to void the Board's approval of Nebraska Beef's application based on the absence of rules and regulations.

The plaintiffs agree with the State defendants and Nebraska Beef that their petition was not an appeal of a "contested case" under the APA. Instead, the plaintiffs assert that their lawsuit is an original equity action seeking to enjoin public officials from expending funds. Therefore, we next examine the district court's jurisdiction with regard to equity actions.

(b) Equity Jurisdiction

The plaintiffs' second cause of action, brought under the Uniform Declaratory Judgments Act, requested a declaratory judgment that the Board's actions were void because the Board acted without statutory authority, and without rules and regulations. The district court rejected the plaintiffs' request for a declaratory judgment. In rejecting this request, the district court addressed only the plaintiffs' allegation that the Act intended to encourage business relocation and expansion in Nebraska, but because Nebraska Beef was already operating in Nebraska, the Board could not justify its decision on this statutory ground. The district court stated, however, that this was only one of several factors for the Board to consider in reviewing an application under § 77-4928(4), and denied the plaintiffs' request for declaratory judgment pursuant to the Uniform Declaratory Judgments Act.

Although the district court denied the plaintiffs' request for relief under their second cause of action, it did not specifically address the plaintiffs' request for a declaratory judgment to void the Board's decision based on a lack of rules and regulations. Thus, the plaintiffs urge that although the district court incorrectly granted them relief under the APA, the judgment should still be affirmed because the court reached the correct decision. See *Gestring v. Mary Lanning Memorial Hosp.*, 259 Neb. 905, 613 N.W.2d 440 (2000). This argument fails, however; although the plaintiffs noted that the district court did not have jurisdiction for the grounds upon which it granted them relief, they did not attempt to rectify this error on cross-appeal.

[6-9] A cross-appeal must be properly designated, pursuant to Neb. Ct. R. of Prac. 9D(4) (rev. 2000), if affirmative relief is to be obtained. *Workman v. Workman*, 262 Neb. 373, 632 N.W.2d 286 (2001). Affirmative relief, for purposes of appeal, is a reversal, vacation, or modification of a lower court's judgment, decree, or final order. *McDonald v. DeCamp Legal Servs.*, 260 Neb. 729, 619 N.W.2d 583 (2000). An appellee's argument that a lower court's decision should be upheld on grounds specifically rejected below constitutes a request for affirmative relief, and the appellee must cross-appeal in order for that argument to be considered. *Id.* An appellee may not raise arguments independent of or not responsive to an appellant's assignments of error without cross-appealing because they will fall beyond the scope of the case as presented in the appellant's brief. *Workman, supra.*

In this case, the district court rejected the plaintiffs' request for relief under the Uniform Declaratory Judgments Act, although it did not specifically consider the request for relief on the ground that the Board acted without rules and regulations. Even though the district court found that the Board's actions in the absence of rules and regulations were void under the APA, we concluded above that the district court did not have jurisdiction to make such a determination under the APA.

[10,11] The plaintiffs argue that the district court correctly found that the Board's actions should be void, even if the district court lacked the jurisdiction to consider the plaintiffs' petition as an appeal of a "contested case" under the APA, and specifically rejected their declaratory judgment action below. A proper result

will not be reversed merely because it was reached for the wrong reason. *Gestring, supra.* This case, however, does not present a problem of errant reasoning, but one of jurisdiction. When a lower court lacks the authority to exercise its subject matter jurisdiction so as to adjudicate the merits of a claim, issue, or question, an appellate court also lacks the power to determine the merits of the claim, issue, or question presented to the lower court. *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001). The plaintiffs did not cross-appeal to receive a declaratory judgment pursuant to the Uniform Declaratory Judgments Act based on their rules and regulations argument, despite agreeing with Nebraska Beef and the State defendants that the district court did not have "contested case" jurisdiction under the APA.

We note that parties cannot confer or concede subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent, nor may subject matter jurisdiction be created or conceded by waiver, estoppel, consent, or conduct of the parties; thus, the plaintiffs' statement that the district court did not have jurisdiction does not constitute an admission subjecting them to the consequences of such. See *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). However, because the district court lacked jurisdiction to enter a declaratory judgment under the APA, and because the plaintiffs did not cross-appeal the district court's denial of a declaratory judgment under the Uniform Declaratory Judgments Act, we cannot consider whether the district court should have entered a declaratory judgment on grounds other than a "contested case" appeal from the APA.

[12] The plaintiffs assert that their case arises from an original equity action. We have determined above that relief is not available in the form of a declaratory judgment; injunctive relief is not available either. The plaintiffs' petition sought an injunction enjoining the Board from approving any applications until the Department of Revenue promulgated rules and regulations, and a permanent injunction enjoining Balka, his successors in interest, and anyone acting on his behalf from executing an agreement between the State and Nebraska Beef allowing the wage benefit credits approved by the Board. The plaintiffs have standing to bring this cause of action: A resident taxpayer, without showing

any interest or injury peculiar to itself, may bring an action to enjoin the illegal expenditure of public funds raised for governmental purposes. See, *Chambers v. Laughtenbaugh*, 263 Neb. 920, 644 N.W.2d 540 (2002); *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993); *Martin v. City of Lincoln*, 155 Neb. 845, 53 N.W.2d 923 (1952). The district court, however, did not issue any of the requested injunctions, and the plaintiffs did not cross-appeal on this ground.

[13] In conclusion, the district court did not consider the plaintiffs' prayer for an injunction, but instead found their cause of action to be a "contested case" under the APA. An appellate court will not consider an issue on appeal that was not passed upon by the trial court. *Dossett v. First State Bank*, 261 Neb. 959, 627 N.W.2d 131 (2001). Based on this established rule and the plaintiffs' failure to cross-appeal, we will not consider whether the district court could have properly entered a declaratory judgment based on grounds other than a "contested case" under the APA. Because we determine that the district court lacked subject matter jurisdiction under the APA, we cannot reach the merits of the questions presented regarding the lack of rules and regulations when the Board rendered its approval of Nebraska Beef's application for wage benefit tax credits. See *Kovar v. Habrock*, 261 Neb. 337, 622 N.W.2d 688 (2001).

2. Closed Session Under Public Meetings Laws

The plaintiffs' cross-appeal assigns four errors related to the district court's rejection of their cause of action under the public meetings laws. First, the district court found that the Board's meeting on August 14, 1996, did not constitute a substantial violation of the public meetings laws, as the Board took no final action and its reasons for convening a closed session "seem[ed] valid." Second, the district court determined that although the Board did not give a legitimate reason for discussing Nebraska Beef's application in closed session at the November 25 meeting, Wasikowski's presence at the meeting and failure to object waived the plaintiffs' right to complain under the public meetings laws.

(a) Waiver of Right to Object to Closed Session

[14,15] Wasikowski attended the Board's November 25, 1996, meeting and did not object to its convening a closed session; the

district court concluded that her failure to object waived her ability to do so at a later date. This court has stated that any person who has notice of a meeting and attends the meeting must object specifically to the lack of public notice at the meeting, or that person will be held to have waived the right to object on that ground at a later date. See, *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992); *Witt v. School District No. 70*, 202 Neb. 63, 273 N.W.2d 669 (1979). A timely objection will permit the public body to remedy its mistake promptly and defer formal action until the required public notice can be given. *Id.*

Neb. Rev. Stat. § 84-1414(3) (Reissue 1999) states that "[a]ny citizen of this state may commence a suit . . . for the purpose of requiring compliance with or preventing violations of [the public meetings laws], for the purpose of declaring an action of a public body void . . . ." In *Otey, supra*, and *Witt, supra*, this court considered a lack of sufficient public notice pursuant to Neb. Rev. Stat. § 84-1411 (Cum. Supp. 1998); the present case deals with objection to a closed session under Neb. Rev. Stat. § 84-1410 (Reissue 1999). Both sufficient notice and closed sessions, however, relate to § 84-1414, under which citizens may commence lawsuits regarding compliance with or violations of the public meetings laws. Thus, despite the difference in grounds for objection, the logic in *Otey, supra*, and *Witt, supra*, applies equally to this case: If a person present at a meeting observes an alleged public meetings laws violation in the form of an improper closed session and fails to object, that person waives his or her right to object at a later date.

[16-18] Contrary to the district court's conclusion, however, Wasikowski's failure to object should not be imputed to the other plaintiffs in this case—to do so would eviscerate the language of § 84-1414, in that "[a]ny citizen of this state" may commence a suit for public meetings laws violations. The "public interest" mentioned in § 84-1410 is that shared by citizens in general and by the community at large concerning pecuniary or legal rights and liabilities. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984). If we were to conclude that Wasikowski's failure to object at the meeting waived the right of the other plaintiffs to object, the unintended result would be that Wasikowski's failure to object waived the right of all potential

plaintiffs to do so. The statute does not support that result. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). Additionally, public meetings laws are broadly construed so as to obtain the objective of openness in favor of the public. See *Rauert v. School Dist. 1-R of Hall Cty.*, 251 Neb. 135, 555 N.W.2d 763 (1996). Thus, although Wasikowski may have waived her individual right to object to the closed session, the other plaintiffs' rights to object are intact. The district court erred in concluding otherwise.

(b) Closed Session Meetings

The plaintiffs assign that the district court erred in determining that the Board did not commit a substantial violation of the public meetings laws by holding closed sessions during its August 14 and November 25, 1996, meetings.

[19] The Nebraska public meetings laws are a statutory commitment to openness in government. *Grein, supra.* The public meetings laws allow meetings to be closed only under limited circumstances. Neb. Rev. Stat. § 84-1408 (Reissue 1999). Any public body may hold a closed session by the affirmative vote of a majority of its voting members, if a closed session is clearly necessary for the protection of the public interest or for the prevention of needless injury to the reputation of an individual. § 84-1410(1). Closed sessions may be held for, but not limited to: strategy sessions with respect to collective bargaining, real estate purchases, pending or imminent litigation, discussion regarding deployment of security personnel or devices, investigative proceedings into allegations of criminal conduct, or evaluation of the job performance of a person when necessary to protect the reputation of that person, and the person has not requested a public meeting. § 84-1410(1)(a) through (d).

In contrast, § 77-4928(3) of the Act states: "The application [for wage benefit tax credits] and all supporting information shall be confidential except for the name of the company, the location of the project, the amounts of increased employment and investment, the result of the net benefit calculations, and whether the application has been approved." The plaintiffs argue that this confidentiality requirement applies only to the application itself

and did not create an exception to the public meetings laws for the Board's decisionmaking process.

[20] We disagree. The Legislature holds the power to decide the scope of citizen access to governmental meetings. Through the public meetings laws, the Legislature committed state agencies, boards, and other public bodies to an open interaction between state citizens and state government. However, the Legislature retains the power to limit access to public meetings through provisions such as § 77-4928(3). The presence of the public meetings laws does not prevent the Legislature from later limiting the scope of those laws in specific situations, such as application reviews under the Act. In the absence of a constitutional claim, we do not judicially consider the Legislature's enacted limitations on public access to meetings. Statutory language is to be given its plain and ordinary meaning. See *Haber v. V & R Joint Venture*, 263 Neb. 529, 641 N.W.2d 31 (2002). A plain reading of § 77-4928(3) reveals that the Legislature determined that most of the information in applications under the Act should be kept confidential, without exception or limitation. The extent of protection of confidential information for potential applicants under the Act is a policy determination within the province of the Legislature.

Although the district court erred in finding that Wasikowski waived the rights of all other plaintiffs by failing to object at the Board's November 25, 1996, closed session, we conclude that the court did not err in determining that the Board did not violate the public meetings laws when it went into closed session for the purpose of considering confidential portions of Nebraska Beef's wage benefit credit application at its meetings on August 14 and November 25, 1996.

VI. CONCLUSION

For the reasons stated above, we conclude that the district court erred in finding that it had "contested case" jurisdiction under the APA such that it could void the agreement between Nebraska Beef and the State defendants. We also determine that the district court erred in finding that Wasikowski waived the rights of all other plaintiffs to object to the Board's closed session by failing to object at the meeting she attended. We conclude, however, that

the district court did not err in its other determinations with regard to the plaintiffs' public meetings laws claims. We, therefore, reverse the judgment of the district court and remand this cause with directions to dismiss all claims brought in case No. 558-163, i.e., the APA, Uniform Declaratory Judgments Act, and due process claims relating to the lack of rules and regulations. We affirm the district court's judgment dismissing the plaintiffs' public meetings laws claims in case No. 562-086.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

STATE OF NEBRASKA, APPELLEE, V.
EARNEST D. JACKSON, APPELLANT.
648 N.W.2d 282

Filed July 26, 2002. Nos. S-00-1055, S-01-051.

1. **Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
2. ____: ____: ____. When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
3. **Criminal Law: Motions for New Trial: Appeal and Error.** In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
4. **Witnesses.** A witness testifying to objective facts must have had means of knowing the facts from the witness' personal knowledge.
5. **Trial: Evidence: Appeal and Error.** An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion.
6. **Judges: Words and Phrases.** A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition.
7. **Witnesses: Appeal and Error.** Witness credibility is not to be reassessed on appellate review.

8. **Jury Instructions.** If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel.
9. **Jury Misconduct: Proof.** The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury.
10. **Motions for New Trial: Jury Misconduct: Records: Appeal and Error.** If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows that the communication had no tendency to influence the verdict.
11. **Motions for New Trial: Evidence: Proof.** One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence.
12. **Evidence: Words and Phrases.** Generally, newly discovered evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings.
13. **Testimony: Evidence.** When a codefendant who has chosen not to testify subsequently comes forward to offer testimony exculpating a defendant, the evidence is not newly discovered; the substance of the codefendant's testimony is not, in fact, new evidence if it was known by the defendant at the time of the initial trial.
14. **Appeal and Error.** Errors that are assigned but not argued will not be addressed by an appellate court.

Appeals from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

James J. Regan for appellant.

Don Stenberg, Attorney General, and Scott G. Gunem for appellee.

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

GERRARD, J.

I. NATURE OF CASE

On August 31, 1999, Larry Perry was killed outside his home at the Redman Apartments in Omaha. Earnest D. Jackson was charged with first degree murder and use of a deadly weapon to commit a felony in connection with Perry's death. A jury found Jackson guilty of first degree murder and not guilty of use of a deadly weapon to commit a felony. Jackson appeals his conviction in case No. S-00-1055. In case

No. S-01-051, Jackson appeals the district court's refusal to grant a new trial based on newly discovered evidence. The cases were consolidated for oral argument.

II. FACTUAL BACKGROUND

1. Case No. S-00-1055

In the early evening of August 31, 1999, Robert Sommerville was riding in a gray Cadillac owned by Shawon McBride. Sommerville and McBride picked up Jackson and Dante Chillous at Chillous' home. The four men drove around without a particular destination. They ended up near the Redman Apartments, where they conversed in the parking lot with a group of people. Sommerville testified that they saw and spoke with Shalamar Cooperrider, then followed Cooperrider to his aunt's house, where Chillous and Jackson got out of the car. At some point, McBride picked up Cooperrider and Jackson at Jackson's house and dropped them off at an alley a block south of Redman Avenue.

Perry shared an apartment at 4614 Redman Avenue with his mother, Margaret Parrott, and his sister Elizabeth Williams. On the evening of August 31, 1999, Parrott and Perry were outside the apartment. Parrott went inside at 11:30 p.m., but Perry stayed outside with Elexsis Fulton.

While Perry was outside with Fulton on August 31, 1999, Cooperrider approached Perry and the two began talking. Fulton, who had not seen Cooperrider before, described him as "light brown" with a brush haircut, wearing a tan shirt and tan pants. During the conversation, two more men, whom Fulton described, respectively, as light-skinned with a ponytail and dark-skinned with braided hair and a blue "FUBU" brand shirt, came out of the apartment building one door north of Perry's door. At trial, Fulton identified the ponytailed man as Chillous and the man with braids and a FUBU shirt as Jackson. The jury received other testimony that Jackson did not have his hair in braids, but that Chillous wore his hair in a ponytail. Fulton observed Jackson, Cooperrider, and Chillous leave the Redman Apartments in a gray Cadillac after Cooperrider's conversation with Perry.

After the Cadillac departed, Perry entered his apartment and retrieved a .22-caliber Ruger handgun. Parrott and Williams

followed Perry out of the apartment, and Parrott observed Perry for some reason bending down beside a bush by 4612 Redman Avenue, the apartment building opposite 4614 Redman Avenue. Parrott reentered the apartment.

Fulton testified that later, the gray Cadillac returned and that Jackson, Cooperrider, and Chillous got out of the Cadillac. Fulton stated that Cooperrider had changed from tan clothing to black clothing. Fulton observed the three men approach Perry, and Cooperrider and Perry began arguing. Chillous and Jackson went across the street to Chillous' home, and on their way back, Fulton saw Chillous try to hand Cooperrider a gun. Fulton testified that Jackson got involved in the argument, then pulled out a gun and struck Perry in the head three times. Fulton then ran inside the building and continued to watch from an upstairs window. Fulton testified that Chillous was the first to fire a gun and that he saw Perry being shot in the back while he lay on his stomach.

Fulton testified at Jackson's trial that he had no doubt that Jackson shot Perry. Fulton had not known the names of Jackson, Chillous, or Cooperrider before bystanders (who had not witnessed the shooting) told Fulton the names of the three men. Jackson's counsel read into evidence Fulton's testimony from the preliminary hearing that Fulton had learned Jackson's, Cooperrider's, and Chillous' names from the police. Fulton testified that he had identified Jackson, Cooperrider, and Chillous at the preliminary hearing as the men who shot Perry. Fulton had not previously identified Jackson in a photographic or police lineup.

Parrott heard 20 to 30 shots that sounded as if they were coming from different types of guns at different distances; Williams testified that the sound resembled firecrackers. Parrott and Williams ran outside after hearing gunshots and found Perry on the sidewalk with bullet wounds in his stomach. Parrott removed the gun from Perry's belt and gave it to Williams, telling her to get rid of it. Parrott testified that when she removed Perry's gun by the handle, it was not warm.

Williams testified to seeing a man, dressed in black with dark skin and a brush haircut, fleeing the scene after Perry's shooting, but she did not know and could not identify Jackson. McBride also testified that he saw a man in black firing a gun, standing by the bushes located near 4612 Redman Avenue. Although

McBride did not see the shooter's face, he stated that the shooter wore the same kind of clothing Cooperrider had been wearing. McBride confirmed that he had seen Jackson with Cooperrider shortly before the shooting.

Jackson's aunt testified that at 11:19 p.m. on August 31, 1999, Jackson knocked on her door, entered her home, talked with her, and went into her basement around 11:30 p.m. to play a video game. Approximately 20 minutes later, Jackson's cousin knocked on the aunt's bedroom door to get the cordless telephone and asked her if she had heard gunshots. She had not. Jackson's aunt and cousin testified that Jackson had stayed at the aunt's home that night.

Officer Harold Scott of the Omaha Police Department arrived at the scene of the shooting at approximately 12:30 a.m. and discovered Perry's body on the sidewalk in front of 4614 Redman Avenue, surrounded by a crowd of people. Omaha police officer Stefan Davis, upon nearing the scene of the murder, was notified of people who had fled the area. Later, Davis received notification that all suspects were in custody. Jackson, however, was not arrested until October 9, 1999.

Dr. Jerry Jones, who performed the autopsy on Perry's body, determined that Perry died of the multiple gunshot wounds that perforated his heart, both lungs, liver, spleen, colon, and kidney. Jones testified that he had examined Perry's body thoroughly and that he did not see abrasions on Perry's head or scalp.

Identical informations were filed against Jackson, Cooperrider, and Chillous in Douglas County District Court, charging each of them with first degree murder and use of a deadly weapon during the commission of a felony in the death of Perry. The cases were consolidated for trial on the State's motion, but the district court subsequently vacated this order on the State's motion. Jackson's trial, having the lowest docket number, began first, followed by Cooperrider's and Chillous' trials.

A jury found Jackson guilty of first degree murder and not guilty of use of a deadly weapon to commit a felony. Jackson filed a motion for new trial, claiming that Fulton's testimony regarding Cooperrider and Chillous did not have proper foundation, that the jury's verdict was inconsistent and self-contradictory, that the court addressed the jury outside the parties' presence after the jury

retired for deliberations, and that there was insufficient evidence to sustain a conviction of first degree murder. The district court overruled Jackson's motion and sentenced him to life imprisonment. Further facts surrounding Perry's shooting are set forth below as necessary.

2. Case No. S-01-051

Following his conviction and sentencing, Jackson filed a motion for new trial based on newly discovered evidence, i.e., testimony given at Cooperrider's and Chillous' trials. Cooperrider testified at his own trial that he did not see Jackson at the scene of Perry's shooting and that Jackson was not one of the people who shot Perry. Instead, Cooperrider testified that Sommerville and one of Sommerville's friends were present at Perry's shooting. Cooperrider testified that Sommerville wore his hair in braids at the time of Perry's death, in a hairstyle similar to Jackson's. At Chillous' trial, Cooperrider again testified that Sommerville and a friend of Sommerville's were present at the scene of Perry's shooting, but he did not see Jackson or anyone else at the scene. Juries acquitted both Cooperrider and Chillous.

Stephen Kraft, Cooperrider's attorney, submitted an affidavit stating that prior to Jackson's trial, Jackson's counsel contacted Kraft to inform Kraft of his intent to subpoena Cooperrider as a witness on Jackson's behalf for Jackson's trial. Kraft informed Jackson's counsel that because Cooperrider was awaiting trial on identical charges in the same matter, he would not be willing to testify and would invoke his Fifth Amendment right against self-incrimination and refuse to testify if called. Jackson served Kraft with a subpoena directing Cooperrider's presence as a witness at Jackson's trial, but Kraft again advised Jackson's counsel that Cooperrider would, if called, invoke his right against self-incrimination.

Jackson filed a motion for new trial, alleging that Cooperrider's testimony from Cooperrider's and Chillous' trials provided new evidence that would have changed the jury's verdict in Jackson's trial. The district court overruled Jackson's motion for new trial, finding that Cooperrider's testimony was not newly discovered, but only newly available—Cooperrider merely controlled the dissemination of his testimony for tactical

reasons. In its order, the district court referred to telephone conversations in which Cooperrider discussed coordinating his testimony with Chillous and other witnesses testifying at Chillous' trial. The district court concluded that even if Cooperrider's testimony had been presented at Jackson's trial, the jury still heard enough evidence to convict Jackson.

Pursuant to Neb. Rev. Stat. § 24-1106(1) (Reissue 1995), we acquired jurisdiction over this appeal because of Jackson's sentence to life imprisonment. Cases Nos. S-00-1055 and S-01-051 were consolidated for oral argument.

III. ASSIGNMENTS OF ERROR

Jackson assigns, restated, that the district court erred in (1) allowing Fulton to testify using the names of Cooperrider and Chillous, as there was insufficient foundation for such testimony; (2) failing to notify Jackson's counsel before responding to questions the jury presented during its deliberation; (3) refusing to grant Jackson a new trial because the jury's verdicts of guilty of first degree murder but not guilty of using a deadly weapon during the commission of a felony were inconsistent, incongruous, and irreconcilable; (4) determining that sufficient evidence was adduced at trial to sustain a conviction for first degree murder; and (5) refusing to grant Jackson a new trial based upon (a) a determination that the testimony of Cooperrider was not newly discovered for the purposes of Neb. Rev. Stat. § 29-2101 (Reissue 1995), (b) a determination that if a jury heard the testimony of Cooperrider in addition to evidence already offered, it would not reach a different verdict, and (c) facts not properly before the court concerning conversations between Chillous and Cooperrider characterized by the court as an agreement to coordinate Cooperrider's testimony with other witnesses called at Chillous' trial.

IV. STANDARD OF REVIEW

[1] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact, and a conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence,

viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Long, ante* p. 85, 645 N.W.2d 553 (2002).

[2] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002).

[3] In a criminal case, a motion for new trial is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *State v. Bao*, 263 Neb. 439, 640 N.W.2d 405 (2002).

V. ANALYSIS

1. Case No. S-00-1055: Jackson's Trial

(a) Foundation for Fulton's Testimony

Jackson assigns, first, that the district court erred in overruling his objections at trial to Fulton's use of the names "Shalamar" and "Dante" in his testimony, because the State did not provide a sufficient foundation for the use of the names. Jackson argues that allowing Fulton to refer to "Shalamar" and "Dante" by name tied together the State's theory of the case that Cooperrider, Chillous, and Jackson acted together to kill Perry. Fulton used these names to identify people present on the night of the shooting, although he testified that he had never met "Shalamar" or "Dante." Fulton stated that he only knew the names "Shalamar" and "Dante" because he had heard them from the police and bystanders at the apartment complex.

[4,5] Jackson alleges that, pursuant to Neb. Rev. Stat. §§ 27-104 and 27-602 (Reissue 1995), Fulton did not possess the foundational personal knowledge necessary to testify regarding the names of "Shalamar" and "Dante." Section 27-602 states, in pertinent part, that a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony

of the witness himself. *Id.* Section 27-104(1) states, in pertinent part, that preliminary questions concerning the qualification of a person to be a witness, or the admissibility of evidence, shall be determined by the trial judge. A witness testifying to objective facts must have had means of knowing the facts from the witness' personal knowledge. See *State v. Kirksey*, 254 Neb. 162, 575 N.W.2d 377 (1998). An appellate court reviews the trial court's conclusions with regard to evidentiary foundation and witness qualification for an abuse of discretion. See *State v. Irish*, 223 Neb. 578, 584, 391 N.W.2d 137, 141 (1986) ("[t]he admission or exclusion of evidence is a matter left largely to the sound discretion of the trial court, whose ruling will be upheld absent an abuse of discretion").

In this case, Fulton saw Cooperrider, Chillous, and Jackson at the scene of Perry's shooting, although he did not know their names. By the time of the preliminary hearing, Fulton had learned the names of the three men from the police and from bystanders who knew the three men. Fulton testified that seeing Cooperrider, Chillous, and Jackson at the preliminary hearing allowed him to link the names with the faces that he recognized from the night of Perry's shooting. In other words, while Fulton later learned Cooperrider's, Chillous', and Jackson's names, that did not affect his testimony, as an eyewitness, that they were present at the scene of the shooting.

[6] A judicial abuse of discretion exists only when the reasons or rulings of a trial judge are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result in matters submitted for disposition. *State v. Dean, ante* p. 42, 645 N.W.2d 528 (2002). The facts above demonstrate that the district court had a tenable basis upon which to allow Fulton's testimony to go to the jury. Thus, the district court did not abuse its discretion in overruling Jackson's objection. This assignment of error is without merit.

(b) Sufficiency of Evidence

Jackson argues that the evidence adduced at trial was not sufficient to support a conviction of first degree murder. Jackson bases this argument on the allegedly erroneous admission of Fulton's testimony, but Jackson argues in the alternative that the

evidence is insufficient to support Jackson's conviction even with Fulton's testimony.

In support of his argument, Jackson notes that forensic evidence of bullet casing locations was presented to demonstrate that Perry was shot many times from a variety of angles, which conflicts with Fulton's testimony that Perry was shot by three people standing over Perry, 3 feet away. Further, Jackson asserts that the autopsy did not reveal bruising or abrasion to Perry's head, in contradiction of Fulton's testimony that Jackson struck Perry on the head with a gun three times with enough strength to cause a bruise. Additionally, Jackson argues that Fulton changed his testimony from the preliminary hearing, had never identified Jackson prior to appearing in court, had never seen any of the parties about whom he was testifying, and had learned the parties' names from the police and bystanders who did not see the shooting.

Fulton, however, testified that he had no doubt that Jackson was the person that he saw shoot Perry. Further, a firearms expert testified that bullet casing locations cannot be used to conclusively establish the location of a firearm's discharge. Finally, although Jones testified that there were no abrasions to Perry's head or scalp, the autopsy photographs reveal an abrasion beneath Perry's left eye.

[7] In essence, Jackson's assignment of error attacks the credibility of the witnesses. Witness credibility, however, is not to be reassessed on appellate review. See *State v. McLemore*, 261 Neb. 452, 623 N.W.2d 315 (2001). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Canaday*, 263 Neb. 566, 641 N.W.2d 13 (2002). Here, relevant and sufficient evidence exists to support Jackson's conviction, and this assignment of error is without merit.

(c) Instructing Jury Outside Counsel and Parties' Presence

Jackson assigns that the district court erred in refusing to grant him a new trial because the court instructed the jury outside the

presence of the parties and counsel when the jury, after retiring, submitted three requests for clarification or additional instructions to the court. The State argues that the record does not establish that the court failed to notify the parties and their counsel and that even if the allegation is supported by the record, the communications did not result in prejudice to Jackson.

The first communication stated: "After debilerating (sic) Monday, juror went home and put on paper her points she would like to make during deliberations on Tuesday. Can a juror refer to her notes that were made at home?" The court responded, "As long as the notes are based upon the evidence that was adduced at trial, those notes can be used by a juror." In the same communication, the jury asked, "Is reasonable doubt 70% 30%?" The court responded, "I am not permitted to expand upon the instructions that you have already been given. Please refer to your instructions, including the definition of 'reasonable doubt' which appears at Instruction No. 9."

The second communication stated: "Juror instruction sheet states use of a firearm to commit a felony. The verdict sheet states use of a weapon . . . which are we to use in our decision — weapon or firearm?" The court responded, "The terms are interchangeable." The third communication read: "May the jury replace its foreperson?" to which the court responded, "Yes."

Jackson claims that the court should not have addressed the jury outside the presence of the parties, pursuant to Neb. Rev. Stat. § 25-1116 (Reissue 1995). Section 25-1116 states:

> After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information upon the point of law shall be given, and the court may give its recollection as to the testimony on the point in dispute in the presence of or after notice to the parties or their counsel.

[8-10] If it becomes necessary to give further instructions to the jury during deliberation, the proper practice is to call the jury into open court and to give any additional instructions in writing in the presence of the parties or their counsel. See *State v. Owen*, 1 Neb. App. 1060, 510 N.W.2d 503 (1993), citing

Nebraska Depository Inst. Guar. Corp. v. Stastny, 243 Neb. 36, 497 N.W.2d 657 (1993). The State has the burden to prove that a defendant was not prejudiced by any improper communication between the judge and the jury. *State v. Thomas*, 262 Neb. 985, 637 N.W.2d 632 (2002). If the record affirmatively shows that the defendant has been prejudiced by private communication between the trial court and jurors, it is reversible error, and a new trial should be granted. Reversal is not required if the record affirmatively shows that the communication had no tendency to influence the verdict. See *id.*

Although communication between the trial judge and jurors should always take place with the parties and their counsel present (unless waived), the record before us does not affirmatively show that the communications in this case resulted in prejudice. The communication regarding the jury foreperson did not relate to the evidence or the law and, thus, does not implicate § 25-1116. The court should have dealt with the other three questions after notice to the parties. The court's responses, however, were legally correct answers to which Jackson, if present, could have raised no valid complaint. Any issue of juror misconduct implied by the jury's questions was waived by Jackson's failure to object on that basis or specifically raise the issue at the hearing on his motion for new trial. The district court did not abuse its discretion in refusing to grant a new trial on the basis of the communications between the jury and the judge.

(d) Contradictory and Inconsistent Verdict

Jackson assigns that the district court erred in refusing to grant him a new trial because the verdicts of guilty of murder in the first degree, but not guilty of use of a deadly weapon to commit a felony, are contradictory. Jackson argues that if the jury found Jackson guilty of murdering Perry, who died from gunshot wounds, but not guilty of using a deadly weapon to commit the murder, such a verdict is illogical and inconsistent. Jackson's argument, however, is without merit.

The court's instructions to the jury included instruction No. 10, which stated:

> A Defendant can be guilty of a crime even though he personally did not commit every act involved in the crime so

> long as he aided someone else to commit it. A Defendant aided someone else if:
>
> (1) He encouraged or intentionally helped another person to commit the crime; and
>
> (2) The Defendant knew that the other person intended to commit the crime; and
>
> (3) The crime in fact was committed by that other person.

Pursuant to this instruction, which accurately states the law and to which Jackson did not object, the jury could feasibly find Jackson guilty of first degree murder without finding that Jackson used a deadly weapon to do so. The verdicts reached by the jury are not necessarily inconsistent—the above instruction reveals that there was a logical and consistent manner in which the jury could have reached its verdict. Based on the evidence presented, the jury could have concluded that Jackson aided in the murder of Perry and was thus guilty of murder under instruction No. 10, but did not personally fire a deadly weapon. Thus, we conclude that the district court did not abuse its discretion in refusing to grant Jackson a new trial on this ground.

2. Case No. S-01-051: Newly Discovered Evidence

Jackson assigns that the district court erred in failing to grant him a new trial based on the alleged newly discovered evidence provided by Cooperrider at Cooperrider's and Chillous' subsequent trials. Section 29-2101 stated, in pertinent part:

> A new trial, after a verdict of conviction, may be granted, on the application of the defendant, for any of the following reasons affecting materially his substantial rights: . . . (5) newly discovered evidence material for the defendant which he could not with reasonable diligence have discovered and produced at the trial.

Cooperrider testified at his trial and at Chillous' trial that Jackson was not present at Perry's shooting.

[11,12] One moving for new trial on the basis of newly discovered evidence must show that the evidence was uncovered since the trial, that the evidence was not equally available before the trial, and that the evidence was not simply discovered by the exercise of belated diligence. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994). Generally, newly discovered

evidence is evidence material to the defense that could not with reasonable diligence have been discovered and produced in the prior proceedings. *State v. Ryan*, 257 Neb. 635, 601 N.W.2d 473 (1999); *Hirsch, supra.*

Jackson argues that because Cooperrider indicated a refusal to testify, if called as a witness, Cooperrider's testimony was not available to Jackson at the time of Jackson's trial. Jackson further asserts that the import of Cooperrider's testimony would likely have changed the outcome of Jackson's trial. Cooperrider's status as a codefendant of Jackson's, however, raises a novel legal question before this court.

[13] We have not addressed whether testimony of a codefendant who offers testimony at a subsequent trial, after refusing to testify at a defendant's previous trial, constitutes newly discovered evidence requiring a new trial for the defendant. We now determine that when a codefendant, such as Cooperrider, who has chosen not to testify subsequently comes forward to offer testimony exculpating a defendant, such as Jackson, the evidence is not newly discovered. See *U.S. v. Moore*, 221 F.3d 1056 (8th Cir. 2000). This is because the codefendant's testimony is not newly discovered evidence, but only newly *available* evidence which does not provide a basis for the granting of a new trial.

The clear policy behind concluding that newly available evidence, such as Cooperrider's testimony, does not constitute newly discovered evidence is that

> [i]t would encourage perjury to allow a new trial once co-defendants have determined that testifying is no longer harmful to themselves. They may say whatever they think might help their co-defendant, even to the point of pinning all the guilt on themselves, knowing they are safe from retrial. Such testimony would be untrustworthy and should not be encouraged.

U.S. v. Reyes-Alvarado, 963 F.2d 1184, 1188 (9th Cir. 1992).

Further, Jackson failed to demonstrate that he was not aware of Cooperrider's testimony prior to trial such that it would be newly discovered evidence. The fact that Jackson attempted to secure Cooperrider's testimony reveals that Jackson knew that Cooperrider's testimony could have been beneficial to his case—even though Jackson filed no formal motion to compel

Cooperrider's testimony and force him to invoke the Fifth Amendment. The substance of the codefendant's testimony is not, in fact, new evidence if it was always known by the defendant seeking a new trial. See *State v. Jackson*, 188 Wis. 2d 187, 525 N.W.2d 739 (Wis. App. 1994). We, therefore, conclude that the district court did not err in determining that Cooperrider's testimony does not constitute newly discovered evidence for the purposes of Jackson's motion for new trial.

We note that our conclusion is consistent with the many state and federal jurisdictions which have determined that the requirement that evidence be discovered since trial is not met by offering the posttrial testimony of a coconspirator or codefendant who refused to testify at trial. See, e.g., *U.S. v. Freeman*, 77 F.3d 812 (5th Cir. 1996); *U.S. v. Theodosopoulos*, 48 F.3d 1438 (7th Cir. 1995); *U.S. v. Muldrow*, 19 F.3d 1332 (10th Cir. 1994); *U.S. v. Dale*, 991 F.2d 819 (D.C. Cir. 1993); *Reyes-Alvarado, supra*; *State v. Bright*, 776 So. 2d 1134 (La. 2000); *State v. Warren*, 592 N.W.2d 440 (Minn. 1999); *State v. Redford*, 248 Kan. 130, 804 P.2d 983 (1991); *Yarbrough v. State*, 57 S.W.3d 611 (Tex. App. 2001); *State v. Dunlap*, 187 Ariz. 441, 930 P.2d 518 (Ariz. App. 1996); *Jackson, supra*. But see, *U.S. v. Montilla-Rivera*, 115 F.3d 1060 (1st Cir. 1997); *Totta v. State*, 740 So. 2d 57 (Fla. App. 1999).

[14] Jackson did not argue, and we will not consider, the assignment that the district court erred in relying upon facts not properly before the court concerning telephone conversations between Chillous and Cooperrider. Errors that are assigned but not argued will not be addressed by an appellate court. *State v. Siddens*, 263 Neb. 751, 642 N.W.2d 791 (2002).

Cooperrider's testimony does not constitute newly discovered evidence that would warrant granting Jackson a new trial. We conclude, therefore, that the district court did not abuse its discretion in refusing to grant Jackson a new trial.

VI. CONCLUSION

For the reasons set forth above, Jackson's assignments of error are without merit. We, therefore, affirm the district court judgments in cases Nos. S-00-1055 and S-01-051.

AFFIRMED.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, A WISCONSIN CORPORATION, APPELLEE AND CROSS-APPELLANT, V. RICHARD HADLEY AND NATALIE HADLEY, AND RICHARD HADLEY AND NATALIE HADLEY, ON BEHALF OF RAINIER HADLEY, A MINOR AND PROTECTED PERSON, APPELLANTS AND CROSS-APPELLEES, AND LINDA HUGHES, APPELLEE.

648 N.W.2d 769

Filed July 26, 2002. No. S-00-1092.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Insurance: Contracts: Appeal and Error.** The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court.
3. **Insurance: Contracts: Intent.** An insurance policy is a contract. An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made.
4. **Contracts.** When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.
5. **Insurance: Contracts.** While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract.
6. **Insurance: Contracts: Parties.** Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute.
7. **Pleadings: Appeal and Error.** As a general rule, an appellate court disposes of a case on the theory presented in the district court.
8. **Insurance: Declaratory Judgments: Pleadings.** An insurer may petition a court to declare, pursuant to Neb. Rev. Stat. § 25-21,149 (Reissue 1995) of Nebraska's Uniform Declaratory Judgments Act, whether an insured's conduct or a specific event is excluded from coverage under a policy of insurance.
9. **Insurance: Declaratory Judgments.** A court may not enter declaratory judgment where there is an unknown potential for liability to an insured and the declaratory judgment would not end the controversy between the parties, or where another equally serviceable remedy is available to the insurer.
10. **Insurance: Declaratory Judgments: Proof.** Where it is proved, however, that a specific event or type of conduct is beyond the terms of an insurance policy, a court may enter a declaratory judgment that the insurer is not obligated to provide coverage to the insured for the event or conduct.

11. **Insurance: Contracts.** In the interpretation of an insurance policy, the reasonable expectations of an insured are not assessed unless the language of the insurance policy is found to be ambiguous.
12. **Public Policy: Words and Phrases.** Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community.
13. **Contracts: Public Policy.** The determination of whether a contract violates public policy presents a question of law.

Appeal from the District Court for Douglas County: GARY B. RANDALL, Judge. Affirmed.

Terry M. Anderson and Gordon R. Hauptman, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellants.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellee American Family Mutual Insurance Company.

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

STEPHAN, J.

American Family Mutual Insurance Company (American Family) brought this declaratory judgment action against one of its policyholders and Richard Hadley and Natalie Hadley. In another action, the Hadleys have asserted a civil claim against the insured to recover damages for injuries sustained by their minor child, Rainier Hadley, while in her care. American Family sought a declaration that under the homeowner's and personal liability umbrella insurance policies it had issued to its insured, there was no duty to defend or indemnify her with respect to the Hadleys' suit. The Hadleys appeal from an order of the district court for Douglas County entering summary judgment in favor of American Family, based upon its determination that policy exclusions for damages arising out of violations of criminal law were applicable and enforceable.

I. BACKGROUND

The insured provided childcare in her Omaha home for six minor children, the youngest of whom was Rainier, born on October 30, 1995. An American Family homeowner's policy and

an American Family personal liability umbrella policy, both issued to the insured, were in force and effect at all relevant times. On January 23, 1996, Rainier suffered severe injuries while under the insured's care. The insured subsequently contacted American Family to report a claim under the aforementioned insurance policies for the injuries to Rainier. American Family responded by letter, stating that it was investigating the claim under a full reservation of rights.

As a result of Rainier's injuries, the insured was charged with knowing and intentional child abuse under Neb. Rev. Stat. § 28-707(5) (Reissue 1995), a Class III felony. The insured subsequently pled guilty to an amended charge of negligent child abuse under § 28-707(3), a Class I misdemeanor.

On January 23, 1997, the Hadleys filed suit against the insured in the district court for Douglas County seeking damages for the injuries sustained by Rainier under a theory of assault and battery. The record also contains an amended petition in which the Hadleys allege a second cause of action for negligence, but this document does not bear a file stamp, and there is no other indication that it was ever filed. American Family hired counsel to defend the insured in the Hadleys' lawsuit under its previously stated reservation of rights.

On January 6, 1998, American Family filed this action seeking a declaration that it had no duty to defend the insured in the Hadleys' pending lawsuit and no duty to indemnify the insured for any claim arising from that lawsuit. In its petition, American Family alleged, inter alia, that the "violation of law" exclusions in the homeowner's and personal liability umbrella policies issued to the insured negated coverage for the claims made in the Hadleys' lawsuit. In their answer, the Hadleys specifically denied that coverage was excluded and, by counterclaim, sought a declaration that the policies provided coverage for the insured in their pending action against her. The insured also answered and alleged that the exclusions relied upon by American Family violated public policy insofar as they applied to her circumstances and further alleged that the Hadleys were not "necessary parties" to the declaratory judgment action and prayed that they be dismissed.

The district court entered an order sustaining American Family's motion for summary judgment on September 21, 2000. In a subsequent order nunc pro tunc, the district court reiterated the findings in its previous order and specifically found that American Family had no duty to defend the insured in the Hadleys' lawsuit and no duty to indemnify the insured for any claim arising from that lawsuit.

The Hadleys perfected this timely appeal. American Family cross-appealed on an evidentiary issue related to the summary judgment proceedings. The insured did not appeal. We removed the case to our docket on our own motion pursuant to our statutory authority to regulate the caseloads of the appellate courts of this state. See Neb. Rev. Stat. § 24-1106(3) (Reissue 1995).

II. ASSIGNMENTS OF ERROR

The Hadleys assign, restated and consolidated, that the district court erred in concluding (1) that the exclusions in the insured's insurance policies applied to negate coverage in this situation and (2) that no genuine issues of material fact were raised concerning coverage under either policy. On cross-appeal, American Family assigns that the district court erred in overruling its objection to the affidavit of the insured, which was received over objection in the summary judgment proceedings.

III. STANDARD OF REVIEW

[1] Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Altaffer v. Majestic Roofing*, 263 Neb. 518, 641 N.W.2d 34 (2002); *Ohio Cas. Ins. Co. v. Carman Cartage Co.*, 262 Neb. 930, 636 N.W.2d 862 (2001).

[2] The interpretation of an insurance policy is a question of law, in connection with which an appellate court has an obligation to reach its own conclusions independently of the determination made by the lower court. *Tighe v. Combined Ins. Co. of America*, 261 Neb. 993, 628 N.W.2d 670 (2001); *Olsen v. Farm Bureau Ins. Co.*, 259 Neb. 329, 609 N.W.2d 664 (2000).

IV. ANALYSIS

The issue before this court is whether insurance coverage for the claim which the Hadleys have asserted against the insured is excluded under the terms of the insurance policies issued by American Family to the insured. Familiar principles of contract interpretation form the framework for our analysis.

[3-6] An insurance policy is a contract. *Callahan v. Washington Nat. Ins. Co.*, 259 Neb. 145, 608 N.W.2d 592 (2000). An insurance contract is to be construed as any other contract to give effect to the parties' intentions at the time the contract was made. *Ohio Cas. Ins. Co. v. Carman Cartage Co., supra*; *Farmers Union Co-op Ins. Co. v. Allied Prop. & Cas.*, 253 Neb. 177, 569 N.W.2d 436 (1997). When the terms of a contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them. *Ohio Cas. Ins. Co. v. Carman Cartage Co., supra*; *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 635 N.W.2d 112 (2001). While an ambiguous insurance policy will be construed in favor of the insured, ambiguity will not be read into policy language which is plain and unambiguous in order to construe against the preparer of the contract. *Tighe v. Combined Ins. Co. of America, supra*; *Callahan v. Washington Nat. Ins. Co., supra.* Parties to an insurance contract may contract for any lawful coverage, and an insurer may limit its liability and impose restrictions and conditions upon its obligations under the contract if the restrictions and conditions are not inconsistent with public policy or statute. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000).

1. Homeowner's Policy

[7] The homeowner's policy issued to the insured includes an optional endorsement which extends liability coverage to an insured who provides home daycare service for which compensation is received. The policy provides that American Family "will pay, up to our limit, compensatory damages for which any insured is legally liable because of bodily injury or property damage caused by an occurrence covered by this policy." "Occurrence" is defined by the policy to mean "an accident, including exposure to

conditions, which results during the policy period, in: a. bodily injury; or b. property damage." The policy includes several exclusions from liability coverage, including the following: "17. Violation of Law. We will not cover bodily injury or property damage arising out of: a. violation of any criminal law for which any insured is convicted . . . ." The policy also includes exclusions for intentional acts and abuse which, along with the violation of law exclusion, were pled by American Family as grounds for its position that the Hadleys' claims against its insured are not covered under the policy. However, the motion for summary judgment was submitted to the district court solely on the violation of law exclusion. As a general rule, an appellate court disposes of a case on the theory presented in the district court. See, *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992); *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988). We do so here.

The Hadleys do not contend in this appeal that the language of the violation of law exclusion is ambiguous, and we conclude on the basis of our independent review that it is not. The plain meaning of the policy language clearly excludes coverage where the alleged liability of the insured is based upon conduct which is also the basis for a criminal conviction. Notably, courts from other jurisdictions have also held similar coverage exclusions in homeowner's insurance policies to be unambiguous. See, e.g., *Allstate Ins. Co. v. Brown*, 16 F.3d 222 (7th Cir. 1994); *Allstate Ins Co v Fick*, 226 Mich. App. 197, 572 N.W.2d 265 (1997); *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997); *Horace Mann Ins. v. Drury*, 213 Ga. App. 321, 445 S.E.2d 272 (1994); *Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001 (Ala. 1990).

Having concluded that the exclusion is unambiguous, we now turn to the question of whether it is applicable to the Hadleys' claim against the insured. On this point, the Hadleys raise four principal arguments. First, they argue that the record does not contain sufficient facts to make this determination as a matter of law. Second, they argue that the exclusion applies only to intentional criminal acts and not to criminal negligence. Third, they contend that application of the exclusion in this case would be contrary to the reasonable expectations of the insured at the time

she purchased the homeowner's policy. Finally, they contend that applying the exclusion in this case would be contrary to public policy. We address each of these arguments separately.

(a) Factual Sufficiency of Record

[8-10] An insurer may petition a court to declare, pursuant to Neb. Rev. Stat. § 25-21,149 (Reissue 1995) of Nebraska's Uniform Declaratory Judgments Act, whether an insured's conduct or a specific event is excluded from coverage under a policy of insurance. *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). See, also, *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995); *State Farm Fire & Cas. Co. v. van Gorder*, 235 Neb. 355, 455 N.W.2d 543 (1990). A court may not enter declaratory judgment where there is an unknown potential for liability to an insured and the declaratory judgment would not end the controversy between the parties, or where another equally serviceable remedy is available to the insurer. See, *Farm Bureau Ins. Co. v. Witte, supra*; *Medical Protective Co. v. Schrein*, 255 Neb. 24, 582 N.W.2d 286 (1998); *Ryder Truck Rental v. Rollins*, 246 Neb. 250, 518 N.W.2d 124 (1994). Where it is proved, however, that a specific event or type of conduct is beyond the terms of an insurance policy, a court may enter a declaratory judgment that the insurer is not obligated to provide coverage to the insured for the event or conduct. *Farm Bureau Ins. Co. v. Witte, supra.* See, also, *Columbia Nat. Ins. v. Pacesetter Homes, supra*; *State Farm Fire & Cas. Co. v. van Gorder, supra*; *State Farm Fire & Cas. Co. v. Victor*, 232 Neb. 942, 442 N.W.2d 880 (1989).

In this case, it is undisputed that the Hadleys' tort claim is based upon the same conduct for which the insured was convicted of the crime of negligent child abuse. The record includes a transcribed statement which the insured gave to police on January 24, 1996, the day following the incident. The insured admitted the accuracy of the statement in answers to requests for admission which are included in the record. In the statement, the insured admitted that she "flipped out" when Rainier was crying and refused to take a bottle and that she shook him and "forcibly threw him on the bed." When the infant developed symptoms of injury soon thereafter, she realized her responsibility and admitted to his

family that "I threw him on the bed." These undisputed facts provide a sufficient basis for determining whether the coverage exclusion is applicable.

(b) Applicability to Criminal Negligence

The Hadleys' principal argument is that the policy exclusion applies only where the insured is convicted of a criminal offense requiring intent and does not apply to a conviction based upon criminal negligence. The offense of "child abuse" is defined by § 28-707, which is included within the Nebraska Criminal Code. See Neb. Rev. Stat. §§ 28-101 through 28-1348 (Reissue 1995). Section 28-707(1) provides:

> A person commits child abuse if he or she knowingly, intentionally, or negligently causes or permits a minor child to be:
>
> (a) Placed in a situation that endangers his or her life or health; or
>
> (b) Cruelly confined or cruelly punished; or
>
> (c) Deprived of necessary food, clothing, shelter, or care.

When committed negligently, child abuse is a Class I misdemeanor, punishable by not more than 1 year's imprisonment, a $1,000 fine, or both. § 28-106(1). When committed intentionally, at the time of Rainier's injury, child abuse was a Class IB, III, or IV felony depending upon whether serious bodily injury or death results from the act and may be punishable by up to life imprisonment. See, § 28-707(4), (5), and (6); § 28-105. Thus, whether committed negligently or intentionally, child abuse is a crime.

The language of the homeowner's policy before us does not make a distinction between criminal acts requiring a specific intent and those which do not; it simply states that coverage is excluded for harm arising out of "[v]iolation of *any criminal law* for which any insured is convicted . . . ." (Emphasis supplied.) Affording this language its plain and ordinary meaning, as we must, it applies to any criminal conviction, whether or not the underlying offense includes an element of intent to cause injury. Other courts have reached the same conclusion with respect to similar policy language. For example, in *Horace Mann Ins. v. Drury*, 213 Ga. App. 321, 445 S.E.2d 272 (1994), the insured lit a firecracker and threw it out of a car window. It reentered the vehicle through a rear window, exploded, and

severely burned a passenger. The court held that there was no coverage under a homeowner's policy which excluded coverage for liability based on acts which constitute "a violation 'of any criminal law or statute.'" *Id.* at 322, 445 S.E.2d at 274. The court rejected the insured's contention that the exclusion should apply only to felonies of a serious nature, such as robbery and murder, reasoning that "crime" was generally understood to exclude violations of municipal ordinances and administrative regulations, but to include "all other violations of penal statutes, including misdemeanors." *Id.* The court reasoned that the exclusion in the homeowner's policy "can only reasonably be read to exclude injuries caused by illegal possession of firecrackers." *Id.*

In *Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001 (Ala. 1990), the insured, who had been drinking, accidentally fired a shotgun while handing it to a friend visiting in his home as they were discussing a hunting trip, severely injuring the friend. The insured was originally charged with first degree assault and later pled guilty to second degree assault. The court held that the injured party's tort claim was not covered under the insured's homeowner's policy, which excluded liability for " 'criminal acts.' " *Id.* at 1003. Based upon the language of the exclusion, the court specifically rejected the insured's contention that it applied to only intentional criminal acts. Similarly, in *Allstate Ins Co v Fick*, 226 Mich. App. 197, 201, 572 N.W.2d 265, 267 (1998), the court held that an exclusion in a homeowner's policy stating that there was no coverage for bodily injury resulting from " 'a criminal act or omission' " applied in the circumstance where the insured unlawfully obtained a prescription drug from her employer and gave it to a friend, who died from an adverse reaction. Affirming a judgment that the exclusion applied whether or not the harm which resulted from the criminal act was actually intended, the Michigan Court of Appeals reasoned that because there was no dispute that the insured had committed a criminal act in obtaining the medication, the homeowner's policy did not provide coverage for a wrongful death action brought against the insured. See, also, *Allstate Ins. Co. v. Sowers*, 97 Or. App. 658, 776 P.2d 1322 (1989) (holding criminal acts exclusion in

homeowner's policy applicable where insured unintentionally injured police officer while unlawfully resisting arrest).

Our conclusion that the violation of law exclusion in the homeowner's policy is not limited to specific intent crimes is also based on the fact that the policy includes a separately numbered and stated exclusion of coverage for injury or damage "caused intentionally by or at the direction of any insured even if the actual bodily injury . . . is different than that which was expected or intended from the standpoint of any insured." The fact that "criminal" acts and "intentional" acts are enumerated as separate and distinct exclusions, considered in conjunction with the fact that the criminal acts exclusion contains no language regarding intent, leads logically to the conclusion that coverage for injury or damage arising from criminal acts is excluded regardless of the actor's intent. See *Liebenstein v. Allstate Ins. Co.*, 517 N.W.2d 73 (Minn. App. 1994). Compare *Young v. Brown*, 658 So. 2d 750, 752 (La. App. 1995) (holding exclusion for injuries " 'which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person' " to be ambiguous and therefore susceptible to construction in favor of insured).

(c) Reasonable Expectations of Insured

Next, the Hadleys contend that application of the "violation of law" exclusion to negate coverage for negligent child abuse defeats the insured's reasonable expectations with respect to her homeowner's insurance. Although the insured did not appeal from the district court's judgment, the Hadleys rely upon the affidavit she offered in opposition to American Family's motion for summary judgment in which she averred that she "purchased the homeowner's policy and the umbrella policy for the specific purpose of providing coverage for bodily injury and property injury that may occur as a result of negligence or inadvertence." Relying on *Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679 (D. Minn. 1993) (applying Minnesota law), and *Young v. Brown, supra*, the Hadleys argue that this court should construe the exclusion in accordance with the reasonable expectations of the insured and thus provide coverage for the consequences of actions which may constitute a violation of the criminal code but are nevertheless negligent in nature.

[11] However, we need not consider the law of other states on this point because this court has recently stated that

> the reasonable expectations of an insured are not assessed *unless the language of the insurance policy is found to be ambiguous*. When the terms of the contract are clear, a court may not resort to rules of construction, and the terms are to be accorded their plain and ordinary meaning as the ordinary or reasonable person would understand them.

(Emphasis supplied.) *Cincinnati Ins. Co. v. Becker Warehouse, Inc.*, 262 Neb. 746, 757, 635 N.W.2d 112, 120 (2001). See, also, *Moller v. State Farm Mut. Auto. Ins. Co.*, 252 Neb. 722, 566 N.W.2d 382 (1997). Because we have concluded that the exclusion in the homeowner's policy is unambiguous, we do not take into consideration whether application of the exclusion to the facts of this case would be consistent with the reasonable expectations of the insured who purchased the policy with knowledge of it content.

(d) Public Policy

Finally, the Hadleys argue that reading the exclusion to include negligently committed criminal acts would violate public policy because it would allow an injured child to go uncompensated. They contend that the homeowner's policy was actually a "business liability policy" because the insured operated a childcare business in her home. Brief for appellant at 21. The Hadleys further argue that "[t]he state clearly has an interest in providing a source of compensation for children injured by childcare providers, particularly where those injuries occur as a result of conduct as to which no public policy prohibits such a source of compensation." *Id.*

[12,13] As noted, an insurer may restrict its liability under a contract of insurance if the restriction is not inconsistent with public policy. *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good, the principles under which the freedom of contract or private dealings are restricted by law for the good of the community. *Hood v. AAA Motor Club Ins. Assn., supra*; *Ploen v. Union Ins. Co.*, 253 Neb.

867, 573 N.W.2d 436 (1998). The determination of whether a contract violates public policy presents a question of law. *Ploen v. Union Ins. Co., supra.*

The Hadleys have identified no statute or regulation which would preclude an insurer from issuing a homeowner's policy to a home childcare provider that excluded coverage for child abuse, whether negligent or intentional. Indeed, we have been directed to no legal requirement that a home childcare provider must have liability insurance in force. As a general rule, the majority of courts that have addressed the issue hold that a provision in a homeowner's policy which excludes coverage for claims arising from criminal acts, whether committed intentionally or not, does not violate public policy. See, e.g., *Allstate Ins. Co. v. Burrough*, 914 F. Supp. 308 (W.D. Ark. 1996) (holding exclusion in homeowner's policy which applied to all criminal acts, regardless of mens rea required for their commission, did not violate public policy of Arkansas law); *Allstate Ins. Co. v. Norris*, 795 F. Supp. 272, 275 (S.D. Ind. 1992) (holding exclusion in homeowner's policy negating coverage for "any 'criminal act or omission' " both applied to unintentional criminal acts and did not violate public policy); *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997) (holding exclusion of coverage for injuries resulting from unintentional criminal acts of insured, such as reckless endangerment, did not violate public policy); *Horace Mann Ins. v. Drury*, 213 Ga. App. 321, 322, 445 S.E.2d 272, 274 (1994) (holding exclusion in homeowner's policy for claims arising from insured's "violation 'of any criminal law or statute' " applied to accidental injury resulting from unlawful possession of fireworks, and did not violate public policy); *Hooper v. Allstate Ins. Co.*, 571 So. 2d 1001, 1002 (Ala. 1990) (holding exclusion in homeowner's policy for " 'intentional or criminal acts of an insured' " extended to all criminal acts, whether or not insured intended to commit act or to cause harm, and did not contravene public policy); *Allstate Ins. Co. v. Schmitt*, 238 N.J. Super. 619, 623, 570 A.2d 488, 490 (1990) (holding exclusion in homeowner's policy for " 'intentional or criminal acts' " applied to unintended result of criminally reckless conduct and did not offend public policy).

The Hadleys rely on *Young v. Brown*, 658 So. 2d 750 (La. App. 1995) for the contrary position. In that case, the court considered

a homeowner's policy provision excluding coverage for " 'any bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured person or which is in fact intended by an insured person.' " *Id.* at 752. The issue was whether this provision excluded coverage for an accidental shooting in which the insured was convicted of "negligent injuring" under Louisiana law. *Id.* The court found the exclusion to be ambiguous and further stated that it would violate Louisiana's "public policy established for the protection of innocent injury victims." *Id.* at 754. We do not find this case persuasive. It involves different policy language that, unlike the language at issue here, the court found to be ambiguous. Given this finding of ambiguity, the *Young* court's statement regarding public policy appears to be dictum.

The issue is not whether public policy favors compensation of crime victims, but whether public policy *requires* an insurer to indemnify the insured for the consequences of his or her criminal behavior, notwithstanding a provision in the policy that such coverage is not provided. We limit our analysis of this question to the specific facts presented in this case. The record does not demonstrate that the homeowner's policy, including the extended endorsement for operation of a home daycare service, is insurance which is mandated by law. The violation of law exclusion does not apply unless the insured has been convicted of a criminal act. The insured was convicted of a crime which involves placing a child in a situation that endangers his or her life or health; cruelly confining or punishing a child; or depriving a child of necessary food, clothing, shelter, or care. See § 28-707(1). The Legislature has determined, as a matter of public policy, that such conduct is a crime whether committed knowingly, intentionally, or negligently. *Id.* It is undisputed that the alleged civil liability of the insured is based upon the same conduct that formed the factual basis for her criminal conviction. That conduct consisted of shaking a fussy infant and then forcibly throwing him on a bed. Regardless of whether harm is subjectively intended, such conduct has no innocent purpose. See *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999). Where, as here, an insurer has unambiguously stated in the contract of insurance that it will not provide coverage for

injury arising out of a violation of criminal law for which the insured has been convicted, we can discern no public policy which would require abrogation of that contractual provision under the facts of this case.

2. Personal Umbrella Policy

The personal liability umbrella policy at issue in this case contained various exclusions, including the following: "23. Violation of Law. We will not cover injury arising out of violation of a penal law or ordinance by or with the knowledge or consent of an insured when an insured is convicted of such violation." The umbrella policy states that it will cover the insured's provision of a "child home day care service" if the insured has applicable underlying coverage, but further provides that any coverage provided for such activity "will be no broader than the underlying insurance."

The Hadleys argue that the violation of law exclusion in the umbrella policy is ambiguous because of its reference to the term " 'penal' law" and its inclusion of the phrase " 'by or with the knowledge or consent of an insured.' " Brief for appellant at 19. With respect to the term " 'penal' law," the Hadleys suggest that "[i]t is doubtful a man or woman purchasing childcare liability insurance would understand 'penal' to mean any criminal law." *Id.* We disagree. The word "penal" is defined as "of, pertaining to, or involving punishment, as for crimes or offenses." Webster's Encyclopedic Unabridged Dictionary of the English Language 1065 (1994). Therefore, "penal law" is synonymous with "criminal law" and is both easily understandable and unambiguous. Regarding the phrase "by or with the knowledge or consent of an insured," the Hadleys argue that this phrase is confusing to the average reader. Again, we disagree. When read in its ordinary grammatical context, the phrase simply modifies the words "violation of a penal law or ordinance" and thus defines the scope of the exclusion to include offenses actually committed by an insured, as well as those, for example, to which an insured is convicted of aiding, abetting, or conspiring with the actual perpetrator.

As for its application, the "violation of law" exclusion found in the umbrella policy, like the "violation of law" exclusion found in

the homeowner's policy, does not contain language narrowing its scope to intentional violations. The intentional acts exclusion in the umbrella policy is separately stated and numbered and specifically excludes coverage for intentional acts that are "fraudulent, criminal or malicious." If the "violation of law" exclusion were read narrowly to include only intentional violations of a penal law, it would be redundant with the intentional acts exclusion. Therefore, when viewed as a whole, we conclude that the umbrella policy unambiguously excludes coverage for an injury arising out of conduct for which the insured was convicted of negligent child abuse. Furthermore, and for the reasons discussed with respect to the homeowner's policy, we also conclude that this exclusion is not contrary to public policy and may therefore be enforced by the insurer.

V. CONCLUSION

The "violation of law" exclusions set forth in both insurance policies issued by American Family are unambiguous and include within their scope the conduct of the insured upon which the Hadleys' claim is based. Neither exclusion contravenes public policy. Based upon our independent review of these issues, we conclude that the district court did not err in granting American Family's motion for summary judgment, and we affirm. Because of this disposition, we need not reach the issue raised by the cross-appeal.

AFFIRMED.

HENDRY, C.J., concurring.

I concur with the result reached by the majority. However, I write separately as I believe it unnecessary to decide this case on the violation of law exclusion. In my view, the intentional acts exclusion excludes coverage. I therefore reserve judgment on whether the violation of law exclusion violates the public policy of Nebraska. While the majority notes that the violation of law exclusion was the sole basis argued by American Family in the hearing on the motion for summary judgment, the motion for summary judgment contains no such limitation, stating only that American Family was entitled to judgment as a matter of law. In addition, the intentional acts exclusion was pled by American Family in its operative petition in the district court as one of the

bases for declaring there was no coverage. Finally, American Family argues in its brief that the insured's actions were "intentional." Brief for appellee at 29.

The policy at issue states in pertinent part: "10. Intentional Injury. We will not cover bodily injury or property damage caused intentionally by or at the direction of any insured even if the actual bodily injury or property damage is different than that which was expected or intended from the standpoint of any insured." A similar exclusion is contained in the umbrella policy.

American Family offered the insured's statement at the hearing on the motion for summary judgment. This statement was taken by police on January 24, 1996, the day after Rainier was injured, and received by the court as exhibit 6. In this statement, the insured said:

> A. . . . [A]nd I . . . and I'm looking at him in the eye and I'm going, what am I doing wrong. Why won't you take the bottle? Why won't you burp? What's going on?
>
> Q. . . . [Y]ou were shaking him?
>
> A. . . . [N]ot violently, like that. I was you know . . . .
>
> Q. . . . [B]ut shaking[?]
>
> A. . . . [J]iggling him.
>
> Q. Okay.
>
> A. Now why won't you take this bottle. You know. And I . . . I could see myself getting' [sic] real tense and I thought, okay, LINDA, calm down and I . . . you know, put him on the bed.
>
> Q. Okay, you told me earlier you had . . .
>
> A. . . . [Y]ou know, forcibly threw him on the bed. But I mean it wasn't like I threw him up in the air. I didn't do that.
>
> Q. But you forcibly threw him down on the bed? Is that correct?
>
> A. Yeah . . . .

Together with the statement, the insured's answers to requests for admission were also received at the summary judgment hearing. In these answers, the insured admitted: "Exhibit [6] accurately sets forth your responses to each of the questions asked of you by Officer Mailander during the statement given by you on January 24, 1996." No evidence was offered at the summary judgment hearing that the insured was incapable of

formulating the intent to shake Rainier or forcibly throw him on the bed, or that the insured was incapable of understanding the nature of her acts.

I recognize that in these same requests for admission the insured also denied that she "intentionally shook" or "forcibly threw Rainier Hadley down on a bed on January 23, 1996." However, "'"'[w]here a party without reasonable explanation testifies to facts materially different concerning a vital issue, the change clearly being made to meet the exigencies of pending litigation, such evidence is discredited as a matter of law and should be disregarded.'"'" *Neill v. Hemphill*, 258 Neb. 949, 954, 607 N.W.2d 500, 504 (2000), quoting *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981). I would therefore disregard the inconsistent denials.

In my view, the record is undisputed that the insured shook Rainier and threw him on the bed. Based on the policy's intentional acts exclusion, there is no coverage. See, *Farm Bureau Ins. Co. v. Witte*, 256 Neb. 919, 594 N.W.2d 574 (1999); *Columbia Nat. Ins. v. Pacesetter Homes*, 248 Neb. 1, 532 N.W.2d 1 (1995). I would therefore affirm the district court's decision, albeit on other grounds. The majority's decision to do otherwise, in my view, is not compelled by this record. Furthermore, the majority's holding that the violation of law exclusion does not offend Nebraska's public policy is troubling for several reasons.

The plain language of the violation of law exclusion permits the denial of coverage upon the conviction of the insured. I have found no other court which has been called upon to interpret the specific exclusionary language utilized in these policies. While the majority concludes, based in part on the conduct of the insured in this case, that such exclusions are not violative of public policy, under the plain language of the exclusion the insured's underlying conduct *plays no part* in determining the applicability of the exclusion. The conviction is the sole determinative factor.

I agree the trend regarding "criminal acts" exclusions follows the reasoning that public policy is not offended when a homeowner's liability policy excludes coverage for reckless, as well as intentional, criminal acts. See *Allstate Ins. Co. v. Peasley*, 131 Wash. 2d 420, 932 P.2d 1244 (1997). However, as noted in *Swift*

v. Fitchburg Mut. Ins. Co., 45 Mass. App. 617, 627, 700 N.E.2d 288, 295 (1998):

> In situations where the offense of which the insured was guilty verges toward the unintentional—say criminal negligence or recklessness—courts might possibly hesitate about holding that the criminal acts exclusion applies, for here the historic justification for the exclusion falters. See *Allstate Ins. Co. v. Zuk*, 78 N.Y.2d 41, 46-47, 571 N.Y.S.2d 429, 574 N.E.2d 1035 (1991); *Tower Ins. Co. v. Judge*, 840 F.Supp. 679, 692-693 (D.Minn.1993); *Young v. Brown*, 658 So.2d 750, 753-754 (La.Ct.App. 1995).

In *Swift*, the insured was not convicted of an intentional or even a reckless violation of the criminal law, but, rather, a negligent one.

The majority assumes in its analysis that the term "criminal act" as used in the cases cited in support of its conclusion is synonymous with the terms "violation of any criminal law" and "violation of a penal law or ordinance" used in the policy exclusions at issue in this case. The problem with trying to equate the category of "criminal act" with the category of "any conviction for violation of a criminal law or ordinance" was highlighted in *Allstate Ins. Co. v. Raynor*, 93 Wash. App. 484, 969 P.2d 510 (1999). In *Raynor*, the insured shot and killed his neighbor and her daughter. He then killed himself. The court held that the insured's actions constituted criminal acts. Therefore, the victims' estates could not recover against the insured's homeowner's policy, which excluded coverage for " 'bodily injury or property damage which may reasonably be expected to result from the intentional or criminal acts of an insured.' " *Id.* at 492, 969 P.2d at 515. The court nonetheless stated in a footnote:

> We do not hold, however, that every violation of a Washington criminal statute will constitute a "criminal" act releasing an insurer from liability for an insured's act or omission. As noted in *Peasley*, 131 Wn.2d at 434-36 (Madsen, J., concurring), some violations of criminal statutes would certainly not be contemplated by the average purchaser of insurance as precluding coverage under a "criminal acts" exclusion in a homeowners policy. But [the insured]'s actions here were so extreme as to constitute

> clearly excluded "criminal acts" in the minds of an average purchaser of insurance.

93 Wash. App. at 496 n.10, 969 P.2d at 516 n.10.

I agree with the Washington Court of Appeals. The breadth of the majority's holding with respect to this exclusion would cause me to "hesitate." See *Swift*, 45 Mass. App. at 628, 700 N.E.2d at 295.

Under its plain meaning, this policy excludes coverage for any acts committed by the insured, if the insured is convicted of violating any "criminal" law, "penal" law, or "ordinance" in connection with the incident. The problem with such broad exclusionary language was addressed in *Safeco Ins. Co. of America v. Robert S.*, 26 Cal. 4th 758, 28 P.3d 889, 110 Cal. Rptr. 2d 844 (2001). In that case, the policy excluded coverage for bodily injury " 'arising out of any *illegal act* committed by or at the direction of an insured.' " *Id.* at 763, 28 P.3d at 893, 110 Cal. Rptr. 2d at 848. The court concluded that this exclusion was too broad, reasoning that

> the homeowners policy that the insureds here bought from Safeco expressly provided that Safeco would defend and indemnify them for bodily injury caused by "an occurrence," which the policy defines as "an accident . . . which results, during the policy period, in bodily injury or property damage." Because the term "accident" is more comprehensive than the term "negligence" and thus includes negligence (Black's Law Dict[ionary 14 (5th ed. 1979)], Safeco's homeowners policy promised coverage for liability resulting from the insured's negligent acts. That promise would be rendered illusory if, as discussed above, we were to construe the phrase "illegal act," as contained in the policy's exclusionary clause, to mean violation of any law, whether criminal or civil.

Safeco Ins. Co. of America, 26 Cal. 4th at 764-65, 28 P.3d at 894, 110 Cal. Rptr. 2d at 850.

Applying this reasoning, the *Safeco* court refused to apply the illegal act exclusion. The court held that because "the illegal act exclusion cannot reasonably be given meaning under established rules of construction of a contract, it must be rejected as invalid." *Id.* at 766, 28 P.2d at 895, 110 Cal. Rptr. at 852. Nebraska has a

similar definition of the term "accident." See *City of Kimball v. St. Paul Fire & Marine Ins. Co.*, 190 Neb. 152, 154, 206 N.W.2d 632, 634 (1973) ("[t]he word 'accident' as used in liability insurance is a more comprehensive term than 'negligence' and in its common signification the word means an unexpected happening without intention"). See, also, *Columbia Nat. Ins. v. Pacesetter Homes, Inc.*, 248 Neb. 1, 532 N.W.2d 1 (1995); *Sullivan v. Great Plains Ins. Co.*, 210 Neb. 846, 317 N.W.2d 375 (1982).

The majority's holding would, in my view, exclude from coverage situations "for which people classically seek insurance coverage." See *Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679, 693 (D. Minn. 1993). *Tower Ins. Co., Inc.* involved a homeowner's insurance policy which excluded coverage for bodily injury which " 'result[s] from the criminal acts of an insured.' " 840 F. Supp. at 683. The insured accidentally electrocuted a friend while attempting to play a practical joke. The insurer asserted that there was no coverage because the insured's actions constituted a criminal act. The court found that the criminal act exclusion violated public policy, noting:

> The court is convinced that it would be bad policy to find that the exclusion applies in this case just because the state of Wisconsin decided to pursue criminal charges. . . . Persons who suffer unintended and unexpected injuries should not be denied compensation because of such a discretionary decision by the state.

Id. at 693. The concern recognized in *Tower Ins. Co., Inc., supra*, is even greater here, wherein the exclusionary language of the policy is applicable to *any* conviction.

Under the majority's holding, one can foresee "accidents" involving a child who is injured by placing his or her hand on a hot heat register, falling out of a swing, or accidentally pulling over a bookcase while playing. These are the types of accidents for which a daycare provider would typically purchase insurance to both protect themselves and provide compensation for the innocent child. In each of the above "accidents," there is no conduct by the daycare provider which fits into the traditional concept of a "criminal act." However, if the daycare provider is convicted of negligent child abuse, then the insured has committed a violation of law under the terms of this policy. There is

no room to debate whether the daycare provider committed a criminal act, intentional or otherwise. There will be no coverage. The conviction is all that is needed.

Another concern which would cause me to hesitate is that under this exclusion, the insured would not know, and could not know at the time of entering into the contract, what "accidents" would be covered under the insurance policy. That determination could be made only after the fact, depending on whether any conviction arises in connection with an occurrence for which coverage is sought. See *Safeco Ins. Co. of America v. Robert S.*, 26 Cal. 4th 758, 28 P.3d 889, 110 Cal. Rptr. 2d 844 (2001).

Neb. Rev. Stat. § 44-102 (Reissue 1998) defines an insurance policy as

> a contract whereby one party, called the insurer, for a consideration, undertakes to pay money or its equivalent or to do an act valuable to another party, called the insured, or to his or her beneficiary, upon the happening of the hazard or peril insured against whereby the party insured or his or her beneficiary suffers loss or injury.

The violation of law exclusion as interpreted by the majority would in effect make coverage dependent not on the "happening of the hazard or peril insured against," but on the discretionary decision of a prosecuting attorney. See, *Tower Ins. Co., Inc. v. Judge*, 840 F. Supp. 679 (D. Minn. 1993); *Safeco Ins. Co. of America, supra*. Under such exclusions, two identical "accidents" may or may not be covered under two identical policies, depending on how aggressively the prosecuting authority responds to the incident. This occurs notwithstanding the fact that each insured paid the same premium for the identical contract.

Accordingly, I reserve judgment on the enforceability of the violation of law exclusion contained in this policy. Such exclusions could exclude from coverage those occurrences for which people classically seek coverage, see *Tower Ins. Co., Inc., supra*, and render the insurance contract illusory. See *Safeco Ins. Co. of America, supra*.

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

MICHAEL C. MORRISSEY, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, APPELLANT.

647 N.W.2d 644

Filed July 26, 2002. No. S-01-268.

1. **Administrative Law: Motor Vehicles: Judgments: Appeal and Error.** Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act.
2. **Administrative Law: Final Orders: Appeal and Error.** A judgment or final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Judgments: Appeal and Error.** An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
5. ____: ____. Whether a decision conforms to the law is by definition a question of law, in connection with which an appellate court reaches a conclusion independent of that reached by the lower court.
6. **Administrative Law: Statutes: Appeal and Error.** Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent.
7. **Supreme Court: Administrative Law: Judicial Notice.** The Supreme Court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law.
8. **Administrative Law.** To be valid, an action of an agency must conform to its rules which are in effect at the time the action is taken.
9. **Administrative Law: Statutes.** A legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose.
10. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.

Appeal from the District Court for Douglas County: RICHARD J. SPETHMAN, Judge. Reversed and remanded with directions.

Don Stenberg, Attorney General, and Jodi M. Fenner for appellant.

R. Douglas Stave, of Stave, Dougherty & Stave, for appellee.

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

MCCORMACK, J.

NATURE OF CASE

In this case, the Nebraska Department of Motor Vehicles (department) appeals from an order of the district court for Douglas County. After an administrative license revocation hearing, the department concluded that Michael C. Morrissey had refused to submit to a chemical test of his breath. In part on this basis, the department revoked Morrissey's driver's license. The district court reversed, relying on *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996). The court found that Morrissey submitted to a chemical test of his breath when he provided a sample of breath sufficient to register a digital result on a test record card. We reverse, and remand with directions.

BACKGROUND

On May 21, 2000, Officer Kenneth Randall of the Omaha Police Department was dispatched to the scene of a car accident on 60th Street near Interstate 80 in Omaha, Nebraska. At the scene, Randall discovered Morrissey behind the wheel of a vehicle situated on the median on 60th Street. Upon approaching the vehicle, Randall detected a strong odor of alcohol coming from Morrissey and the vehicle. Randall also observed that Morrissey had bloodshot eyes and appeared to be extremely intoxicated and sleepy. Randall attempted to administer a field sobriety test; however, Morrissey's condition prevented him from completing the test. Morrissey also failed a preliminary breath test at the scene.

Morrissey was arrested and transported to police headquarters. At the police station, Morrissey was read a postarrest chemical test advisement form and he agreed to submit to the chemical test. The chemical test was conducted by an analyst in the presence of two Omaha police officers, including Randall. Morrissey placed the mouthpiece of the Intoxilyzer 5000 in his mouth and blew a "small" sample into the machine. The test record card indicated that Morrissey had an alcohol content of 0.203 grams of alcohol per 210 liters of breath. However, the test record card

also indicated that the sample of breath obtained from Morrissey was deficient. Morrissey was told that he needed to repeat the test to produce a sufficient sample. Morrissey refused to submit to any further chemical test. Randall completed a "Notice/Sworn Report/Temporary License" (sworn report) and provided a copy to Morrissey. The sworn report indicates that Morrissey was requested to submit to a chemical test and that he "refused to submit to a chemical test or tests of breath, blood or urine."

Morrissey petitioned for a hearing to contest the revocation of his drivers' license. At the hearing, testimony was received from Randall and exhibits were received into evidence, including the sworn report. Also received into evidence was a copy of the test record card and the chemical test checklist. The checklist set forth the steps to be followed when administering a chemical test using an Intoxilyzer 5000. One of the steps stated: "SUBJECT DIGITAL READING: 0.____ of a gram of alcohol per 210 liters of breath." Handwritten in the blank space of that step was the number ".203."

Following the license revocation hearing, the department entered an order revoking Morrissey's driver's license for 1 year. As a basis for revocation, the department found in part that Morrissey had refused to submit to a chemical test. Morrissey appealed the order of revocation to the district court. The court reversed, finding that pursuant to *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), Morrissey did not refuse to submit to a chemical test. The department appealed from the district court order, and we moved the case to our docket.

ASSIGNMENTS OF ERROR

The department assigns that the district court erred in (1) reversing the decision of the director of the department and reinstating Morrissey's driver's license and (2) finding that Morrissey had submitted to and completed a valid chemical test pursuant to Neb. Rev. Stat. § 60-6,205 (Reissue 1998).

STANDARD OF REVIEW

[1] Decisions of the director of the Department of Motor Vehicles, pursuant to Nebraska's administrative revocation statutes, are appealed under the Administrative Procedure Act (APA).

Reiter v. Wimes, 263 Neb. 277, 640 N.W.2d 19 (2002). See Neb. Rev. Stat. § 60-6,208 (Reissue 1998).

[2,3] A judgment or final order entered by a district court in a judicial review pursuant to the APA may be reversed, vacated, or modified by an appellate court for errors appearing on the record. *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002). When reviewing an order of a district court under the APA for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

[4] An appellate court, in reviewing a district court's judgment for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Reiter v. Wimes, supra.*

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

[6] Interpretation of statutes presents a question of law, and an appellate court is obligated to reach an independent conclusion, irrespective of the decision made by the court below, with deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Davis v. Wimes, supra.*

ANALYSIS

The fundamental issue in this appeal is whether the evidence offered by the department established that Morrissey refused to provide a sufficient sample of breath. As a general rule, the offer by the department of the sworn report at the hearing establishes the department's prima facie case and the burden shifts to the driver to refute such evidence. *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995). The rule presupposes a proper report, that is, a sworn report which comports with statutes and the relevant administrative rules and regulations. If the sworn report is not proper, the department may, nevertheless, establish its case by other means, such as by the testimony of a witness who observed the administration of the breath test. In this case, we conclude that the department carried its burden by means of live testimony.

[7] In its argument to this court, the department places considerable emphasis on the Nebraska Department of Health and Human Services Regulation and Licensure's rules and regulations, 177 Neb. Admin. Code, ch. 1 (1998), which we take judicial notice of. See *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002) (this court will take judicial notice of general rules and regulations established and published by Nebraska state agencies under authority of law). Among the rules and regulations relied upon by the department is 177 Neb. Admin. Code, ch. 1, § 002.01A (1998), which instructs that "[n]o digital result shall be reported on the checklist . . . if the test record card indicates an insufficient sample." The test record card in this case indicates that Morrissey provided an insufficient sample of breath during the chemical test. This insufficient sample produced a digital reading on the test record card of 0.203 grams of alcohol per 210 liters of breath. Yet, despite the clear command of § 002.01A, the analyst who conducted Morrissey's chemical test reported on the checklist that Morrissey's blood alcohol level was 0.203 grams of alcohol per 210 liters of breath.

[8] We deem this violation of § 002.01A to be significant. We have previously held that to be valid, an action of an agency must conform to its rules which are in effect at the time the action is taken. *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998). More importantly, any violation of the rules and regulations governing the administration of chemical tests calls into doubt the reliability of the results of such tests, especially in light of the evidentiary burdens the department is free from.

In *McPherrin v. Conrad, supra*, we held that the department makes a prima facie case for revocation once they establish the officer provided his or her sworn report containing the required recitations. The burden then shifts to the defendant to prove that one or more of the recitations in the sworn report are false. See, also, *Davis v. Wimes*, 263 Neb. 504, 641 N.W.2d 37 (2002); *Urwiller v. Neth*, 263 Neb. 429, 640 N.W.2d 417 (2002); *Wolgamott v. Abramson*, 253 Neb. 350, 570 N.W.2d 818 (1997); *McGuire v. Department of Motor Vehicles*, 253 Neb. 92, 568 N.W.2d 471 (1997); § 60-6,205(7). We adopted this rule aware that in some circumstances, the officer may not have personal

knowledge of every fact stated in the sworn report, such as the reliability or validity of the chemical test procedures. Despite this, we held that the recitations in the sworn report will be taken as true until proved false by the defendant.

The rule expressed in *McPherrin v. Conrad*, 248 Neb. 561, 537 N.W.2d 498 (1995), frees the department of independently investigating the circumstances of each arrest. The department is also free from establishing the foundational elements necessary for the admission of a breath test in a driving under the influence prosecution. See, e.g., *State v. Baue*, 258 Neb. 968, 607 N.W.2d 191 (2000). Thus, *McPherrin* conveys a substantial procedural benefit upon the department in an administrative license revocation proceeding. However, given this benefit, the department is expected to strictly comply with the applicable rules and regulations. Where, as in this case, the department violates one of those rules, we believe that concerns are properly raised about whether other aspects of the chemical testing conformed to the rules and regulations. Therefore, we conclude that when the applicable rules and regulations are not strictly complied with, the department cannot obtain the benefit of a presumption that all facts recited in the sworn report are true.

The sworn report received at Morrissey's license revocation hearing recited, inter alia, that Morrissey refused to submit to a chemical test of his breath, blood, or urine. While we determine that this fact may not be presumed to be true, the question now becomes whether the department offered sufficient evidence of Morrissey's refusal, independent of the sworn report.

At Morrissey's license revocation hearing, Randall testified that he transported Morrissey to police headquarters for chemical testing and was present during Morrissey's chemical test. Randall described the administration of the chemical test as follows:

> Q Did he — did Mr. Morrissey, did he take the mouth piece into his mouth?
>
> A Yes he did. He refused to blow an adequate sample.
>
> Q Did he offer some air into the instrument? I mean —
>
> A Yes, I believe he did some.
>
> Q Did he, at any point, verbally refuse?
>
> A Yes, he did.

Q What — okay, what happened? Just explain to me what happened.

A For the test, he sat down, Mr. Ingram explained the test, he did put the mouth piece to his mouth, then he got angry. He did — I believe he did blow a small amount at one point, and Mr. Ingram explained he needs to blow long and hard through the tube, and he verbalized that he wasn't going to do it, after a small period of time.

Q And did, at any — after he said he was not going to do it, did he offer any air into the instrument after that point?

A No, he didn't.

Morrissey argues that the district court correctly applied *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), to the facts of this case to conclude that he submitted to a chemical test of his breath. In *Keys*, a motorist was arrested for driving under the influence of alcohol and was requested to submit to a chemical breath test. During the initial attempt to administer the chemical test, the motorist blew air around the mouthpiece of an Intoxilyzer Model 4011AS. The Intoxilyzer's indicator light did not light up, indicating that no air was entering the machine. The officer administering the test then requested that the motorist again offer a sample of breath into the machine. On this second attempt, the motorist provided a sample of air. The Intoxilyzer registered a digital reading of 0.110 grams of alcohol per 210 liters of breath. However, the sample of breath provided by the motorist was insufficient for the Intoxilyzer to print the result on a test record card. The motorist was cited for refusing to submit to a chemical breath test, and his driver's license was later revoked by the department after an administrative license revocation hearing.

On appeal, we were asked to decide if the motorist had submitted to a chemical breath test as required by Nebraska law under these facts. We noted that "[o]ur [driving under the influence] and administrative license revocation statutes are silent on whether the results of a chemical breath test must be shown on a test record card in order to be legally sufficient, or whether a digital Intoxilyzer reading will suffice." *Id.* at 968, 546 N.W.2d at 822. Because this issue was not addressed by statute

or case law, we looked to the applicable Nebraska Department of Health regulations for guidance. *Id.* After analyzing the applicable rules and regulations at 177 Neb. Admin. Code, ch. 1 (1993), we concluded that

> a motorist who provides a sufficient sample of breath to register a digital reading on an Intoxilyzer, but who does not provide enough breath to cause the machine to print the result on a test record card, has submitted to a breath test as required by Nebraska law in the absence of any statutory or regulatory requirement that the results be printed on a test record card . . . .

Keys v. Department of Motor Vehicles, 249 Neb. at 971, 546 N.W.2d at 824.

The department now argues that *Keys* is no longer controlling in light of revisions to 177 Neb. Admin. Code, ch. 1, promulgated subsequent to, and purportedly in response to, *Keys*. The department asserts that under these rules and regulations, Morrissey's failure to provide a sufficient sample of breath constituted a refusal to submit to a chemical test of his breath.

The Department of Health and Human Services Regulation and Licensure defines refusal as "*the failure to provide a sufficient sample of body fluid to complete a blood, breath, or urine test* or the refusal to submit to a chemical test of blood, breath, or urine." 177 Neb. Admin. Code, ch. 1, § 001.19 (1998). (Emphasis supplied.) Section 002.01A states in part: "[An] insufficient sample does not constitute a valid test." "Valid test" is defined as "an analysis performed according to methods approved by The Department of Health and Human Services Regulation and Licensure and by an individual possessing a valid permit." 177 Neb. Admin. Code, ch. 1, § 001.15 (1998).

[9,10] Generally, a legislative enactment may properly confer general powers upon an administrative agency and delegate to the agency the power to make rules and regulations concerning the details of the legislative purpose. *Creighton St. Joseph Hosp. v. Tax Eq. & Rev. Comm.*, 260 Neb. 905, 620 N.W.2d 90 (2000). Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *City of Lincoln v. Central Platte NRD*, 263 Neb. 141, 638 N.W.2d 839 (2002).

The Legislature has conferred power to the Department of Health and Human Services Regulation and Licensure to adopt methods for determining whether chemical tests may be considered valid. Neb. Rev. Stat. § 60-6,201(3) (Reissue 1998). The rules and regulations cited above indicate that a motorist who fails to provide a sufficient sample of breath, regardless of the digital reading produced by that insufficient sample, has refused to submit to a chemical test. Those rules and regulations also indicate that a valid test has not been conducted when an insufficient sample of breath has been provided. In this case, Randall testified that Morrissey offered a "small," but inadequate, sample of breath into the Intoxilyzer. Morrissey was then instructed to repeat the process in order to obtain an adequate sample of breath; however, Morrissey refused, and no adequate sample of breath was ever received from him. Under the above-cited rules and regulations, Morrissey is deemed to have refused to submit to a chemical test. To the extent that it conflicts with these rules and regulations, *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), is no longer applicable.

CONCLUSION

Where the department fails to strictly comply with 177 Neb. Admin. Code, ch. 1, it cannot obtain the benefit of a presumption that all facts recited in a sworn report are true. Instead, the department must offer sufficient evidence, independent of the sworn report, to establish that a motorist's driver's license should be revoked. In this case, the department offered sufficient evidence, independent of the sworn report, to establish that Morrissey refused to submit to a chemical test of his breath under the Nebraska Department of Health and Human Services Regulation and Licensure's rules and regulations. These rules and regulations, which have the effect of statutory law, indicate that Morrissey's failure to provide a sufficient sample of breath during a chemical test constitutes a failure to submit to a chemical test. These rules and regulations supersede our decision in *Keys v. Department of Motor Vehicles*, 249 Neb. 964, 546 N.W.2d 819 (1996), and control the disposition of this case. Thus, the district court erred in reversing the department's order

of revocation. We reverse, and remand with directions to vacate the order reinstating Morrissey's driver's license.

REVERSED AND REMANDED WITH DIRECTIONS.

CAROL A. BOWERS, FORMERLY KNOWN AS CAROL A. SCHERBRING, APPELLANT, V. GAIL LENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT J. SCHERBRING, DECEASED, APPELLEE.

648 N.W.2d 294

Filed July 26, 2002. No. S-01-447.

1. **Modification of Decree: Alimony: Appeal and Error.** An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion.
2. **Divorce: Appeal and Error.** Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record.
3. **Alimony.** In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness.
4. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor.
5. **Equity: Judgments: Interest.** A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right.
6. ____: ____: ____. The language of Neb. Rev. Stat. § 45-103.01 (Cum. Supp. 2000) is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.
7. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.
8. **Modification of Decree: Attorney Fees: Appeal and Error.** In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion.
9. **Divorce: Attorney Fees.** The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Affirmed as modified.

Michael B. Kratville for appellant.

Karen L. Vervaecke, on brief, for appellee.

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

GERRARD, J.

NATURE OF CASE

The appellant, Carol A. Bowers, appeals from the district court's award of alimony for $400 per month for 54 months, pursuant to this court's remand with directions to modify Bowers' award of alimony. See *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000). Bowers argues on appeal that the district court erred in failing to award her a larger amount of alimony for a longer time period, interest on the judgment, and attorney fees.

BACKGROUND

Bowers, formerly known as Carol A. Scherbring, and Robert J. Scherbring were married on May 30, 1969, and divorced pursuant to a dissolution decree entered on June 3, 1996. The decree awarded, inter alia, alimony of $1 per year to each party. Bowers filed a petition for modification on September 24, alleging a material change in circumstances because she unexpectedly lost her job as part of a reduction in force on August 15. Bowers requested an award of alimony on a temporary basis and modification of alimony on a permanent basis.

The district court held a hearing on Bowers' petition to modify. See *Bowers, supra*. Bowers, who had previously worked as a medical technologist for numerous years, had been dismissed from several jobs in her field since the entry of the dissolution decree and had not worked since March 1997. Bowers testified that because of cognitive impairments relating to her short-term memory, she was no longer able to work in the field of medical technology. Bowers presented medical testimony that she had suffered problems with memory retention and concentration since 1994. Dr. Thomas Grandy, a psychologist, testified that Bowers' deficiency in short-term memory prevented her from satisfactorily performing the daily duties required of a laboratory

medical technologist, and he recommended that she undergo vocational rehabilitation. The district court, in a May 15, 1998, order, concluded that there was no material change in circumstances after the entry of the decree and denied Bowers' petition for modification.

Bowers appealed the district court's order. The Nebraska Court of Appeals affirmed in an unpublished opinion, determining that Bowers failed to prove a change of circumstances since the time of the decree, as Bowers had suffered from memory problems since 1994 and had reported difficulties with thinking and remembering in 1995. *Bowers v. Scherbring*, 8 Neb. App. ci (No. A-98-564, June 29, 1999). Thus, the Court of Appeals determined that the record did not support a modification of alimony, and the district court did not abuse its discretion in denying Bowers' application to modify. *Id.*

This court granted Bowers' petition for further review. We determined that although Bowers' neurocognitive problems existed prior to the decree, neither party contemplated the extent to which Bowers' illness would prevent her from working as a medical technologist. *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000). Additionally, we concluded that the Court of Appeals erred in requiring Bowers to present evidence that she was unemployable in any position, rather than just as a medical technologist. Thus, we reversed the judgment of the Court of Appeals and remanded the cause to the district court with directions for further proceedings. *Id.*

On remand, the district court held a hearing to determine the appropriate amount of alimony. Bowers requested an increase in alimony retroactive to April 1997, because she had not worked since March 1997. Bowers had been employed as a medical technologist until March 1997, but her physician advised Bowers at that time to get out of the medical technology field and apply for Social Security disability benefits because of her ongoing cognitive problems. Bowers testified that she received neurocognitive therapy from May 1997 to August or September 1997, but discontinued treatment after her insurance company stopped paying for it.

Bowers entered a master's degree program in community counseling at the University of Nebraska-Omaha in August 1998,

and at the time of the hearing, she expected to finish her degree in May 2001. Bowers testified that she could seek a job in counseling after graduation, but she would not become a licensed mental health practitioner until she passed board examinations and completed 3,000 hours of work in her field.

Because she had not been employed since March or April 1997, Bowers used her savings and Social Security as income, and eventually liquidated assets totaling approximately $9,100 in the form of IRA's and mutual funds. Bowers received $2,631 in Social Security benefits for 1997. Bowers also received $17,000 in loans from her mother and student loans totaling approximately $36,000. For the spring 2001 semester, Bowers received an additional $4,200 in student loans.

The court admitted as an exhibit a list of Bowers' estimated monthly expenses, which included the type of monthly expenses Bowers incurred back to March or April 1997 when she first became unemployed. Bowers' monthly expenses, as estimated, totaled $1,838; she incurred approximately $5,000 in additional expenses since March 1997 for medical insurance, dental expenses, and eye care. Bowers testified that 6 months after her graduation, she will begin making payments of $400 per month on her student loans and will continue such payments for 10 years.

Scherbring indicated his income from the years 1997 to 2000 by submitting tax returns and W-2 forms as exhibits: $43,983.82 in 1997 (W-2 form); $43,048 in 1998; $47,775 in 1999; $50,533.42 in 2000 (W-2 form). Scherbring testified that his average net income was $2,771 per month and that his average monthly expenses were $2,923. Scherbring's cohabitant did not contribute to any of Scherbring's living expenses. Although Scherbring's monthly mortgage payment was approximately $800 to $850 at the time of the dissolution in 1996, that amount had increased to $1,193 because he refinanced his mortgage pursuant to a $22,000 property settlement in the dissolution decree. The district court received as an exhibit Bowers' attorney's affidavit and itemization of hours up to the time of the previous trial in this matter.

In a March 13, 2001 order, the district court awarded Bowers alimony retroactive to April 1, 1997, and ending on September

1, 2001, for a total of 54 payments at the rate of $400 per month, a purported total judgment of $21,200—54 multiplied by $400, however, actually totals $21,600. The district court ordered that Scherbring pay $500 per month starting on April 1, 2001, until the judgment is paid in full. The district court denied Bowers' request for attorney fees. Bowers appealed the judgment of the district court on April 10.

Scherbring died on October 12, 2001. Gail Lens, personal representative of Scherbring's estate, has been substituted as the appellee, and the judgment and instant appeal have been revived.

ASSIGNMENTS OF ERROR

Bowers assigns, restated, that the district court erred in (1) terminating Bowers' alimony in September 2001, (2) allowing Scherbring to pay off the judgments on a monthly basis instead of allowing Bowers to collect the judgment as may be deemed appropriate, (3) not allowing Bowers interest on the judgment, (4) awarding only $400 per month in alimony, and (5) failing to award Bowers attorney fees.

STANDARD OF REVIEW

[1] An appellate court entrusts the modification of an alimony award to the discretion of the trial court and reviews the trial court's decision de novo on the record for abuse of discretion. *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997).

[2] Appeals in domestic relations matters are heard de novo on the record, and thus, an appellate court is empowered to enter the order which should have been made as reflected by the record. *Medlock v. Medlock*, 263 Neb. 666, 642 N.W.2d 113 (2002).

ANALYSIS

Time Period of Alimony

Bowers assigns, first, that the district court erred in terminating alimony in September 2001. Due to Scherbring's death on October 12, 2001, we limit our consideration of this assignment of error to whether Bowers should receive 1 additional month of alimony for October 2001.

Bowers claims that because of her employment uncertainties, the district court should not have provided a termination date for

alimony, but instead hold another hearing to gauge Bowers' employment situation after she graduated from school. At the time of the March 2001 hearing, Bowers was scheduled to graduate in May 2001. The court's September 2001 end date of alimony allowed Bowers 4 months beyond graduation in which to secure gainful employment. Bowers testified that she will receive payment for working toward her 3,000-hour requirement for full certification.

[3] In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Bauerle v. Bauerle*, 263 Neb. 881, 644 N.W.2d 128 (2002). We have reviewed the district court's alimony determination de novo on the record for an abuse of discretion. Given the evidence submitted, it was reasonable for the district court to expect Bowers to begin supporting herself after September 2001; therefore, the court did not abuse its discretion in setting September 2001 as the termination date of Scherbring's alimony payments. Bowers' first assignment of error is without merit.

Paying Off Judgment on Monthly Basis

Next, Bowers argues that the district court erred in ordering Scherbring to pay off the judgment on a monthly basis. In its March 13, 2001, order, the district court awarded Bowers alimony of $400 per month retroactive from April 1997 through March 2001, plus an additional 6 months of alimony through September 2001, for a total of 54 payments. The court stated that the total amount awarded was $21,200 and ordered Scherbring to pay off the judgment in monthly installments of $500 starting April 1, 2001, and continuing until Scherbring paid the judgment in full.

[4] This court has long held that a decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty by the judgment debtor. See *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). See, also, *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980); *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975). Installments of alimony ordinarily become vested as they accrue, and past-due installments become final judgments,

which courts have no authority to cancel or reduce. See, *Wolter v. Wolter*, 183 Neb. 160, 158 N.W.2d 616 (1968); *Sullivan v. Sullivan*, 141 Neb. 779, 4 N.W.2d 919 (1942). Although the instant case involves retroactive alimony rather than past-due alimony installments, the principle remains the same. Alimony payments ordinarily vest as they accrue; thus, we conclude that a judgment for retroactive alimony, i.e., alimony that should have vested and accrued in prior months, is one which is immediately due and collectible by the judgment creditor. This situation is, of course, distinguishable from an order in which a court may allow a contemnor to purge his or her contempt for past-due support on an installment basis. See, e.g., *Pope v. Pope*, 251 Neb. 773, 559 N.W.2d 192 (1997); *Snodgrass v. Snodgrass*, 241 Neb. 43, 486 N.W.2d 215 (1992).

Applying the above principles to the present case, the district court's award of retroactive alimony from April 1997 through March 2001 became vested upon entry of the judgment—because the time for which it was due had passed, it had accrued and was immediately collectible. In addition, the alimony award from April 1, 2001, through September 2001 has also accrued, and it was immediately due and collectible at the time each installment vested on a monthly basis. The alimony awarded to Bowers became a lien on Scherbring's property at the time of the entry of the judgment. See Neb. Rev. Stat. § 42-371 (Cum. Supp. 2000).

We, therefore, conclude that the district court erred in limiting Bowers' ability to collect the alimony judgment from Scherbring to a periodic basis under these circumstances. We review a trial court's modification of an alimony award de novo on the record for abuse of discretion, and we are empowered to enter the order which should have been made as reflected by the record. We determine that the court abused its discretion in ordering Scherbring to pay off the judgment in $500 monthly increments starting on April 1, 2001; the order shall be modified to allow Bowers to collect the entire alimony judgment in such manner as allowed by law.

INTEREST

Bowers claims that the district court erred in failing to award her interest on the judgment retroactive to April 1997. Scherbring

argued that assessing interest back to 1997 would unreasonably penalize Scherbring for failing to comply with an order that, until March 13, 2001, did not exist.

[5,6] A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (1994). Neb. Rev. Stat. § 45-103.01 (Cum. Supp. 2000) provides that interest shall accrue on decrees and judgments for the payment of money from the date of entry of judgment until the satisfaction of judgment. The language of § 45-103.01 is mandatory, and a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money. *Gallner v. Gallner*, 257 Neb. 158, 595 N.W.2d 904 (1999); *Welch, supra*. In this case, the district court entered a judgment on March 13, 2001, for the payment of money from Scherbring to Bowers; thus, the district court does not have discretion to withhold interest from its judgment after March 13.

We must, however, consider when interest began accruing on the judgment and what effect that may have on the final satisfaction of the judgment. We determined above that when the district court entered its award of retroactive alimony to Bowers on March 13, 2001, Scherbring owed Bowers alimony from April 1997 to March 2001—$400 per month for 48 months, for a total of $19,200. We conclude that interest on this $19,200 began to accrue when the district court entered its judgment on March 13, because, as stated above, Scherbring owed the full $19,200 when the court entered its order. Prior to March 13, there was simply no judgment from which interest could accrue.

For the 6 months of alimony from April through September 2001, we determine, pursuant to § 45-103.01, that interest on each of those $400 payments began to accrue as each payment became due, as a final judgment, on the first day of each month.

Amount of Alimony

[7] Bowers next assigns that the district court erred in granting her only $400 per month in alimony. Bowers argues that the district court's award is unreasonable and untenable, considering that between 1997 and 2000, Bowers' average monthly income was approximately $3,000 less than Scherbring's average

monthly income. In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result. *Kalkowski v. Kalkowski*, 258 Neb. 1035, 607 N.W.2d 517 (2000).

We determine, after reviewing the record de novo and considering the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1998), that the district court did not abuse its discretion in awarding Bowers $400 per month alimony for the time period at issue. Bowers' fourth assignment of error is without merit.

ATTORNEY FEES

[8,9] Bowers' final assignment of error alleges that the district court erred in failing to award her attorney fees. In an action for modification of a marital dissolution decree, the award of attorney fees is discretionary with the trial court, is reviewed de novo on the record, and will be affirmed in the absence of an abuse of discretion. *Peter v. Peter*, 262 Neb. 1017, 637 N.W.2d 865 (2002). The award of attorney fees depends on multiple factors that include the nature of the case, the services performed and results obtained, the earning capacity of the parties, the length of time required for preparation and presentation of the case, customary charges of the bar, and the general equities of the case. *Priest v. Priest*, 251 Neb. 76, 554 N.W.2d 792 (1996).

Based on our de novo review of the record, and the general equities of the case, we find nothing to indicate an abuse of discretion on the part of the district court in its refusal to award attorney fees. Therefore, the district court did not err in refusing to grant Bowers attorney fees.

CONCLUSION

For the reasons stated above, we conclude that Bowers' assignments of error relating to the term of alimony, amount of alimony, and attorney fees are without merit, and we affirm the district court's order on those matters.

We determine, however, that the district court erred in (1) allowing Scherbring to pay off the $19,200 alimony judgment (i.e., retroactive alimony from April 1997 through March 2001)

and the alimony that accrued at a rate of $400 per month from April through September 2001, on a periodic basis—starting on April 1, 2001, until the judgment is paid in full; (2) failing to order interest, as set forth above, until the judgment is satisfied; and (3) calculating the total sum of the judgment as $21,200 rather than $21,600. We, therefore, modify the order of the district court to reflect (1) that 54 payments of $400 per month totals $21,600 and judgment in the sum of $21,600 shall be entered in favor of Bowers and against the appellee and (2) that judgment interest, pursuant to § 45-103.01, began to accrue on the sum of $19,200 when the district court entered its judgment on March 13, 2001, and on each of the $400 payments when they became due on the first day of each month from April through September 2001.

The judgment of the district court is thus affirmed as modified.

AFFIRMED AS MODIFIED.

STEPHAN, J., concurring.

For the sake of consistency, I note my dissent in the first appeal in this case, *Bowers v. Scherbring*, 259 Neb. 595, 611 N.W.2d 592 (2000), in which I expressed my opinion that the district court did not abuse its discretion in determining that there was no material change in circumstances which would justify modification of the original alimony award. Inasmuch as that view did not prevail and the adequacy of the factual grounds for modification is not before us in this appeal, I fully agree with the reasoning and disposition set forth in the majority opinion.

HENDRY, C.J., joins in this concurrence.

STATE OF NEBRASKA EX REL. COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. LYLE J. KOENIG, RESPONDENT.

647 N.W.2d 653

Filed July 26, 2002. No. S-01-634.

Original action. Judgment of suspension.

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

PER CURIAM.

INTRODUCTION

On June 15, 2001, amended formal charges were filed by the office of the Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Lyle J. Koenig. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on January 31, 2002. With respect to both counts I and II, the referee concluded that respondent's conduct had breached the disciplinary rules of the Code of Professional Responsibility and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended that respondent be suspended from the practice of law for 90 days. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

The substance of the referee's findings may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska on February 28, 1972. He practiced in Hebron from 1972 to 1994 when he moved to Lincoln.

Count I involves respondent's conduct with respect to the handling of the estate of Alice Nelsen and the sale of an estate asset, real property, to the city of Hebron, while respondent represented the estate and served as Hebron City Attorney. The detailed facts underlying count I as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that respondent prepared the documentation to effect the sale of certain real property in which he misrepresented the status of the estate proceedings and the legal status of the real property, in violation of Canon 1, DR 1-102(A)(4); continued the multiple employment by the Nelsen estate and the city of Hebron when it involved different interests, in violation of Canon 5, DR 5-105(B); neglected the probate of the Nelsen estate in various respects, in violation of Canon 6, DR 6-101(A)(3); engaged in conduct that was prejudicial to the administration of justice, in violation of DR 1-102(A)(5) as a result of his continuing in multiple employment; and, accordingly, violated disciplinary rules, constituting a violation of DR 1-102(A)(1).

Count II involves respondent's conduct with respect to his representation of Ted Nelsen in Nelsen's federal lawsuit against Cargill, Inc., in which Nelsen claimed that Cargill, Inc., as lessee of a certain grain elevator owned by Ted Nelsen, had misused the elevator, resulting in damage to Ted Nelsen. The detailed facts underlying count II as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that respondent neglected the federal lawsuit by, inter alia, failing to file a status report, resulting in the dismissal without prejudice of the case, in violation of DR 6-101(A)(3); engaged in conduct that was prejudicial to the administration of justice, due to the neglect of the federal lawsuit, in violation of DR 1-102(A)(5); and, accordingly, violated disciplinary rules, constituting a violation of DR 1-102(A)(1).

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above and his oath as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended that respondent be suspended from the practice of law for 90 days.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by

clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), and (5); DR 5-105(B); and DR 6-101(A)(3). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent's conduct with respect to these matters violated several disciplinary rules and his oath of office as an attorney. As mitigating factors, we note his cooperation during the disciplinary proceeding, his continuing commitment to the legal profession and the community, and the lack of evidence of any harm to the clients.

Factors weighing against respondent include his lack of willingness to take responsibility for his conduct, which he characterizes as merely "sloppy practice," and a prior reprimand.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be suspended from the practice of law for 90 days.

CONCLUSION

The motion for judgment on the pleadings is granted. It is the judgment of this court that respondent should be suspended from the practice of law for a period of 90 days, and we therefore order him suspended from the practice of law for a period of 90 days effective immediately, after which period, respondent may apply for readmission to the bar. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF SUSPENSION.

CONNOLLY, J., not participating.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. PETER R. BRINKER, RESPONDENT.

648 N.W.2d 302

Filed July 26, 2002. No. S-01-690.

Original action. Judgment of disbarment.

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

PER CURIAM.

INTRODUCTION

On June 19, 2001, formal charges were filed by the office of the Special Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Peter R. Brinker. Amended formal charges were filed on January 8, 2002. Respondent's answer disputed the allegations. A referee was appointed and heard evidence. The referee filed a report on May 10, 2002. With respect to counts I and II of the amended formal charges, the referee concluded that respondent's conduct had breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney. See Neb. Rev. Stat. § 7-104 (Reissue 1997). The referee recommended disbarment. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

The substance of the referee's findings may be summarized as follows:

Respondent was admitted to the practice of law in the State of Nebraska on December 24, 1980. He has practiced in Omaha.

Count I involves respondent's conduct in the handling of a client's settlement proceeds which had been set aside to satisfy a physician's lien, as well as respondent's conduct during the Counsel for Discipline's investigation into a grievance regarding the same funds. The detailed facts underlying count I as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that respondent represented a client in a personal injury claim and in the course of such representation, executed a physician's lien with a chiropractor who had treated the client. When the personal injury claim was settled and a portion of the settlement proceeds were set aside to satisfy the lien, respondent deposited the funds into a bank account which was not his attorney trust account and failed and refused to satisfy the lien, despite repeated requests from the chiropractor's office and its bill collection agency. When the chiropractor's office filed a grievance against

respondent with the Counsel for Discipline's office, respondent denied representing the client and denied receipt of the settlement proceeds until he was confronted with information provided by another attorney, whose response detailed respondent's involvement. Respondent also failed to provide an accounting for the funds and failed to file a timely and appropriate response to the grievance. The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Canon 1, DR 1-102(A)(1) (disciplinary rule violation), DR 1-102(A)(4) (dishonesty or deceit), and DR 1-102(A)(6) (conduct adversely reflecting on fitness to practice law); Canon 6, DR 6-101(A)(3) (neglect); Canon 9, DR 9-102(A) (handling client funds); Neb. Ct. R. of Discipline 9(E) (rev. 2001) (requiring response to grievance); and the attorney's oath of office.

Count II involves respondent's failure to deposit the settlement funds discussed above into an attorney trust account and respondent's failure to file the required affidavit regarding his attorney trust account. The detailed facts underlying count II as found by the referee are not disputed by the parties and are not repeated here. In sum, the facts show that in addition to respondent's failure to deposit the settlement funds into his attorney trust account, during the years 1993 through 1998, respondent did not file with the Nebraska State Bar Association affidavits identifying a trust account or accounts into which he deposited client funds or affidavits stating that he did not expect to receive client funds. The referee found by clear and convincing evidence that as a result of respondent's conduct, respondent had violated Neb. Ct. R. of Trust Accounts and Blanket Bonds 1 (rev. 2001) and 4 (rev. 2002) and the attorney's oath of office.

In his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary and trust account rules recited above and his oath of office as an attorney. With respect to the sanction which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended that respondent be disbarred from the practice of law.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion for judgment on the pleadings, under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (4), and (6); DR 6-101(A)(3); DR 9-102(A); Neb. Ct. R. of Discipline 9(E); and Neb. Ct. R. of Trust Accounts and Blanket Bonds 1 and 4. We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *State ex rel. NSBA*

v. Frank, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case establishes, inter alia, that respondent's conduct with respect to these matters violated several disciplinary and trust account rules and his oath of office as an attorney. Factors weighing against respondent include his misrepresentation of the truth during the disciplinary proceeding, his failure to cooperate during the disciplinary proceeding, and his lack of remorse. The referee concluded there were no "mitigating circumstances" and recommended disbarment as a result of respondent's improper handling of client funds, numerous trust account rule violations, and misrepresentations to the Counsel for Discipline. We have previously disbarred an attorney who, like respondent, had violated trust account rules, mishandled client funds, and failed to cooperate with the Counsel for Discipline. *State ex rel. NSBA v. Howze,* 260 Neb. 547, 618 N.W.2d 663 (2000) (noting lack of mitigating circumstances).

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. Upon due consideration, the court agrees with the referee's recommendation and finds that respondent should be disbarred from the practice of law in the State of Nebraska.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be disbarred from the practice of law in the State of Nebraska, and we therefore order respondent disbarred, effective immediately. Respondent is directed to comply with Neb. Ct. R. of Discipline 16 (rev. 2001), and upon failure to do so, respondent shall be subject to punishment for contempt of this court. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001).

JUDGMENT OF DISBARMENT.

LYLE D. LARSEN, APPELLEE, V.
D B FEEDYARDS, INC., APPELLANT.
648 N.W.2d 306

Filed July 26, 2002. No. S-01-839.

1. **Workers' Compensation: Appeal and Error.** An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law.
2. **Jurisdiction: Appeal and Error.** Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it.
3. **Jurisdiction: Final Orders: Appeal and Error.** For an appellate court to acquire jurisdiction of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders.
4. **Jurisdiction: Appeal and Error.** When an appellate court is without jurisdiction to act, the appeal must be dismissed.
5. **Final Orders: Appeal and Error.** The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered.
6. **Workers' Compensation: Appeal and Error.** A workers' compensation case is a special proceeding for appellate purposes.
7. **Workers' Compensation: Claims.** An order of the compensation court which eliminates what would have been a complete defense to an employee's claim affects a substantial right of the employer.
8. **Workers' Compensation.** In keeping with the language of Neb. Rev. Stat. § 48-106(2) (Reissue 1998), excepting "employers" of farm and ranch laborers, it is the nature of the employer's business which determines the exception.

9. ____. One employer may engage in two separate businesses, one subject to the workers' compensation law and one excepted from that law.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Walter E. Zink II and Jenny L. Panko, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

Clarence E. Mock and Denise E. Frost, of Johnson & Mock, and Brent M. Bloom for appellee.

Jacqueline M. Tessendorf, of Mattson, Ricketts, Davies, Stewart & Calkins, for amicus curiae Nebraska Cattlemen, Inc.

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

PER CURIAM.

Lyle D. Larsen was employed by D B Feedyards, Inc., on November 13, 1999, when he was injured while roping a steer owned by a customer of D B Feedyards. Larsen filed a petition against D B Feedyards in the Workers' Compensation Court seeking benefits for his injury. D B Feedyards answered by asserting that because it was an employer of farm or ranch laborers, it was excepted from the Nebraska Workers' Compensation Act under Neb. Rev. Stat. § 48-106(2) (Reissue 1998). The trial judge rejected D B Feedyards' defense and determined that Larsen was a covered employee. The review panel of the Nebraska Workers' Compensation Court affirmed. D B Feedyards appeals.

FACTS

This case was tried on stipulated facts. D B Feedyards is a Nebraska corporation with its principal place of business located slightly southeast of Craig, Nebraska. Daryl Bromm and his wife, Shirley Bromm, are the sole shareholders in the corporation. Daryl, Shirley, and their son Rodney Bromm are the only officers of the corporation. D B Feedyards was incorporated in 1973 and has remained incorporated since that time.

D B Feedyards began operation as a feedlot to feed livestock owned by Daryl and Rodney. Approximately 12 to 15 years ago, however, D B Feedyards began feeding cattle owned by other per-

sons or entities. D B Feedyards charges a fixed amount per head, per day for the cattle it feeds owned by others. D B Feedyards averages 5,000 head of cattle on feed. At any given time, one-half to three-fourths of the cattle on the feedlot are owned by persons or entities other than D B Feedyards. Although it does not do any formal advertising, D B Feedyards provides calendars and baseball caps bearing its name to its customers. D B Feedyards occasionally solicits customers to have their cattle fed at its feedlots. D B Feedyards receives separate income for its feeding operation and files a separate corporate income tax return each year. D B Feedyards' gross revenue for the period July 1, 1999, through July 1, 2000, was $5,122,186.

D B Feedyards owns 440 acres of farm ground in its own name, which it farms. The feedlot area, including the offices, scales, and Daryl and Shirley's residence, covers 160 acres. Crops raised on the farm are delivered to the feedlot for use as cattle feed, and manure from the feedlot is spread on the farmland. D B Feedyards owns farm equipment consisting of a combine, two payloaders, and several tractors, as well as two trucks used in its feeding operations.

At all relevant times, D B Feedyards employed three employees, including Larsen. Larsen is a professional roper who was hired to perform general labor, which included sorting and treating sick cattle. On November 13, 1999, Larsen injured his right thumb while roping a steer. The steer was owned by an entity other than D B Feedyards.

On March 8, 2000, Larsen filed a petition in the Workers' Compensation Court seeking benefits for the injury to his right thumb. In its answer, D B Feedyards asserted that Larsen was employed as a farm or ranch laborer under § 48-106(2) and therefore was not a covered employee under the provisions of the Nebraska Workers' Compensation Act. By joint stipulation of the parties, the case was bifurcated so that the trial judge could first determine whether D B Feedyards fit within the exception.

In an order filed January 22, 2001, the trial judge resolved this issue in favor of Larsen, concluding:

> The Court finds that the enterprise [D B Feedyards] was engaged in on November 13, 1999, while [Larsen] was roping a steer and was injured was a commercial business

> separate and distinct from farming and ranching. The sheer size of [D B Feedyards'] operation shows that it is more in the nature of a commercial enterprise rather than on [sic] old-fashioned farm and ranch operation. Employers operating businesses performing commercial services primarily for others, even though the task performed may commonly occur on a farm or a ranch, do not employ "farm or ranch laborers" within the meaning of Nebraska Revised Statute, Section 48-106.

This decision was affirmed without an opinion by a three-judge review panel of the Workers' Compensation Court. D B Feedyards perfected a timely appeal to the Nebraska Court of Appeals and filed a petition to bypass, which we granted.

ASSIGNMENTS OF ERROR

D B Feedyards assigns, restated, that the trial judge's decision as affirmed by the review panel erred as a matter of law in its determination as to Larsen's injury sustained on November 13, 1999, that D B Feedyards was not an excepted employer within the meaning of § 48-106(2) and therefore in its conclusion that Larsen was a covered employee subject to the provisions of the Nebraska Workers' Compensation Act.

STANDARD OF REVIEW

[1] An appellate court is obligated in workers' compensation cases to make its own determinations as to questions of law. *Rodriguez v. Monfort, Inc.*, 262 Neb. 800, 635 N.W.2d 439 (2001); *Thornton v. Grand Island Contract Carriers*, 262 Neb. 740, 634 N.W.2d 794 (2001); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

ANALYSIS

Jurisdiction.

[2-4] Before reaching the legal issues presented for review, it is the duty of an appellate court to determine whether it has jurisdiction over the matter before it. *Scottsdale Ins. Co. v. City of Lincoln*, 260 Neb. 372, 617 N.W.2d 806 (2000); *Billingsley v. BFM Liquor Mgmt.*, 259 Neb. 992, 613 N.W.2d 478 (2000); *Airport Auth. of Village of Greeley v. Dugan*, 259 Neb. 860, 612 N.W.2d 913 (2000). For an appellate court to acquire jurisdiction

of an appeal, there must be a final order entered by the court from which the appeal is taken; conversely, an appellate court is without jurisdiction to entertain appeals from nonfinal orders. *Chief Indus. v. Great Northern Ins. Co.*, 259 Neb. 771, 612 N.W.2d 225 (2000); *Thompson v. Kiewit Constr. Co.*, 258 Neb. 323, 603 N.W.2d 368 (1999). When an appellate court is without jurisdiction to act, the appeal must be dismissed. *Thompson v. Kiewit Constr. Co., supra.*

Larsen argues that because the trial judge's order merely gave him the opportunity to proceed to the merits of his claim and did not resolve the issue of compensation, the order is not final and may not be appealed. We disagree.

[5-7] The three types of final orders which may be reviewed on appeal are (1) an order which affects a substantial right and which determines the action and prevents a judgment, (2) an order affecting a substantial right made during a special proceeding, and (3) an order affecting a substantial right made on summary application in an action after judgment is rendered. See, Neb. Rev. Stat. § 25-1902 (Reissue 1995); *State v. Gibbs*, 253 Neb. 241, 570 N.W.2d 326 (1997); *Richardson v. Griffiths*, 251 Neb. 825, 560 N.W.2d 430 (1997); *Tess v. Lawyers Title Ins. Corp.*, 251 Neb. 501, 557 N.W.2d 696 (1997). It is well settled that a workers' compensation case is a "special proceeding" for appellate purposes. See *Thompson v. Kiewit Constr. Co., supra.* The order of the trial judge as affirmed by the review panel eliminated what would have been a complete defense to the claim and thus affected a substantial right of D B Feedyards. See *SID No. 1 v. Nebraska Pub. Power Dist.*, 253 Neb. 917, 573 N.W.2d 460 (1998). Accordingly, we have jurisdiction of this appeal.

Larsen as Covered Employee.

D B Feedyards appeals the decision of the trial judge as affirmed by the review panel concluding that Larsen was covered under the Nebraska Workers' Compensation Act. D B Feedyards specifically claims that because it was engaged in the business of farming or ranching, it is an excepted employer under § 48-106(2) and that, therefore, its employee Larsen was not covered by the Nebraska Workers' Compensation Act. Larsen argues in response that D B Feedyards was primarily engaged in a commercial

enterprise, that D B Feedyards is not an excepted employer, and that the trial judge correctly concluded that Larsen was an employee covered by the Nebraska Workers' Compensation Act. In view of the statute, the case law, and the facts of this case, we agree with the conclusion of the trial judge as affirmed by the review panel that Larsen was a covered employee.

The Nebraska Workers' Compensation Act applies to employers described in § 48-106(1), but it does not apply to employers identified in § 48-106(2). The statutory language at issue in this case, § 48-106(2), provides in pertinent part, "The following are . . . not within the provisions of the Nebraska Workers' Compensation Act: . . . employers of farm or ranch laborers . . . ." We long ago observed that the agricultural exception statutes in other states generally focus on the characteristics of the laborer who is excluded from workers' compensation coverage, whereas under Nebraska's statutory language, the agricultural exception focuses on the employer of such laborer. In *Keefover v. Vasey*, 112 Neb. 424, 427, 199 N.W. 799, 800 (1924), we specifically stated, "It is worthy of note that in these other states the emphasis seems to be placed upon the exclusion of the laborer, while in this state it rests upon the exclusion of the employer of such labor." We have further noted that the classification of the exception as a function of the employer's status is a legislative prerogative. *Id.* See, also, *Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984); *Otto v. Hahn*, 209 Neb. 114, 306 N.W.2d 587 (1981).

[8] In keeping with the language of § 48-106(2) excepting "employers" of farm and ranch laborers, our recent cases have emphasized that it is the nature of the employer's business which determines the exception. In *Leppert v. Parker*, we said, "It is clear from both the statute and the cases that it is the nature of the employer's business which determines the exemption, and not the work performed by the employee." 218 Neb. at 67, 352 N.W.2d at 182. See, also, *Bartunek v. Becker*, 222 Neb. 126, 382 N.W.2d 300 (1986). In *Leppert v. Parker*, we observed that although the emphasis is on the employer's operation in a § 48-106(2) analysis, the cases arising under § 48-106(2) nevertheless show that a case-by-case factual examination is required. In this regard, although the task the employee is performing at the time of the injury is relevant to the inquiry, see *Leppert v.*

Parker, supra, and *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963), the fact that the injury occurred on the farm or ranch and the fact that the work itself could be characterized as farm or ranch labor does not control whether the employee is covered. *Campos v. Tomoi, supra.*

The farming exception under discussion was enacted in 1913, and the exception for ranching was added in 1945. 1913 Neb. Laws, ch. 198, § 6(2), p. 580; 1945 Neb. Laws, ch. 111, § 1, p. 356. More than 30 years ago, we acknowledged that

> old-fashioned farming and ranching contemplated by the Legislature at the time of the adoption of the [Nebraska Workers'] Compensation Act has been extensively affected by mechanization, specialization, and scientific advancement. The growth in the size of farms and the constantly accelerating changes in methods and machines, together with spiraling costs, have spawned a multitude of commercial businesses which provide equipment and specialized services for farmers and ranchers. These developments have, in some cases, created a type and kind of regular commercial business, separate and distinct from farming and ranching.

Hawthorne v. Hawthorne, 184 Neb. 372, 378, 167 N.W.2d 564, 567 (1969). It has been stated that "[s]ometimes intensive specialization, if carried too far, is enough to transform agriculture to commerce." 4 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 75.03[5] at 75-13 (2002).

[9] Given the realities of modern farming and ranching, we have observed that under the Nebraska Workers' Compensation Act, an employer may be engaged in several businesses. *Bartunek v. Becker, supra.* In *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 527, 340 N.W.2d 4, 8 (1983), we held that "one employer may engage in two separate businesses, one subject to the workmen's compensation law and one exempt from that law." We also stated:

> "[T]he fact that an employer is engaged in farming does not remove from the coverage of the statute another business or occupation carried on by the employer which is otherwise within the coverage of the [workers' compensation] statute, nor does it subject the farming business to the statute."

Id. at 527, 340 N.W.2d at 8 (quoting 99 C.J.S. *Workmen's Compensation* § 33 (1958)).

D B Feedyards emphasizes on appeal that its operations are in the nature of farming and ranching and that the trial judge's determination that D B Feedyards was not excepted from the Nebraska Workers' Compensation Act for purposes of this case is in error. We do not agree. In the instant case, the parties stipulated to the facts, and the determinations made by the trial judge derived from the stipulation are supported by the record and the law.

The trial judge focused on the activities of the employer, as he should under § 48-106(2). See, *Bartunek v. Becker*, 222 Neb. 126, 382 N.W.2d 300 (1986); *Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984). The record shows that D B Feedyards offers a specialized service to its customers, the feeding of cattle. See *Hawthorne v. Hawthorne, supra*. The trial judge found that in connection with Larsen's claim, D B Feedyards was set up as a commercial business on November 13, 1999, when and where Larsen was injured. The facts that D B Feedyards averages 5,000 head of cattle on feed, one-half to three-fourths of which are owned by customers of D B Feedyards, and that Larsen was injured while roping a steer which was owned by a customer of D B Feedyards support the trial judge's decision that Larsen was performing tasks for a commercial employer and thus not a farm or ranch laborer within the meaning of the workers' compensation law.

D B Feedyards appears to urge on appeal that because D B Feedyards is engaged in farming and ranching for its own account, it cannot also be a commercial enterprise for purposes of § 48-106(2). Contrary to D B Feedyards' assertion on appeal, the trial judge's determinations do not preclude the existence of two businesses being operated by D B Feedyards such that one is commercial and subject to the workers' compensation laws and the other is excepted from the workers' compensation laws under § 48-106(2). See, *Bartunek v. Becker, supra*; *Brown v. Leavitt Lane Farm, supra*. The tasks Larsen was performing when and where he was injured in this case were for the benefit of a separate commercial business conducted by D B Feedyards, which enterprise consists of feeding the cattle of the customers

of D B Feedyards. The trial judge's conclusion, as affirmed by the review panel, that D B Feedyards was not an employer excepted from the compensation laws under § 48-106(2) in this case was correct. The judgment is affirmed.

CONCLUSION

For the reasons discussed above, we conclude that the trial judge as affirmed by the review panel did not err in determining that D B Feedyards was not excepted from the Nebraska Workers' Compensation Act as an employer of farm or ranch laborers in this case. The judgment is affirmed.

AFFIRMED.

HENDRY, C.J., not participating.

STEPHAN, J., dissenting.

I agree with the majority that under Nebraska law, it is the nature of the employer's business, and not the work performed by the employee, that determines whether the employer is exempt from the workers' compensation laws. See *Leppert v. Parker*, 218 Neb. 63, 352 N.W.2d 180 (1984). However, I cannot accept the majority's premise that D B Feedyards was engaged in two separate and distinct enterprises, one agricultural and one commercial, differentiated solely by the ownership of the cattle on feed. Nor can I accept the majority's decision to determine the applicability of the farm or ranch laborer exemption based upon the narrow and irrelevant question of whose steer was being roped at the time of the injury. In my view, all of the employer's operations fell within the farm or ranch laborer exemption codified at Neb. Rev. Stat. § 48-106(2) (Reissue 1998).

The facts in this case bear no semblance to those in prior cases in which we have recognized that an employer may be engaged in two separate enterprises, one agricultural and one commercial. For example, in *Bartunek v. Becker*, 222 Neb. 126, 129, 382 N.W.2d 300, 301 (1986), cited by the majority, we held that an employer who operated an automobile body shop on a farm which he and his father owned was engaged in "two businesses, one a farming operation which is exempt under [§ 48-106(2)] and the other an auto body shop which is not exempt." See, also, *Brown v. Leavitt Lane Farm*, 215 Neb. 522, 340 N.W.2d 4 (1983) (holding employer's general farming activities on his own land separate

and distinct business from his unrelated sale of nutrition products); *Campos v. Tomoi*, 175 Neb. 555, 122 N.W.2d 473 (1963) (indicating employers' general farming activities on own land separate and distinct business from employers' custom hay grinding services provided offsite). In all of our prior cases involving the operation of two businesses, there was a discernible separation of the two enterprises. Conversely, however, the record in this case demonstrates that D B Feedyards conducts a single, integrated operation in which its land is cultivated for the production of agricultural crops which are then used on D B Feedyards' premises to feed animals for livestock production, including animals owned by D B Feedyards and animals owned by others. Under these facts, it is impossible to draw a meaningful distinction between operations performed by D B Feedyards that are related exclusively to its own farming activities, and thus within the exemption, and those operations performed primarily for the benefit of a third-party consumer. To conclude that D B Feedyards is engaged in two separate businesses on these facts, one subject to the exemption and one not, "would tax our powers of distinction to the point of confusion." *Keefover v. Vasey*, 112 Neb. 424, 432, 199 N.W. 799, 802 (1924) (concluding question of whether grain thresher was farm laborer could not rest solely upon factual determination of whose grain was being threshed at time of injury). As briefed and argued by the parties, the precise issue presented is whether D B Feedyards was engaged in one business of farming or ranching, or in one commercial enterprise distinct from farming and ranching.

Addressing the issue as presented in this manner, I would conclude that D B Feedyards was engaged in one business of farming and ranching. This is not a case where intensive specialization has transformed an agricultural endeavor into a commercial venture. Our prior case law on this subject is factually distinguishable. In *Hawthorne v. Hawthorne*, 184 Neb. 372, 167 N.W.2d 564 (1969), we held that an employer engaged solely in custom combining for the public as a regular commercial business was not an employer of farm or ranch laborers within the meaning of § 48-106(2). Similarly, in *Campos v. Tomoi, supra*, we held that farmers who formed a partnership to perform custom hay grinding for cattle feeders did not fall within the statutory exemption when the

grinding services were unrelated to the farmers' day-to-day farming activities and were performed offsite. In both *Campos* and *Hawthorne*, the custom services were conducted away from the employers' premises and involved a single and independent aspect of crop and livestock production, i.e., harvesting grain in *Hawthorne* and grinding cattle feed in *Campos*. As noted, in the present case the record discloses a single integrated operation in which land was cultivated for the production of agricultural crops which were then used on D B Feedyards' premises to feed animals for livestock production, including animals owned by D B Feedyards and animals owned by others which D B Feedyards kept fed on its land. The same land, equipment, and labor are used regardless of who owns the cattle, and D B Feedyards' activities are not limited solely to the specialized feeding of animals owned by third parties. The essential nature and character of the enterprise operated by D B Feedyards is the same regardless of whether revenue is generated by the sale of its own fattened cattle or from the fees it receives for feeding cattle owned by others. Thus, D B Feedyards' entire operation constituted farming and ranching, albeit on a scale which was probably not envisioned by the Legislature when it enacted the farm laborer exemption in 1913 and added the ranch laborer exemption in 1945.

Based on the above, I would conclude that D B Feedyards was engaged in the business of farming and ranching and that it hired Larsen to perform tasks generally associated with that enterprise. Accordingly, it was an employer of farm or ranch laborers within the meaning of § 48-106(2) and not subject to the Nebraska Workers' Compensation Act.

Moreover, in my opinion, the fact-intensive nature of the present inquiry into the applicability of the farm or ranch laborer exemption benefits neither employers nor employees, and our prior case law on the subject has done little to clarify the parameters of the exemption. Although none of our prior case law has recognized it, since Initiative Measure No. 300 was adopted by the people of Nebraska in 1982, the Nebraska Constitution has defined "farming or ranching" in the context of what constitutes a family farm to mean "(i) the cultivation of land for the production of agricultural crops, fruit, or other horticultural products, or

(ii) the ownership, keeping or feeding of animals for the production of livestock or livestock products." Neb. Const. art. XII, § 8. This constitutional definition provides a plain and workable test to apply to the language of the exemption in § 48-106(2). Based upon such test, I would hold as a matter of law that D B Feedyards' entire operation constituted farming or ranching and that it was therefore an exempt employer of farm or ranch laborers within the meaning of § 48-106(2).

For these reasons, I respectfully dissent.

GERRARD, J., joins in this dissent.

GERRARD, J., dissenting.

Under the lamentable state of our farm and ranch workers' compensation law, it appears that employer liability turns not on whose ox was gored, but on whose steer was roped. That such an otherwise insignificant distinction should be meaningful indicates to me that Neb. Rev. Stat. § 48-106(2) (Reissue 1998) needs serious reconsideration at the Legislature's earliest convenience.

Justice Stephan's analysis is on point, and given the language of § 48-106(2) and our prior jurisprudence, the facts of this case lead to the conclusion that D B Feedyards was an exempt employer of farm or ranch laborers. Thus, I join his dissent. The problem, of course, is that the lack of workers' compensation coverage for such an obviously hazardous activity goes against every intuitive bone in a judge's body—which is why I write separately.

Section 48-106(2) provides, in relevant part, that "employers of farm or ranch laborers" are "declared not to be hazardous occupations and not within the provisions of the Nebraska Workers' Compensation Act." Such a declaration is ludicrous given the nature of farm and ranch work. Nearly 20 years ago, we observed that

> the statement contained in § 48-106(2) to the effect that farm or ranch labor is not a hazardous occupation is patently silly, and while we would agree that subjecting someone to the likelihood of being kicked in the knee by a horse or being pulled into a combine is as hazardous as any office work covered by the act, nevertheless, the Legislature, which has absolute control in this matter, has made such a classification, and absent a determination by

this court that the classification violates the Nebraska Constitution, we are compelled to apply the law as written. *Leppert v. Parker*, 218 Neb. 63, 68, 352 N.W.2d 180, 183 (1984). That straightforward observation has drawn no amendment to the statute.

Equally troubling, the Legislature has not defined "employers of farm or ranch laborers" or, alternatively, attempted to distinguish laborers on the basis of the work they do, rather than the nature of their employers. Nonetheless, despite the defects of § 48-106(2), courts must still decide the cases presented, and in the absence of definitive guidance from the Legislature, we have resorted to "an examination on a case-by-case basis of the facts in each particular instance." *Leppert*, 218 Neb. at 67, 352 N.W.2d at 182. While it is a truism that each case is decided on its own unique facts, our piecemeal consideration of these cases has degenerated, as the present case demonstrates. Workers' compensation liability cannot possibly depend on whose steer the claimant was roping, yet that is precisely the circumstance that confronts the court today.

"A fundamental element of Anglo-American jurisprudence is the principle that the law should be stable, fostering both equality and predictability of treatment." *Metro Renovation v. State*, 249 Neb. 337, 349, 543 N.W.2d 715, 724 (1996) (Connolly, J., concurring in result). Our workers' compensation law, with respect to farm and ranch laborers, fosters neither; workers engaged in identical labors can be treated differently based on the business structure chosen by their employers, and workers' treatment turns on distinctions that are too subtle to be understood or anticipated.

In short, the Legislature needs to speak on this matter and provide statutory definitions that are clear and meaningful. The Legislature is the appropriate forum for the collective resolution of questions of public policy. See *Parnell v. Good Samaritan Health Sys.*, 260 Neb. 877, 620 N.W.2d 354 (2000). Should the Legislature determine, out of articulated and legitimate policy concerns, that some, or all, farm and ranch laborers should be exempt from the Nebraska Workers' Compensation Act, then the Legislature should so provide in a manner that clearly delineates the scope of the act. Employers and laborers may then govern

their affairs accordingly. Should the Legislature continue to ignore the matter, this court will have little alternative but to continue its semantic distinctions between "farm or ranch" cattle and "commercial" cattle, and similar oddities. In that case, to the purchasers of farm and ranch liability or workers' compensation insurance coverage—caveat emptor.

STEPHAN, J., joins in this dissent.

STATE OF NEBRASKA EX REL. SPECIAL COUNSEL FOR DISCIPLINE OF THE NEBRASKA SUPREME COURT, RELATOR, V. ROBERT J. SIVICK, RESPONDENT.

648 N.W.2d 315

Filed July 26, 2002. No. S-01-901.

Original action. Judgment of pubic reprimand.

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

PER CURIAM.

INTRODUCTION

On August 9, 2001, formal charges were filed by the Special Counsel for Discipline of the Nebraska Supreme Court, relator, against respondent, Robert J. Sivick. Respondent disputed certain allegations. A referee was appointed and heard evidence. The referee filed a report on February 12, 2002. With respect to counts I, II, and III, the referee concluded that respondent's conduct breached disciplinary rules of the Code of Professional Responsibility and his oath as an attorney, see Neb. Rev. Stat. § 7-104 (Reissue 1997), and recommended specified discipline. Neither relator nor respondent filed exceptions to the referee's report.

FACTS

Respondent was admitted to the practice of law in the State of Nebraska on September 13, 1988. He has practiced law primarily in Douglas County.

The substance of the referee's findings may be summarized as follows:

Count I generally involves an incident which occurred on March 2, 2000, in which respondent engaged in an angry personal conversation in open court with a judge of the county court for Douglas County following the judge's public criticism of a fellow judge, the latter of whom is respondent's spouse. It is a matter of public record that the Nebraska Commission on Judicial Qualifications found that the judge's "insistence on making a heated private conversation public, and participation in an angry dispute in open court" was inappropriate. The judge was reprimanded. See *In re Complaint Against Prochaska*, No. S-35-010005 (Neb. Comm. on Jud. Qual. May 17, 2002). Among the comments included in this exchange, respondent questioned the impartiality of the judge's decision in a pending case. The referee found by clear and convincing evidence that respondent had admitted that he yelled at the judge, that he interrupted the judge, and that he was rude. The referee also found by clear and convincing evidence that respondent's "tirade" adversely reflects on respondent's fitness to practice law in violation of Canon 1, DR 1-102(A)(6); that by virtue of his remarks regarding the pending case, he engaged in undignified or discourteous conduct which is degrading to the tribunal while appearing in his professional capacity, in violation of Canon 7, DR 7-106(C)(6); and that the foregoing violations of disciplinary rules violated DR 1-102(A)(1).

Count II generally involves a letter respondent wrote to Chief Justice John V. Hendry on July 27, 2000, regarding both the March 2 incident referred to in count I and a subsequent appearance by respondent in front of the same judge on June 15. The referee found by clear and convincing evidence that the letter contained numerous false statements regarding various matters, including the judge's handling of the pending case referred to in count I without respondent's investigating the accuracy of his accusatory statements, and thus, that respondent had made false accusations against a judge, in violation of Canon 8, DR 8-102(B). The referee also found by clear and convincing evidence that respondent had engaged in conduct that adversely reflected on his fitness to practice law, in violation of DR 1-102(A)(6); engaged in conduct that was prejudicial to the administration of justice, in violation of DR 1-102(A)(5);

knowingly made false statements of law or fact in representation of a client, in violation of Canon 7, DR 7-102(A)(5); and violated DR 1-102(A)(1) through the foregoing violations of disciplinary rules.

Count III generally involves the course of this disciplinary proceeding. A letter of complaint was received by the office of the Counsel for Discipline on August 23, 2000, regarding respondent's conduct on March 2 and June 15 before the judge referred to in count I. The referee found by clear and convincing evidence that respondent failed to substantively respond to the office of the Counsel for Discipline's and the special counsel's inquiries regarding the matters raised in the letter of complaint without excuse and that such failures were prejudicial to the administration of justice, in violation of DR 1-102(A)(5), and that respondent violated a disciplinary rule, constituting a violation of DR 1-102(A)(1). The referee also found by clear and convincing evidence that respondent violated his oath of office as an attorney. See § 7-104.

As summarized above, in his report, the referee specifically found by clear and convincing evidence that respondent had violated the disciplinary rules recited above and his oath as an attorney. With respect to the discipline which ought to be imposed for the foregoing violations, and considering the mitigating and aggravating factors the referee found present in the case, the referee recommended respondent receive a public reprimand and probation for a period no less than 1 year.

ANALYSIS

In view of the fact that neither party filed written exceptions to the referee's report, relator filed a motion under Neb. Ct. R. of Discipline 10(L) (rev. 2001). When no exceptions are filed, the Nebraska Supreme Court may consider the referee's findings final and conclusive. *State ex rel. Counsel for Dis. v. Apker*, 263 Neb. 741, 642 N.W.2d 162 (2002). Based upon the findings in the referee's report, which we consider to be final and conclusive, we conclude the formal charges are supported by clear and convincing evidence.

A proceeding to discipline an attorney is a trial de novo on the record. *Apker, supra*. To sustain a charge in a disciplinary

proceeding against an attorney, a charge must be established by clear and convincing evidence. *Id.* Violation of a disciplinary rule concerning the practice of law is a ground for discipline. *Id.*

Based on the record and the undisputed findings of the referee, we find that the above-referenced facts have been established by clear and convincing evidence. Based on the foregoing evidence, we conclude that by virtue of respondent's conduct, respondent has violated DR 1-102(A)(1), (5), and (6); DR 7-102(A)(5); DR 7-106(C)(6); and DR 8-102(B). We further conclude that respondent has violated the attorney's oath of office. See § 7-104.

We have stated that " '[t]he basic issues in a disciplinary proceeding against a lawyer are whether discipline should be imposed and, if so, the type of discipline appropriate under the circumstances.' " *State ex rel. NSBA v. Frank*, 262 Neb. 299, 304, 631 N.W.2d 485, 490 (2001) (quoting *State ex rel. NSBA v. Brown*, 251 Neb. 815, 560 N.W.2d 123 (1997)). Neb. Ct. R. of Discipline 4 (rev. 2001) provides that the following may be considered by the court as sanctions for attorney misconduct: (1) disbarment; (2) suspension for a fixed period of time; (3) probation in lieu of suspension, on such terms as the court may designate; (4) censure and reprimand; or (5) temporary suspension.

With respect to the imposition of attorney discipline in an individual case, we have stated that " '[e]ach case justifying discipline of an attorney must be evaluated individually in light of the particular facts and circumstances of that case.' " *State ex rel. NSBA v. Frank*, 262 Neb. at 304, 631 N.W.2d at 490 (quoting *State ex rel. NSBA v. Rothery*, 260 Neb. 762, 619 N.W.2d 590 (2000)). For purposes of determining the proper discipline of an attorney, this court considers the attorney's acts both underlying the events of the case and throughout the proceeding. *Frank, supra*; *State ex rel. NSBA v. Freese*, 259 Neb. 530, 611 N.W.2d 80 (2000); *State ex rel. NSBA v. Denton*, 258 Neb. 600, 604 N.W.2d 832 (2000).

To determine whether and to what extent discipline should be imposed in a lawyer discipline proceeding, this court considers the following facts: (1) the nature of the offense, (2) the need for deterring others, (3) the maintenance of the reputation of the bar as a whole, (4) the protection of the public, (5) the attitude of the offender generally, and (6) the offender's present or future fitness

to continue in the practice of law. *Apker, supra*; *State ex rel. NSBA v. Gallner*, 263 Neb. 135, 638 N.W.2d 819 (2002).

We have noted that the determination of an appropriate penalty to be imposed on an attorney requires consideration of any mitigating factors. *Apker, supra*; *State ex rel. NSBA v. Abrahamson*, 262 Neb. 632, 634 N.W.2d 462 (2001).

The evidence in the present case established the misconduct charged. As mitigating factors, we note that respondent has not received prior discipline, there is evidence of his continuing commitment to the legal profession and the community, and respondent indicates regret with respect to the underlying events and the initial manner in which he approached this disciplinary proceeding.

We have considered the record, the findings which have been established by clear and convincing evidence, and the applicable law. We find that the three counts in the formal charges stem from the single underlying event of March 2, 2000, during which the judge inappropriately insisted on making a personal and angry dispute with respondent public in open court. Upon due consideration, we find that respondent should be publicly reprimanded. We do not deem a term of probation to be appropriate discipline in this case.

CONCLUSION

The motion for the judgment on the pleadings is granted. It is the judgment of this court that respondent should be reprimanded. Respondent is hereby publicly reprimanded. Respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. § 7-114 (Reissue 1997) and Neb. Ct. R. of Discipline 23 (rev. 2001), including the total referee's fee of $5,144.87, previously approved by the court.

JUDGMENT OF PUBLIC REPRIMAND.

HENDRY, C.J., not participating.