

**IN THE DISTRICT COURT OF BROWN COUNTY, NEBRASKA**

**GARY KELLY,**

Plaintiff-Appellee,

vs.

**JEFF FREDERICKSON,**

Defendant-Appellant.

Case No. CI00-59

**JUDGMENT ON APPEAL**

**DATE OF HEARING:** February 16, 2001.  
**DATE OF RENDITION:** February 17, 2001.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**TYPE OF HEARING:** Oral arguments on appeal from county court.  
**APPEARANCES:**  
For plaintiff-appellee: Rodney J. Palmer.  
For defendant-appellant: W. Gerald O’Kief.  
**SUBJECT OF JUDGMENT:** Appeal from county court judgment.  
**PROCEEDINGS:** See journal entry rendered February 17, 2001.  
**MEMORANDUM:**

1. Gary Kelly (Kelly), the plaintiff below, filed his petition with the county court against Jeff Frederickson (Frederickson) claiming forcible detainer. Frederickson responded to the petition and summons with a written motion for continuance. The motion stated as cause that “[d]efendant’s attorney will be out of town on October 16, 2000, . . .” T6.

2. The matter apparently came before the county court on October 16. The judgment (entitled “Order”) was not rendered or entered until October 25, 2000. T7. The judgment recites that no personal appearance was made for defendant. The judgment next recites that the court overruled the motion for continuance because there was “no showing of good cause or appearance by the [d]efendant . . . .” T7. The judgment recites that the court received evidence. It then recites “that the [d]efendant has not personally appeared, that no answer has been filed and that he is in default.” T7. The judgment then

recites granting of judgment for restitution of the premises and costs in favor of the plaintiff. Frederickson appeals.

3. There is no bill of exceptions despite the defendant's praecipe for bill of exceptions filed with the county court on November 9. The praecipe for bill of exceptions specifically requests "all testimony taken and evidence introduced at a [h]earing held in the [c]ounty [c]ourt on the 16<sup>th</sup> day of October, 2000." T13. The notice of appeal was filed with the county court on November 2. The bill of exceptions was due on December 14. Frederickson filed a statement of errors with this court on November 27, 2000. On December 1, 2000, an affidavit was executed by the clerk-magistrate of the county court and filed with this court. The affidavit states that "a search of the files and records of the Brown County Court discloses that no steno type [sic] notes, [j]udge's notes, exhibits or other record containing any testimony at any hearing in this case is presently in my possession to the best of my belief and knowledge; that there is nothing which I can have transcribed to file as a [b]ill of [e]xceptions." Upon the expiration of the time for filing a bill of exceptions, the matter was scheduled for oral arguments after an opportunity to submit briefs.

4. In an appeal from the county court general civil docket, the district court acts as an intermediate court of appeals and not as a trial court. *In re Conservatorship of Mosel*, 234 Neb. 86, 449 N.W.2d 220 (1989). Both the district court and a higher appellate court generally review appeals from the county court for error appearing on the record. *State v. Patterson*, 7 Neb. App. 816, 585 N.W.2d 125 (1998).

5. The higher appellate courts have repeatedly stated that it is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed. E.g., *In re App. of Sanitary and Improvement District No. 384*, 259 Neb. 351, \_\_\_ N.W.2d \_\_\_ (2000). However, this court finds no instance applying this rule where the failure to produce a bill of exceptions stems from the failure of the lower court to produce a record. Consequently, despite Kelly's counsel's strenuous argument relying thereon, this court finds no support for application of the rule in this case.

6. Kelly's counsel also asserted that County Court General Rule 52(I)G required Frederickson's statement of errors to be filed within 10 days of the notice of appeal. However, that rule

has been amended to require the filing within 10 days of the filing of the bill of exceptions with the district court. Neb. Ct. R. of Cty. Cts. 52(I)G (rev. 2000). See also Neb. Ct. R. of Dist. Cts. 18 (rev. 2000). The statement of errors was filed prior to the deadline for filing of the bill of exceptions. Although the express condition has not yet been fulfilled (i.e., no bill of exceptions has been filed), some deadline probably applies. This court need not decide precisely where that line lies, as it is clear that Frederickson rests safely on the proper side. Kelly's contention lacks merit.

7. Frederickson assigns four errors, which may be consolidated to three issues. First, he claims that the county court erred in denying a continuance. He asserts that § 25-21,225 required the granting of the continuance as a matter of right. NEB. REV. STAT. § 25-21,225 (Reissue 1995). This court finds no published decisions interpreting that statute. That section traces its lineage to former statutes relating to justices of the peace and to municipal courts. See NEB. REV. STAT. § 26-1,125 and 27-1408 (Reissue 1964). The only decision located by this court citing the statute or its predecessors is *Sporer v. Herlik*, 158 Neb. 644, 64 N.W.2d 342 (1954). That case provides little guidance, as the municipal court initially granted a 7-day continuance, after which the defendant failed to appear for trial. The court did not discuss the question of entitlement to the initial continuance.

8. The meaning of a statute is a question of law, and a reviewing court is obligated to reach conclusions independent of the determination made by the court below. *Jacob v. Schlichtman*, 261 Neb. 169, \_\_\_ N.W.2d \_\_\_ (2001). In discerning the meaning of 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, as it is the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself. *Id.*

9. The plain language of the statute imposes a limitation on the power of the court to grant a continuance. The words used do not address the decision-making criteria for granting a continuance of 7 days or fewer. This court concludes that the statute does not require the granting of a continuance as a matter of right.

10. Generally, a motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Weis v. Weis*, 260 Neb. 1015, \_\_\_ N.W.2d \_\_\_ (2001). An abuse of discretion occurs when a trial court's decision is based upon

reasons that are untenable or unreasonable or if its action is clearly against justice or conscience, reason, and evidence. *Id.* As Frederickson did not appear on October 16 in person or by counsel, the only cause before the county court was the bare statement of the defendant about his attorney. The motion for continuance was submitted by the defendant pro se and did not even identify the attorney. Moreover, the motion lacked any supporting affidavit. NEB. REV. STAT. § 25-1148 (Reissue 1995). The county court did not abuse its discretion in denying the motion for continuance.

11. Frederickson also attacks the county court finding that Frederickson was in default and claims that the county court failed to “try the cause as though he were present.” NEB. REV. STAT. § 25-21,224 (Reissue 1995). In *Sporer*, the Supreme Court discussed the nature of a default in the context of forcible entry and detainer. The court observed that, in the strict sense, a default judgment is one taken against a defendant who, having been duly summoned in an action, fails to enter an appearance in time; but the term is also now ordinarily applied where default occurs after appearance as well as before, and may be rendered against a defendant who fails to answer or plead or take some step required within the time limited by statute or authoritative order or rule of court, or after issues joined fails to appear at the hearing or trial when the same is called or set for trial, as required by statute or authoritative rule or order of court. *Sporer v. Herlik, supra*. Consequently, the county court did not err in using the term “default” to describe Frederickson’s failure to personally appear.

12. However, it is clear that the statutory procedure does not require the defendant to file a written answer on the summary issue of restitution of premises. Section 25-21,223 requires the summons to state “the time and place of trial of the action for possession, and the answer day *for other causes of action . . .*” NEB. REV. STAT. § 25-21,223 (Reissue 1995) (emphasis supplied). The trial of the action upon the complaint and the summons has ancient roots in Nebraska jurisprudence. *Gallagher v. Connell*, 23 Neb. 391, 36 N.W. 566 (1888). Indeed, the statute requires that if the defendant does not appear, “the court shall try the cause as though he were present.” NEB. REV. STAT. § 25-21,224 (Reissue 1995). The county court judgment recites that the court received evidence. T7. Thus, there is nothing to show that the county court failed to so try the case. To the contrary, the judgment recites that the court did so. However, this court then faces the absence of a bill of exceptions.

13. Frederickson’s last assignment claims that the county court erred in not making a verbatim record of the trial. The county court is a court of record. *Strasser v. Ress*, 165 Neb. 858, 87 N.W.2d 619 (1958). The statutes governing appeals from the county court expressly require that “[t]estimony in all civil . . . cases in county court shall be preserved by tape recording . . . .” NEB. REV. STAT. § 25-2732(1) (Reissue 1995). Further, “[t]he transcription of such testimony, when certified to by the stenographer or court reporter who made it and settled by the court as such, shall constitute the bill of exceptions . . . .” NEB. REV. STAT. § 25-2732(3) (Reissue 1995). Although County Court General Rule 52(II)D authorizes a county judge to designate a court stenographer to settle and certify the record, there is nothing in this case to indicate that the county judge made any such election. Neb. Ct. R. of Cty. Cts. 52(II)D (rev. 2000). Ultimately, the responsibility to assure that the record is produced rests upon the trial judge.

14. Shortly after conclusion of the oral arguments, both counsel approached the court so that Kelly’s counsel could direct the court’s attention to a trial exhibit evidently filed in the county court’s file. T8. Exhibits are not part of the pleadings, and, to be made a part of the record on appeal, must be contained in a bill of exceptions or some substitute therefor. *Durkan v. Vaughan*, 259 Neb. 288, 609 N.W.2d 358 (2000); *Connor v. State*, 175 Neb. 140, 120 N.W.2d 916 (1963); *Dolen v. Dolen*, 155 Neb. 347, 51 N.W.2d 734 (1952). This court cannot consider the filed exhibit as “evidence” in the absence of a bill of exceptions.

15. In *Gerdes v. Klindt’s, Inc.*, 247 Neb. 138, 525 N.W.2d 219 (1995), the Nebraska Supreme Court left no doubt regarding the obligation of the lower courts to produce a verbatim record. It is not the trial court’s prerogative to decide what the trial record shall be. *Id.* It is the duty of the court reporter to make such a record and the obligation of the trial court to see to it that the reporter fulfills that duty. *Id.* If a bill of exceptions cannot be prepared and certified by a court reporter, it must be prepared under the direction or, and certified by, the trial judge. *Id.* 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. *Id.* Thereafter, the Supreme Court modified its rules of practice to expressly require a verbatim record of the evidence offered at trial and to prohibit waiver of that record. Neb. Ct. R. of Prac. 5A(1) (rev. 2000). That rule clearly applies to all Nebraska courts of record.

16. As the Nebraska Court of Appeals similarly described in *Lockenour v. Sculley*, 8 Neb. App. 254, \_\_\_ N.W.2d \_\_\_ (1999), the failure to make a verbatim record in the instant case prevents this court from reviewing the lower court's decision. The parties are entitled to the benefits afforded them by court rules. *Id.* This court's inability to review the matter to determine the sufficiency of the evidence is due to error by the trial court, and the result is mandated by *Gerdes. Id.* That result requires reversal, as was necessary in both *Gerdes* and *Lockenour*.

17. The judgment of the county court must be reversed and the cause remanded for a new summary trial on the issue of restitution of the premises. So far as possible, upon the issuance of the mandate of this court, the trial court must adhere to the time constraints imposed by the applicable statutory framework.

**JUDGMENT:** IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The judgment of the county court is REVERSED AND the cause is REMANDED FOR A NEW TRIAL on the issue of restitution of premises.
2. Costs on appeal are taxed to the plaintiff-appellee.
3. The mandate shall issue as provided by law.

Signed in chambers at Ainsworth, Nebraska, on February 17, 2001.  
DEEMED ENTERED upon filing by court clerk.

If checked, the Court Clerk shall:

- Mail a copy of this order to all counsel of record and to any pro se parties **and deliver a certified copy to county court.**  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- 9 Enter judgment on the judgment record.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Mail postcard/notice required by § 25-1301.01 within 3 days **stating judgment entered as "REVERSED AND REMANDED FOR A NEW TRIAL"**.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.
- Note the decision on the trial docket as: [date of filing] Signed "Judgment on Appeal" entered.  
Done on \_\_\_\_\_, 20\_\_ by \_\_\_\_.

Mailed to:

BY THE COURT:

\_\_\_\_\_  
William B. Cassel  
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE JUDGMENT OR ORDER  
AND IS INCLUDED SOLELY FOR THE CONVENIENCE OF THE CLERK OF THE DISTRICT COURT:**

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the “entry” defined by § 25-1301) on **Tuesday, February 20, 2001**, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeals would be **Thursday, March 22, 2001**. Obviously, if filed sooner, the last day for further appeal would change accordingly.
2. If further appeal is timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.
3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.
4. The clerk of the district court should be prepared to transmit the mandate on **Friday, March 23, 2001**. Again, obviously, if this judgment is filed sooner than February 20, the date would change accordingly.
5. In anticipation, at the clerk’s earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as “**REVERSED AND REMANDED FOR NEW TRIAL**”.
6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.
7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.
8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court’s instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.