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LEROY IHDE AND KAREN IHDE, HUSBAND AND WIFE, APPELLEES, V. LIDWINA KEMPKES, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF CHARLES A. WEBER, DECEASED, APPELLANT.

422 N.W.2d 788

Filed May 6, 1988. No. 86-623.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Reversed and dismissed.

Richard H. Williams, for appellant.

Kent F. Jacobs of Blevens, Blevens & Jacobs, for appellees.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

GITNICK, D.J.

Lidwina Kempkes, as personal representative of the estate of Charles A. Weber and individually, appeals from a judgment entered by the district court for Seward County, Nebraska, in which the trial court, sitting without a jury, entered judgment for the appellees, Leroy Ihde and Karen Ihde, in the sum of $3,500 against Lidwina Kempkes in her individual capacity. We reverse and dismiss.

In their petition the Ihdes alleged the following: Lidwina Kempkes was appointed personal representative of the estate of Charles A. Weber, her brother, and the filing of a bond by her was waived. She, as personal representative, conveyed certain real property by a personal representative's deed to the Ihdes, for which the personal representative was paid $3,500. The personal representative's deed covenanted that the personal representative "had legal power and lawful authority to convey" the real property. After the delivery and acceptance of the deed, objections to the title to the real property were raised by the Ihdes' attorney, which resulted in the filing of a quiet title action by the personal representative, but the trial court in that quiet title action determined that the estate of Charles A. Weber was not the owner of the real property. The Ihdes then brought this action against the personal representative for the damages they sustained for the purchase price and for improvements

made by them to the real property.

The trial court found for the Ihdes and determined that the personal representative had agreed to quiet the title to the real property but had been unable to do so because of a third-party claim thereto, and it then awarded the amount of the purchase price paid of $3,500 as damages but declined to award damages to them for the improvements made to the property on the basis that the improvements were made after the Ihdes had notice of the infirmity in the title. The Ihdes do not cross-appeal from this determination. The personal representative appeals and assigns as error, in substance, that the trial court erred in its result because the petition alleges a cause of action for breach of the covenant of the personal representative's deed that she had the lawful power and authority to convey the real property, and not a breach of contract to clear the title to the real property and convey good and merchantable title to the real property; in holding the personal representative personally liable for the damages; and in failing to hold that the doctrine of caveat emptor applies in the sale of real property by a personal representative.

While the pleadings are not absolutely clear, the theory of the appellees' petition appears to be that an express warranty of title was, in effect, made when the personal representative's deed covenanted that the personal representative had the lawful power and authority to convey the real property. The difficulty with this premise is that a covenant of lawful power and authority to convey real property is distinctly different in quality and effect from a covenant warranting title.

The usual covenant of a personal representative's deed that a personal representative has the lawful power and authority to convey real property means only that the personal representative has been given the authority and has the legal capacity to sell real property on such terms as the decedent, as absolute owner, could sell. Neb. Rev. Stat. § 30-2472 (Reissue 1985) provides: "[A] personal representative has the same power over the title to property of the estate that an absolute owner would have . . . ." Obviously, the absolute owner may negotiate to sell real property without a covenant warranting title, and in this case that is the effect of the personal

representative's deed. Neb. Rev. Stat. § 30-2476 (Reissue 1985) states: "[A] personal representative, acting reasonably for the benefit of the interested persons, may properly . . . (23) sell . . . any real . . . property . . . . The court may authorize . . . the sale . . . either upon such terms as the personal representative may determine, or upon specified terms . . . ." As is stated in 31 Am. Jur. 2d *Executors and Administrators* § 426 at 201-02 (1967):

> There is no implied warranty of title or of the soundness of an article of personalty sold by an executor or administrator acting in his representative capacity. So too, in sales of land by an executor or administrator, the purchaser, in the absence of a covenant in the deed, takes title without any warranty. An executor or administrator, not being bound to convey with any covenants except against encumbrances of his own making, conveys only the title of the decedent. In effect, the deed of the executor or administrator is the equivalent of a quitclaim deed.

Accordingly, we hold that the covenant of a personal representative's deed of lawful power and authority to convey real property is not a warranty of title and contains no implication of a covenant warranting title. Furthermore, we have previously held that the doctrine of caveat emptor applies in all judicial sales, subject to the qualification that a purchaser at a judicial sale is entitled to relief on the ground of after-discovered mistake of material facts or fraud, provided the purchaser is free from negligence. *Fisher v. Minor*, 159 Neb. 247, 66 N.W.2d 557 (1954). We are afforded no policy argument for withdrawing from this position, and an examination of the provisions of Neb. Rev. Stat. ch. 30 (Reissue 1985) reveals no provision thereof which requires a different rule.

We further note that our recording act, as set forth in Neb. Rev. Stat. § 76-238 (Reissue 1986), is intended to impart to a prospective purchaser notice of instruments which affect the title of land in which such purchaser is interested. Here, the appellees were bound to search the records for evidence that valid title existed in the estate of Charles A. Weber. That is the purpose of the recording statutes. As we have stated earlier, in *Campbell v. Ohio National Life Ins. Co.*, 161 Neb. 653, 667, 74 N.W.2d 546, 556 (1956):

> A purchaser of real estate is required to take notice of instruments properly placed of record in the office of the register of deeds. . . . Increased diligence, alertness, and scrutiny in searching for the facts are expected of a purchaser who accepts a deed that is less than a general warranty with full covenants of ownership and title.

As is stated in 34 C.J.S. *Executors and Administrators* § 642b at 619 (1942):

> The rule [of] caveat emptor applies to sales of decedent's property under order of court, and it is the general rule that the purchaser has no right to complain . . . because of defects in quantity, quality, or title, especially where . . . he had notice of, or could with reasonable diligence have discovered, the defects.

An ordinary, prudent person would have been put on inquiry as to what interest Charles A. Weber or his estate had in the real property, if any, had such person searched the record and noted the outstanding interest which resulted in the determination that the estate of Charles A. Weber was not the owner of the land here in question.

Lastly, as we perceive the petition in this case, the issue to be decided was whether the covenant of the personal representative that "the estate had legal power and lawful authority to convey" the real property had been breached.

As tried by the trial court, it decided the case on a different issue, i.e., whether the personal representative had agreed to clear the title to the property from third-party claims and whether, in effect, a warranty of title had been given by her. These issues were never pleaded in the petition. In this state pleadings frame the issues upon which a cause is to be tried, and issues in a given case are limited to those which are pleaded and advise the adversary as to what he must meet. It is the facts that are well pleaded which state a cause of action. *Circle 76 Fertilizer v. Nelsen*, 219 Neb. 661, 365 N.W.2d 460 (1985). The facts well pleaded in this case placed the personal representative on notice that she was to meet the issue of whether the estate had the lawful power and authority to convey the real property, and nothing more. However, the issues as decided by the trial court were wholly different issues than framed by the petition.

Accordingly, the trial court erred in deciding issues not properly before it.

For the reasons set out in this opinion, the judgment of the trial court is reversed and the cause dismissed; and having come to this conclusion, we need not determine the personal liability of the personal representative.

REVERSED AND DISMISSED.

ANNA LOU MICEK, APPELLANT, V. RICK L. METZGER ET AL., ALSO KNOWN AS LOT OWNERS OF SIGNAL HILL PARK AND SIGNAL HILL PARK REPLAT, APPELLEES.

422 N.W.2d 791

Filed May 6, 1988. No. 86-711.

1. **Summary Judgment.** Summary judgment is proper when pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
2. **Restrictive Covenants.** A restrictive covenant is to be construed in connection with the surrounding circumstances which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.
3. **Restrictive Covenants: Equity.** Where the owners of a tract of land have platted the same into many lots and formed and carried out a plan to sell the lots subject to covenants restricting them to the construction of homes of a certain character, equity will protect the rights of other grantees who accepted deeds in the same locality with similar restrictions.

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

William T. Oakes of Kennedy, Holland, DeLacy & Svoboda, for appellant.

H. Daniel Smith of Smith, Trustin & Schweer, for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

FAHRNBRUCH, J.

Anna Lou Micek filed suit in equity to have a protective covenant covering Lots 300 and 301 in Signal Hill Park Replat in Omaha, Nebraska, declared void and unenforceable. She appeals a summary judgment granted by the Douglas County District Court in favor of the defendant lot owners. We affirm.

Summary judgment is proper when pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to ultimate inferences that may be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Stodola v. Grunwald Mechanical Contractors, ante* p. 301, 422 N.W.2d 341 (1988); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Moseman v. L & P Investment Co.*, 226 Neb. 677, 414 N.W.2d 254 (1987).

In this case, the record reflects that in 1963 the Signal Hill Park Replat subdivision in Omaha was platted. A protective covenant affecting the subdivision and the Signal Hill Park subdivision was duly filed of record by the owner, Madeline Jacobson Properties, Inc., on July 5, 1963. Except for certain lots, this covenant restricted the use of land in the subdivisions to various types of dwellings, or church or school purposes. Lots 300 and 301 were permitted to be used for commercial, church, or school purposes. The covenant could only be modified by an instrument in writing executed by two-thirds of the owners of lots in the subdivisions or their successors in title.

On October 3, 1963, by amendment duly recorded, the original protective covenant was modified to provide, insofar as applicable here, that Lots 300 and 301, in addition to commercial, school, or church uses, could be used for various types of dwellings. This amendment was approved by two-thirds of the owners of lots in both subdivisions.

On September 16, 1965, Madeline Jacobson Properties, Inc., as sole owner of Lots 300 and 301, executed and thereafter duly recorded another protective covenant. This covenant limited the use of Lots 300 and 301 to single-family dwellings.

Although the corporation was the sole owner of Lots 300 and 301, it did not own two-thirds of the original subdivisions. After the September 1965 document was filed, Lots 300 and 301 were subdivided into parcels and sold. Seven of those parcels were sold to some of the defendants or their predecessors in title, and each parcel is used for a single-family dwelling. The remaining parcels in Lots 300 and 301 were sold to Mutual Investors, Inc., as evidenced by a deed filed September 8, 1983. Mutual Investors, Inc., then conveyed its land to Micek by deed filed February 2, 1984.

Micek's petition seeks a declaratory judgment that the 1965 covenant, limiting the use of Lots 300 and 301, is void and unenforceable. All of the Signal Hill Park and Signal Hill Park Replat lot owners have been named as defendants in this action. In view of our holding hereafter, only those lot owners who have title to parcels in Lots 300 and 301 are necessary parties.

Micek assigns as error that the trial court erred in holding that the covenant executed by Madeline Jacobson Properties, Inc., dated September 16, 1965, was a valid and enforceable covenant and is binding upon all subsequent owners of any part of Lots 300 and 301 of Signal Hill Park Replat.

It is Micek's contention that the 1965 covenant is an invalid modification of the original 1963 covenant because it was not approved by two-thirds of the lot owners of both subdivisions. The lot owners argue that the 1965 covenant is not a modification but a covenant which stands by itself. The district court found that the covenant "is a valid and enforceable covenant and is binding on all subsequent owners of the property involved, namely, Lots 300 and 301 of Signal [Hill] Park Replat in Douglas County, Nebraska, including plaintiff and defendants."

This court has long embraced the rule that a restrictive covenant is to be construed in connection with the surrounding circumstances which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the

property. *Hogue v. Dreeszen*, 161 Neb. 268, 73 N.W.2d 159 (1955); *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 266 N.W.2d 62 (1978); *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 406 N.W.2d 337 (1987). If there was a general building scheme, the purpose of which was to restrict a district to single-family residences, it matters not how it is expressed in the covenant, or what the covenant may be called. However, so far as the purpose is definitely stated in the covenant, that purpose should control. Where the owners of a tract of land have platted the same into many lots and formed and carried out a plan to sell the lots subject to covenants restricting them to the construction of homes of a certain character, equity will protect the rights of other grantees who accepted deeds in the same locality with similar restrictions. *Hogue v. Dreeszen, supra.*

The 1965 covenant expresses an intent to "limit the use of said Lots 300 and 301 to single family dwellings." The beneficiaries of this covenant are those persons who purchased a part of Lots 300 and 301 in reliance thereon. Clearly, the 1965 covenant is more restrictive than earlier protective covenants, stands on its own, and affects only the owners of parcels in Lots 300 and 301. It is valid and enforceable.

The district court was correct in finding that the 1965 covenant is valid and enforceable. The trial court's summary judgment is hereby affirmed.

AFFIRMED.

DOUGLAS A. CLARK, APPELLEE, V. RITA V. CLARK, ALSO KNOWN AS RITA V. OFFUTT, APPELLANT.

422 N.W.2d 793

Filed May 6, 1988. No. 87-655.

1. **Child Custody: Modification of Decree.** When a court has retained legal custody of the children, pursuant to Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986), a question whether to change physical custody is determined by the best interests of the children without the necessity of showing any change of circumstances

otherwise required for a change in legal custody of the children.

2. _____: _____. While a move from the jurisdiction does not by itself necessarily affect the best interests of the children, nevertheless, when considered in conjunction with other evidence, such a move may well be a key factor which would warrant a modification.
3. **Child Custody: Appeal and Error.** Custody matters are initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Sarpy County: RAYMOND J. CASE, Judge. Affirmed.

Robert J. Hovey, P.C., of Robinson, Hovey, P.C., & Kenney, for appellant.

Donald A. Roberts of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

HASTINGS, C.J.

The respondent mother has appealed from the order of the district court changing possession of the parties' minor children to the petitioner father and denying the mother's claim for additional child support. We affirm.

The parties were divorced in March 1983. Custody of the couple's two boys, Michael Clark (date of birth August 20, 1976) and Jonathan Clark (date of birth October 23, 1979), was given to the mother. The father was awarded the family residence, with possession to remain with the mother pursuant to a lease agreement between the parties. In addition, the mother was given a $5,000 lien in the property for her share of the equity. The father was ordered to pay $400 per month for child support.

In June 1985, the mother asked the court for permission to remove her children from the jurisdiction, as her new husband was being stationed at Eielson Air Force Base, Alaska. The father contested this, but the court granted the mother's request. After a hearing, the court placed custody of the

children in the court, with possession in the mother. As to visitation, the court ordered that the father would have the boys for 2 months in the summer and that the transportation expenses for this visit would be borne by the father. The court also ordered that the Christmas vacation would be divided equally between the parties. The transportation expenses for the Christmas visitations were to be paid by the mother. The court also found that the mother had breached the lease agreement and that her lien would thereby be reduced by $1,441.75.

When the time came for the father to make arrangements for the Christmas 1985 visitation, the mother told him that she could not afford to send the boys to Nebraska. As a result, the father financed the trip, and the amount of the mother's lien in the house was reduced by the amount that the father spent for the transportation expenses. As scheduled, the boys came to Nebraska for 60 days in the summer, at the father's expense.

For the Christmas 1986 visit, the father once again ran into problems. The younger son has juvenile diabetes of such severity that he cannot travel without adult supervision. The mother gave birth to a daughter on December 10, 1986, and was instructed by her doctor not to travel for 4 weeks after the birth. Therefore, she was unable to accompany the boys to Nebraska, as was necessary. Additionally, the mother felt that she could not afford to send the children to Nebraska, although this does not appear to have been a major consideration. The mother did offer to fly the father to Alaska for Christmas, but he declined, as he did not want to spend Christmas with his boys in a motel room in Alaska. Consequently, the father did not exercise his Christmas 1986 visitation.

The court order had also instructed the mother to aid the children in regular written correspondence with their father. According to the father, the children did not often communicate with him. The mother testified that the boys and she had been so busy with scouting, piano lessons, etc., that "we just haven't had the time to write the letters to their dad."

In January 1987, the father petitioned the court to modify the decree as to custody of the children, based upon the mother's alleged lack of compliance with the visitation and

communication requirements. The mother denied that a change of circumstances warranting a change of custody had taken place and cross-petitioned for an additional $200 per month child support.

The matter was heard June 10, 1987. On June 30, the court found that there had been no substantial change in circumstances which would warrant an increase in child support. Moreover, the court found that the mother's "inability and refusal" to comply with the court-ordered visitation was a change of circumstances sufficient to warrant a change of possession of the children from the mother to the father.

Since the issue of whether to award the mother additional child support becomes moot if she no longer has possession of the children, it is first necessary to determine whether the court erred in changing possession of the children to the father.

In the past we have held that an order concerning custody of the children will not be modified unless there has been a material change of circumstances indicating that the person with custody of the children is unfit *or* that the best interests of the children require such action. *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986); *Hoschar v. Hoschar*, 220 Neb. 913, 374 N.W.2d 64 (1985). There is no indication in the present case that either parent was unfit to care for the boys. Therefore, under the *Hicks* rule, the issue would be whether there has been a material change of circumstances. The trial court found that there was; however, that rule has been modified.

In *Christen v. Christen, ante* p. 268, 271, 422 N.W.2d 92, 95 (1988), we said:

> However, when a court has retained legal custody of a child in a dissolution proceeding, requiring a change of circumstances to alter physical custody of a child would impair the court's swift action which may be necessary in the best interests of the child. Therefore, we hold that, when a court has retained legal custody of a child, pursuant to § 42-364, a question whether to change physical custody is determined by the best interests of the child without the necessity of showing any change of circumstances otherwise required for a change in legal custody of the child.

The mother was unable or had refused to comply with the visitation and correspondence requirements of the order. If the trial court had been aware that the mother could not (or would not) comply with visitation, in the best interests of the children it presumably would have granted possession in the father initially.

The importance of visitation was emphasized in *Heyne v. Kucirek*, 203 Neb. 59, 277 N.W.2d 439 (1979). There, the court affirmed the lower court's modification of its decree so as to allow more contact between the petitioner and his children. The respondent, who had custody of the children, had been "uncooperative" in arranging visitation with the noncustodial parent. This court relied on the lower court's observation, " 'Visitation is a key ingredient of raising children, and it is in the best interests to be with their respective parents to the utmost. . . .' " *Id.* at 63, 277 N.W.2d at 441.

In the present case, visitation was strained by the mother's physical and economic inability to accompany her children from Alaska to Nebraska and back. While a move from the jurisdiction does not by itself necessarily affect the best interests of the children, nevertheless, when considered in conjunction with other evidence, such a move may well be a key factor which would warrant a modification. *Marez v. Marez*, 217 Neb. 615, 350 N.W.2d 531 (1984); *Scott v. Scott*, 223 Neb. 354, 389 N.W.2d 567 (1986); *Parsons v. Parsons*, 219 Neb. 736, 365 N.W.2d 841 (1985). In *Marez, supra*, this court cited *Read v. Read*, 103 Cal. App. 2d 721, 230 P.2d 46 (1951), which held that when a mother moved her children to a distant part of the state, thus rendering frequent visits with their father impracticable, that was sufficient to justify a modification of the custody provisions.

Similarly, in *Parsons v. Parsons, supra*, the custodial mother removed her children to California, which "effectively eliminated" the father's visitation. This court held that the effective denial of the father's visitation rights could be considered in determining the best interests of the children and whether such denial justified a modification.

Apparently, the trial court anticipated that problems could arise with the removal of the boys to Alaska. It therefore placed

custody in the court, with *possession* in the mother. Such a practice is authorized by Neb. Rev. Stat. § 42-364 (Cum. Supp. 1986), and, as previously stated, was recently approved in *Christen v. Christen, supra*, and also was approved in *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). The *Peterson* opinion cited *Bartlett v. Bartlett*, 193 Neb. 76, 225 N.W.2d 413 (1975), wherein this court stated that the court may retain custody of the children when it is uncertain as to where the best interests of the children lie.

> When the best interests of the children, in regard to custody, [are] not clear, the court may, and should, place custody in the court. . . .
>
> It is evident that when a court finds it necessary to place custody of minor children in the court, it does so because it is doubtful that it is cognizant of the full story relating to the best interests of the children and of the propriety of awarding custody to one of the parties.

193 Neb. at 78-79, 225 N.W.2d at 415-16. See, also, *Berry v. Berry*, 202 Neb. 540, 276 N.W.2d 200 (1979), in which this court approved of the trial court's retaining custody of the children where "the trial court was confronted with a record which did not weigh clearly either way . . . ." *Id.* at 542, 276 N.W.2d at 201.

The *Bartlett* court further explained that retaining custody of the children in the court " ' "facilitate[s] judicial supervision and summary power to act swiftly in their [the children's] best interests," ' " and that the court may reconsider its determination upon a showing of change of circumstances. 193 Neb. at 79, 225 N.W.2d at 201; *Benson v. Benson*, 190 Neb. 87, 206 N.W.2d 51 (1973); *Lueders v. Lueders*, 187 Neb. 539, 192 N.W.2d 161 (1971).

This court, in *Mason v. Mason*, 200 Neb. 476, 263 N.W.2d 865 (1978), also emphasized the advantages which result from judicial custody of the children, namely, "If it should appear at any time that the best interests and welfare of the children are adversely affected by any circumstance, the court will be able to take prompt action to correct the situation." *Id.* at 478, 263 N.W.2d at 867.

Child custody determinations are matters initially entrusted to the sound discretion of the trial court, and, on appeal,

although the Supreme Court reviews these cases de novo on the record, the trial court's determination will normally be affirmed in the absence of an abuse of discretion. Additionally, this court may give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other. *Staman v. Staman*, 225 Neb. 864, 408 N.W.2d 320 (1987); *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987). Although the present case differs somewhat because the issue is possession of the children, not custody, nevertheless the paramount consideration for this court is whether the trial court has abused its discretion in determining the best interests of the children. See *Bartlett v. Bartlett, supra.*

The district court did not abuse its discretion in placing possession of the children in the father. Although the mother's move to Alaska was not itself a factor weighing against her, the distance, and the physical and economic obstacles in overcoming that distance, hindered the father's visitation. Thus, it was in the best interests of the children that possession of the children be placed with their father. Whether the mother refused to facilitate visitation, or was merely unable to cooperate, really makes little difference. The fact that the father was effectively denied contact with his children was sufficient to warrant a change. The best interests of the children include having access to both parents. With possession in the mother, this condition was not being met.

Furthermore, it was proper for the court to keep custody of the children and only change possession. It was unclear to the court whether the move to Alaska was in the boys' best interests, and, in fact, it turned out not to be. This type of order is designed for just such a situation.

The judgment of the district court is affirmed.

AFFIRMED.

JACK MANTZ, APPELLANT, V. CONTINENTAL WESTERN INSURANCE COMPANY, A MEMBER OF ARMCO INSURANCE GROUP, APPELLEE.

422 N.W.2d 797

Filed May 6, 1988. No. 87-659.

1. **Directed Verdict.** The party against whom a motion for a direction of liability is made 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.
2. _____. A directed verdict is proper only where reasonable minds cannot differ and can only draw one conclusion from the evidence.
3. **Trial: Negligence.** Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury.
4. **Motor Vehicles: Pedestrians: Negligence.** When a pedestrian in a place of safety sees or could have seen the approach of a moving vehicle in close proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery.
5. **Motor Vehicles: Negligence: Right-of-Way.** The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout ahead or in the direction of travel, and he is bound to take notice of the road, to observe the conditions along the way, and to know what is in front of him for a reasonable distance.
6. **Motor Vehicles: Negligence.** The range of vision rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog.
7. _____: _____. A driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he can stop in time to avoid a collision with an object within the area lighted by his headlights, and the driver is negligent if he fails to do so. A motorist is not, however, negligent where the object cannot be observed by the exercise of ordinary care in time to avoid a collision.
8. **Motor Vehicles: Negligence: Words and Phrases.** In operating a motor vehicle upon a public street, a driver has a duty to have his vehicle under such reasonable control as will at all times enable him to avoid a collision or accident, assuming that other drivers or people upon the highway are also exercising ordinary care. Reasonable control requires motor vehicle drivers to take into consideration such factors as the speed of their automobiles, the condition of the highway upon which they are traveling, the traffic involved, and any other factors affecting driving conditions that may have been developed by the evidence.
9. **Circumstantial Evidence: Proof.** It is not necessary for a plaintiff to prove his case solely by direct evidence. A plaintiff may rely partially upon circumstantial evidence to support his position.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed in part, and in part reversed and remanded for a new trial.

William J. Elder of McCormack, Cooney, Mooney & Hillman, for appellant.

Alan L. Plessman, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Plaintiff-appellant, Jack Mantz, was injured when an uninsured station wagon knocked him to the pavement and again when a hit-and-run Datsun ran over one or both of his legs while Mantz was lying on the street. The accidents occurred on 13th Street in Omaha on November 9, 1984.

Mantz sued his own insurance carrier, the defendant-appellee, Continental Western Insurance Company, for damages resulting from each accident. The suit was brought under the uninsured motorist clause of Mantz' insurance policy. After Mantz presented evidence before a jury and rested, a verdict was directed in favor of the defendant, Continental, in regard to both accidents. Mantz appeals. We affirm the trial court's directed verdict as to the station wagon accident, reverse it as to the Datsun accident, and remand the cause with directions.

Mantz' petition claims that the station wagon driver and the Datsun hit-and-run driver each negligently failed to keep a proper lookout, failed to have reasonable control of her/his respective vehicle, failed to yield the right-of-way to the plaintiff, and negligently operated her/his respective vehicle at a speed in excess of that which was reasonable and prudent under the conditions existing at the time of the accidents. Mantz further claims that the station wagon driver placed him in a position of peril whereby Mantz suffered additional injuries. Finally, Mantz claims that the station wagon driver was negligent in failing to extricate him from the position of peril in which she placed him, thereby contributing to his injuries.

In its amended answer, Continental claims that Mantz was

contributorily negligent in failing to maintain a proper lookout and in failing to yield the right-of-way to the vehicles involved; that Mantz suddenly left a curb or other place of safety and walked or ran into the path of the station wagon, which was so close that it was impossible for the driver to stop; and, finally, that Mantz assumed the risk of injury and damage.

The operable facts in this case reflect that after working all day on Friday, November 9, 1984, Mantz cashed his paycheck and went to the Ball Park Bar. He arrived at the tavern around 7 p.m. and drank eight or nine bottles of beer and a "shot" of whiskey during a 3 1/2-hour period.

Mantz left the tavern about 10:30 p.m. Once outside the tavern, he noticed that it was raining, sleeting, and snowing simultaneously. Mantz waited for a while in a protected area just outside the tavern door. His vehicle was parked across the street at a service station on the east side of 13th Street. Thirteenth Street runs north and south and has two lanes each for northbound and southbound vehicular traffic. Mantz said he saw three or four cars 200 to 225 feet to the south in the northbound lanes of traffic. Looking north, Mantz saw two southbound cars 300 to 325 feet away. The plaintiff testified he wanted to go east across 13th Street to his vehicle. He decided he could run safely across the southbound lanes to the center of the street. Mantz said that with his head down, while looking to the side, he ran as "[f]ast as I could" to the center of the street and that while he was standing there, a northbound car passed him. He further testified that while he was standing on the centerline of the street he was bumped from behind by a southbound station wagon. There was testimony that Mantz was in the southbound lane when the lady driver in the station wagon honked at him. There was evidence that the station wagon did not swerve after hitting Mantz. It stopped in its own southbound lane about 2 or 3 feet in front of where Mantz lay.

The station wagon's emergency flashers were turned on, as were the flashers of a southbound car that had stopped just north of the station wagon. A third southbound vehicle had also stopped near the west curb in the vicinity of where Mantz was lying. Paul Munkel, a passenger in that vehicle, went to where Mantz lay on the pavement. Munkel put his own jacket

over the injured man and began directing traffic. A girl came from the tavern and put her jacket over Mantz. People from the service station also arrived at the scene. A small crowd gathered in the area of the injured plaintiff.

While Munkel was directing traffic, he noticed a northbound Datsun automobile coming toward him and the injured Mantz. This vehicle was in the lane closest to the centerline. At this time, only Mantz' legs were protruding into the northbound lane of traffic, Munkel testified. Munkel tried to flag the Datsun in an effort to divert it east, away from Mantz and away from the centerline of the street. The Datsun, bearing a No. 59 county Nebraska license plate, did not vary its course. It "just [came] straight forward." Munkel had been "right where the man was [lying]." Munkel was required to jump out of the Datsun's path to keep from being hit. The evidence reflects that the Datsun ran over one or both of Mantz' legs and proceeded northbound without stopping. Although Munkel could clearly see the profile of the Datsun's male driver, he could not identify him, nor could Munkel see the remaining numbers of the vehicle's license plate.

Mantz' policy of insurance with Continental clearly covered hit-and-run accidents. Part C, "Uninsured Motorists Coverage," specifically defines an "uninsured motor vehicle" as one "which is a hit and run vehicle whose operator or owner cannot be identified and which hits" the insured. The station wagon driver was uninsured because her insurance carrier had become insolvent.

We now examine whether the trial court properly directed a verdict against the plaintiff in each accident involved here. When Mantz rested after adducing evidence in his case in chief, the defendant moved for a directed verdict in its favor in regard to each accident for two reasons: (1) that the plaintiff failed to establish a prima facie case and (2) that the evidence established as a matter of law that Mantz was contributorily negligent to a degree sufficient to preclude any recovery.

In reviewing a directed verdict, the party against whom a motion for a direction of liability is made 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. *Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985). See, also, *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

A directed verdict is proper only where reasonable minds cannot differ and can only draw one conclusion from the evidence. *Vice v. Darm Corp.*, 224 Neb. 1, 395 N.W.2d 524 (1986); *Lambelet v. Novak*, 225 Neb. 229, 404 N.W.2d 28 (1987). Where reasonable minds may draw different conclusions from the evidence, the question of negligence is for determination by the jury. *Bourke v. Watts*, 223 Neb. 511, 391 N.W.2d 552 (1986); *Cullinane v. Interstate Iron & Metal*, 216 Neb. 245, 343 N.W.2d 725 (1984).

The trial court was correct in directing a verdict against Mantz insofar as the accident with the station wagon was concerned. Based upon the evidence, reasonable minds cannot differ but that Mantz was contributorily negligent in a degree sufficient to bar recovery in the accident involving the station wagon. Mantz, by his own testimony, on a dark, rainy, sleety, and snowy November night, ran as fast as he could across a busy street's southbound vehicular traffic lanes. That night, Mantz admittedly knew that traffic was heavier than normal. He saw the headlights of oncoming cars, but proceeded to cross the southbound lanes anyway. By his own testimony, Mantz ran with his head down, although he looked to the side. He was oblivious to the sound of the station wagon's horn, which was honking while Mantz was transversing the west half of 13th Street. Driving conditions were slippery when Mantz ran. There was no evidence that the station wagon was speeding or that the driver did not have control of her vehicle. It hit the plaintiff, but stopped a few feet after the impact. While there was evidence that the impact between Mantz and the station wagon occurred near an intersection, there is no evidence in the record it occurred in a crosswalk. When he began to run as fast as he could, Mantz suddenly left a place of safety and ran across the path of the station wagon. He failed to yield the right-of-way to the station wagon. When a pedestrian in a place of safety sees or could have seen the approach of a moving vehicle in close

proximity to him or her and suddenly moves from the place of safety into the path of such vehicle and is struck, such conduct constitutes contributory negligence more than slight as a matter of law and precludes recovery. *Hennings v. Schufeldt*, 222 Neb. 416, 384 N.W.2d 274 (1986); *Gerhardt v. McChesney*, 210 Neb. 351, 314 N.W.2d 258 (1982).

The trial court properly directed a verdict against the plaintiff in the accident involving the station wagon. We need not discuss further whether the plaintiff presented a prima facie case.

In regard to the second accident involving the Datsun, the trial court, at the close of the plaintiff's evidence, erroneously directed a verdict in favor of the defendant.

As the Datsun approached the accident scene from the south, Mantz lay on the pavement with his legs extending into a northbound traffic lane. Mantz was dazed and startled, and there was evidence that he may have been unconscious after the collision with the station wagon.

How long Mantz lay on the pavement before being hit by the hit-and-run Datsun is not specified in the record. However, it was of such duration that a northbound car could pass by; that the station wagon driver had time to stop her vehicle, turn on flasher lights, get out of her vehicle, and talk to Mantz; that the witness Munkel could leave his vehicle, walk to where Mantz lay, put his jacket over the plaintiff, and begin directing traffic; that a girl could walk from the tavern and put her jacket over the plaintiff; that two people from the service station could walk to the scene where Mantz was first hit; and that a group of people could congregate at the accident site. Although the record does not disclose the volume of traffic he directed, Munkel had been directing traffic when Mantz was struck by the Datsun. While some of these acts may have occurred simultaneously, it is apparent that a period of time elapsed between the time Mantz was knocked to the pavement by the station wagon and the time he was hit by the Datsun. If a sufficient period of time elapsed, Mantz' position on the pavement might well have created only a condition. If plaintiff's position merely created a condition, Mantz may not have been actively contributorily negligent. *C.S. v. Sophir*, 220

Neb. 51, 368 N.W.2d 444 (1985); *Steenbock v. Omaha Country Club*, 110 Neb. 794, 195 N.W. 117 (1923).

In regard to lookout, Munkel testified that there was nothing between him and the Datsun that obscured his own vision of the driver. From that testimony, a jury could infer that if Munkel could see the Datsun driver, the driver could see Munkel.

The driver of a motor vehicle has the duty to keep a proper lookout and watch where he is driving even though he is rightfully on the highway and has the right-of-way. He must keep a lookout ahead or in the direction of travel, and he is bound to take notice of the road, to observe the conditions along the way, and to know what is in front of him for a reasonable distance. *Hilferty v. Mickels*, 171 Neb. 246, 106 N.W.2d 40 (1960), cited with approval in *Prime Inc. v. Younglove Constr. Co.*, 227 Neb. 423, 418 N.W.2d 539 (1988). The "range of vision" rule is applicable, notwithstanding that a motorist's vision is impaired by atmospheric or weather conditions, such as falling or blowing snow, rain, mist, or fog. *Prime Inc. v. Younglove Constr. Co., supra*; *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977); *Vrba v. Kelly*, 198 Neb. 723, 255 N.W.2d 269 (1977).

Moreover, a driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he can stop in time to avoid a collision with an object within the area lighted by his headlights, and the driver is negligent if he fails to do so. A motorist is not, however, negligent where the object cannot be observed by the exercise of ordinary care in time to avoid a collision. *Greenwade v. Drake*, 202 Neb. 815, 277 N.W.2d 248 (1979); *Fink v. Meister*, 188 Neb. 248, 196 N.W.2d 122 (1972).

Whether the hit-and-run Datsun driver in this case failed to keep a proper lookout was a question of fact which should have been submitted to the jury for resolution.

We now consider Mantz' excessive speed allegation against the Datsun driver. Neb. Rev. Stat. § 39-662 (Reissue 1984) provides:

> No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential

> hazards then existing. Any person shall drive at a safe and appropriate speed when . . . special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

There was direct evidence that special hazards existed as the Datsun driver approached the accident scene. It was raining, sleeting, and snowing simultaneously. Driving conditions were slippery. People were congregated in the street. One of them lay with his legs protruding into the Datsun's line of travel. Another was standing in the hit-and-run vehicle's path. There were two vehicles with emergency flasher lights in operation at the scene. A jury could conclude that under those conditions any vehicle's speed greater than a very slow speed would not be reasonable nor prudent as required by § 39-662.

The question of whether the Datsun was traveling at an excessive speed for the conditions existing at the time of the accident with Mantz should have been submitted to the jury.

In operating a motor vehicle upon a public street, a driver has a duty to have his vehicle under such reasonable control as will at all times enable him to avoid a collision or accident, assuming that other drivers or people upon the highway are also exercising ordinary care. "Reasonable control" requires motor vehicle drivers to take into consideration such factors as the speed of their automobiles, the condition of the highway upon which they are traveling, the traffic involved, and any other factors affecting driving conditions that may have been developed by the evidence. See, *Prime Inc. v. Younglove Constr. Co., supra*; *Bartosh v. Schlautman*, 181 Neb. 130, 147 N.W.2d 492 (1966).

Whether the Datsun driver had reasonable control of his vehicle under all the facts of this case and whether he could have avoided running his vehicle over the plaintiff are questions which should have been submitted to the jury for resolution.

It is not necessary for a plaintiff to prove his case solely by direct evidence. A plaintiff may rely partially upon circumstantial evidence to support his position. *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. 375, 406 N.W.2d 101 (1987), quoting *Anderson v. Farm Bureau Ins. Co.*, 219 Neb. 1, 360 N.W.2d 488 (1985), quoting *Popken v. Farmers Mutual Home*

Ins. Co., 180 Neb. 250, 142 N.W.2d 309 (1966).

Mantz, by direct and circumstantial evidence, established a prima facie case of negligence against the driver of the hit-and-run Datsun. That portion of Mantz' case should have been submitted to the jury. The trial court's decision not to submit the hit-and-run accident to the jury is reversed, and that portion of the cause is remanded to the district court for a new trial.

The trial court's directed verdict in regard to the accident involving the station wagon is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

STATE OF NEBRASKA, APPELLEE, V. RICHTER U. GIBSON, APPELLANT.

422 N.W.2d 570

Filed May 6, 1988. No. 87-675.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
2. **Criminal Law: Words and Phrases.** Custodial interrogation is questioning instigated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
3. **Miranda Rights: Confessions: Right to Counsel.** Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer, retained or court-appointed, and to have a lawyer present during interrogation.
4. **Miranda Rights: Confessions.** A purpose of the *Miranda* warning is preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment.
5. **Constitutional Law: Miranda Rights: Confessions.** The *Miranda* warning is required before a defendant's custodial statement, as the product of express questioning or its functional equivalent, is constitutionally admissible as evidence against the defendant.

6. _____: _____: _____. To determine whether there is interrogation within the meaning of *Miranda*, an objective standard is applied: Would a reasonable and disinterested person conclude that police conduct, directed to a suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant?
7. _____: _____: _____. Police conduct which results in an unforeseeable or volunteered response by a defendant is not interrogation within the meaning of *Miranda*, requiring the *Miranda* warning before that response is constitutionally admissible as evidence against the defendant.

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

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, for appellant.

Robert M. Spire, Attorney General, and Steven J. Moeller, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

A jury found Richter U. Gibson guilty of violating Neb. Rev. Stat. § 28-1206(1) (Reissue 1985), which prohibits a convicted felon from possessing a firearm "with a barrel less than eighteen inches in length." In his appeal, Gibson does not contest the sufficiency of evidence for the conviction, but does contend that the district court erred in overruling Gibson's motion to suppress an oral statement made to police at the time of his arrest and in admitting that statement as evidence in Gibson's trial.

Before trial, Gibson moved for suppression of his oral statement. See Neb. Rev. Stat. § 29-115 (Reissue 1985) (proceedings for suppression of a statement obtained by violation of a defendant's constitutional rights). In his suppression motion, Gibson alleged that his oral custodial statement was made without the antecedent "*Miranda* warning." See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

At the suppression hearing, Paul W. Briese, an officer in the narcotics unit of the Omaha Police Division, testified about the circumstances surrounding Gibson's statement in question.

Police had obtained a warrant to search premises designated as 3504 North 24th Street in Omaha, which was the duplex residence of Gayle Eagle Feather. Gibson shared the residence with Eagle Feather. The warrant authorized a premises search for "[m]arijuana its derivatives and administrating instruments either homemade or manufactured. Monies and records pertaining to an illegal narcotics operation and records pertaining to the occupants of 3504 North 24th Street, Omaha, Douglas County, Nebraska." At approximately 11:30 a.m. on December 4, 1986, and equipped with the search warrant, Officer Briese and five other narcotics officers went to the residence described in the search warrant to search for contraband "drugs." Some of the officers wore vest-like jackets bearing the visible inscription "Omaha Police" on the front and back of such vests. When the officers arrived at the duplex, the front door was unlocked. The officers entered through the front door, announcing: "Police officers, search warrant."

In the residence the officers found Gibson with Eagle Feather and her two children. Briese handed Gibson a copy of the search warrant. While Eagle Feather remained with some officers in the residence's living room-dining room area, Briese and other officers undertook a search which, after a half hour, brought them into the residence's kitchen. Before entry into the kitchen, the officers had not questioned Gibson and had not given him the *Miranda* warning. In the kitchen, Briese, who was accompanied by two other officers, directed Gibson "to sit down and not try to leave." Officer Briese acknowledged that Gibson was not free to leave the kitchen or premises. While searching in the kitchen's wall cupboard, Officer Briese discovered a loaded "stub-nose" .38-caliber revolver. Displaying the discovered revolver, Briese remarked: "Oh, look what I found." As an immediate response to the officer's remark, Gibson stated: "That's my gun, and I use it for protection."

Briese explained his comment on discovering the revolver. First, Briese's comment was not directed toward Gibson alone but was made for all—"everybody"—to hear. Second, Briese's reason for his comment was:

Because I made the statement to everybody in the room

> "Oh, look what I found," meaning that I wanted to alert everybody in the room that was present that I had located a firearm. . . . Because it is a firearm, it means it could have been used against us, it was something that I wanted to alert the officers to the fact that we had found the gun. . . . [I]t was worth noting to the other officers.

In the remainder of their search, the officers found a "controlled substance." Police gave the *Miranda* warning to Gibson, who declined to talk with the officers. Apparently by radio, an officer inquired about the registration of the revolver which Briese had discovered. Based on the revolver's serial number, the officer determined that the firearm was unregistered and, when checking whether Gibson had a criminal record, ascertained that Gibson was a convicted felon. Police arrested Gibson.

In his further testimony at the suppression hearing, Officer Briese testified that Gibson was not under the influence of alcohol or drugs and was calm throughout the search of the duplex.

The district court concluded that Gibson's statement was not made in response to custodial interrogation by police and overruled Gibson's suppression motion. At trial and over objection by Gibson's counsel, Officer Briese testified substantially in accord with his testimony at the suppression hearing, including the circumstances surrounding discovery of the .38-caliber revolver and Gibson's statement concerning the discovered revolver. After the verdict of guilty, the court sentenced Gibson to imprisonment for 1 to 2 years.

Gibson contends his oral statement, when Officer Briese discovered the revolver, should have been suppressed and excluded from evidence because police had not administered the *Miranda* warning before Gibson's statement.

" ' " 'In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. . . .' " ' " *State v. Blakely*, 227 Neb. 816, 820, 420 N.W.2d 300, 303 (1988) (quoting *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987)).

There is no question that Gibson was in custody when he

made the statement in question. Officer Briese emphatically instructed Gibson to remain in the kitchen, where Gibson was not free to leave the officer's presence.

" 'Custodial interrogation' has been characterized by the U.S. Supreme Court in *Miranda* as 'questioning instigated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " *State v. Bodtke*, 219 Neb. 504, 509, 363 N.W.2d 917, 921 (1985) (quoting *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)).

Before a defendant's custodial statement is admissible as evidence, the absolute and indispensable prerequisites of the *Miranda* warning must have been satisfied preceding the interrogation producing such statement, namely, law enforcement personnel must (1) inform the defendant of the right to remain silent, (2) explain that anything said can and will be used against the defendant in court, and (3) inform the defendant of the right to consult with a lawyer, retained or court-appointed, and to have a lawyer present during interrogation. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986).

According to the U.S. Supreme Court, a purpose of the *Miranda* warning is "preventing government officials from using the coercive nature of confinement to extract confessions that would not be given in an unrestrained environment." *Arizona v. Mauro*, ____ U.S. ____, 107 S. Ct. 1931, 1936-37, 95 L. Ed. 2d 458 (1987).

Consequently, Gibson made a custodial oral statement to police. However, the question is: Was Gibson's custodial statement the product of police interrogation?

In *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), the U.S. Supreme Court expanded "custodial interrogation" beyond express questioning of a defendant while in police custody. Police arrested Innis for a robbery perpetrated with a sawed-off shotgun and advised Innis of his *Miranda* rights before transporting him to the police station. Innis stated that he understood such rights and wanted to talk with a lawyer. The police had not located the shotgun used in the robbery. While accompanying Innis to the

station, officers talked among themselves regarding the missing shotgun, which conversation included comments by the officers concerning the possible tragedy of a child's finding the loaded shotgun and receiving an injury from that weapon. Innis interrupted the officers' conversation and told the officers that, if they would return to the arrest scene, he would locate the shotgun for the police. Near the arrest scene, Innis led police to the missing shotgun. In considering whether Innis' actions in pointing out the shotgun were the product of interrogational compulsion by police, the U.S. Supreme Court stated:

> The issue, therefore, is whether the respondent was "interrogated" by the police officers in violation of the respondent's undisputed right under *Miranda* to remain silent until he had consulted with a lawyer. In resolving this issue, we first define the term "interrogation" under *Miranda* before turning to a consideration of the facts of this case.
>
> The starting point for defining "interrogation" in this context is, of course, the Court's *Miranda* opinion. There the Court observed that "[b]y custodial interrogation, we mean *questioning* initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.*, at 444 (emphasis added). This passage and other references throughout the opinion to "questioning" might suggest that the *Miranda* rules were to apply only to those police interrogation practices that involve express questioning of a defendant while in custody.
>
> We do not, however, construe the *Miranda* opinion so narrowly. The concern of the Court in *Miranda* was that the "interrogation environment" created by the interplay of interrogation and custody would "subjugate the individual to the will of his examiner" and thereby undermine the privilege against compulsory self-incrimination. *Id.*, at 457-458. The police practices that evoked this concern included several that did not involve express questioning. For example, one of the practices discussed in *Miranda* was the use of line-ups in which a coached witness would pick the defendant as the

perpetrator. This was designed to establish that the defendant was in fact guilty as a predicate for further interrogation. *Id.*, at 453. A variation on this theme discussed in *Miranda* was the so-called "reverse line-up" in which a defendant would be identified by coached witnesses as the perpetrator of a fictitious crime, with the object of inducing him to confess to the actual crime of which he was suspected in order to escape the false prosecution. *Ibid.* The Court in *Miranda* also included in its survey of interrogation practices the use of psychological ploys, such as to "posi[t]" "the guilt of the subject," to "minimize the moral seriousness of the offense," and "to cast blame on the victim or on society." *Id.*, at 450. It is clear that these techniques of persuasion, no less than express questioning, were thought, in a custodial setting, to amount to interrogation.

This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted: "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.*, at 478 (emphasis added). It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation," as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.

We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to

> say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [Emphasis in original.]

Rhode Island v. Innis, 446 U.S. 291, 298-302, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).

In *Innis*, the Court also noted:

> This is not to say that the intent of the police is irrelevant, for it may well have a bearing on whether the police should have known that their words or actions were reasonably likely to evoke an incriminating response. In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect.

Id. at 301-02 n.7.

The *Innis* Court further noted:

> Any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion might be an important factor in determining whether the police should have known that their words or actions were reasonably likely to elicit an incriminating

response from the suspect.

Id. at 302 n.8.

Finally, the Court, in *Rhode Island v. Innis, supra*, concluded that there was no interrogation within the meaning of *Miranda* because the police had not subjected Innis to the "functional equivalent" of express questioning. According to the U.S. Supreme Court:

> The case thus boils down to whether, in the context of a brief conversation, the officers should have known that the respondent would suddenly be moved to make a self-incriminating response. Given the fact that the entire conversation appears to have consisted of no more than a few offhand remarks, we cannot say that the officers should have known that it was reasonably likely that Innis would so respond. This is not a case where the police carried on a lengthy harangue in the presence of the suspect. Nor does the record support the respondent's contention that, under the circumstances, the officers' comments were particularly "evocative." It is our view, therefore, that [Innis] was not subjected by the police to words or actions that the police should have known were reasonably likely to elicit an incriminating response from him.

Id. at 303.

Therefore, as concluded in *Innis, supra*, the *Miranda* warning is required before a defendant's custodial statement, as the product of express questioning or its functional equivalent, is constitutionally admissible as evidence against the defendant.

As we interpret *Innis, supra*, to determine whether there is interrogation within the meaning of *Miranda*, an objective standard is applied: Would a reasonable and disinterested person conclude that police conduct, directed to a suspect or defendant in custody, would likely elicit an incriminating response from that suspect or defendant? See 1 W. LaFave & J. Israel, Criminal Procedure § 6.7 (1984). If the answer is "yes," there is interrogation requiring the *Miranda* warning before a defendant's incriminating response is constitutionally admissible as evidence against the defendant.

According to *Innis*, some factors which may be considered in

determining whether there has been interrogation within the meaning of *Miranda* are a police practice designed to elicit an accused's incriminating response and a defendant's susceptibility to respond to a particular persuasion.

Rhode Island v. Innis, supra, has been applied in decisions of this court to determine whether a defendant's oral statement was the product of the "functional equivalent" of custodial interrogation by police. See, *State v. Whitmore*, 221 Neb. 450, 378 N.W.2d 150 (1985): officer's question about ownership of keys found in room where defendant was present was a neutral question, resulting in a spontaneous reaction; *State v. Taylor*, 221 Neb. 114, 115, 375 N.W.2d 610, 612 (1985): during a booking procedure, the defendant's volunteered statement, " 'It can't get much worse than this' " was not the product of interrogation; *State v. Parsons*, 213 Neb. 349, 328 N.W.2d 795 (1983): without interrogation, the defendant admitted he was responsible for the marijuana which was the subject of a criminal charge of possession of marijuana with intent to distribute; *In re Interest of Durand. State v. Durand*, 206 Neb. 415, 420, 293 N.W.2d 383, 386 (1980): showing a defendant police reports of unsolved burglaries, after the defendant had asserted his right to remain silent and terminated conversation with police, was "the functional equivalent of questioning" which produced defendant's self-incriminating statement.

In addition to application of *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), to determine whether a suspect or defendant was subjected to the "functional equivalent" of custodial interrogation, this court has also held that a "spontaneously volunteered statement" of a suspect or defendant is admissible in the absence of the *Miranda* warning. *State v. Red Feather*, 205 Neb. 734, 738, 289 N.W.2d 768, 771 (1980). See, also, *State v. Taylor, supra* (" 'Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence,' " 221 Neb. at 116, 375 N.W.2d at 612-13).

In Gibson's case, Officer Briese's remark, "Oh, look what I found," was not express questioning of Gibson. However, we must now determine whether Officer Briese's remark was conduct directed to Gibson, which the officer should have

known was likely to evoke an incriminating response from Gibson. See *Rhode Island v. Innis, supra.*

In *State v. Finehout*, 136 Ariz. 226, 665 P.2d 570 (1983), police detectives repeatedly urged the defendant, who had refused to talk to the detectives, to tell the truth, and appealed for the defendant's honesty through their remarks, such as " 'it's just better to tell the truth and get out in the open.' " *Id.* at 230, 665 P.2d at 574. The Arizona Supreme Court determined that "the detectives' repeated urging of the defendant to tell the truth was, under the circumstances, interrogation because the detectives should have known that their appeals for honesty were reasonably likely to elicit an incriminating response." *Id.*

United States v. Suggs, 755 F.2d 1538 (11th Cir. 1985), involved an incriminating statement made when Suggs was shown a copy of the indictment charging him with falsifying travel vouchers and responded: " '[H]ell, everybody cheats on their travel vouchers,' " and " '[E]verybody falsifies their travel vouchers.' " *Id.* at 1541. In finding that Suggs' statements were constitutionally admissible evidence, the court stated: "[T]he evidence reasonably supports the trial court's finding that defendant's comment was a spontaneous exclamation not prompted by any questioning. The trial court apparently found that Suggs made the statement not as a result of any Government probing, but spontaneously after he was shown his indictment." *Id.* at 1541-42.

In *People v Benjamin*, 101 Mich. App. 637, 300 N.W.2d 661 (1980), officers were investigating a shoplifting charge against Benjamin and found a "razor knife and a jackknife" in Benjamin's purse. *Id.* at 641, 300 N.W.2d at 663. When a deputy sheriff, Purucker, removed the knives from the purse and showed Benjamin the knives, Benjamin said: " 'I carry them when I'm walking down Frances Street, never know when I might need them'." *Id.* at 642, 300 N.W.2d at 663. Benjamin had not been given the *Miranda* warning before she made the statement about the knives. Benjamin was charged and convicted of carrying a concealed weapon. Referring to *Rhode Island v. Innis*, the court concluded that Benjamin's statement regarding the knives was not a response to the "functional equivalent" of interrogation and stated:

> [T]he deputy's isolated act of holding up the knives in front of defendant was *not* a practice which the officer should have known would be reasonably likely to elicit an incriminating response. Defendant's response was an unforeseeable result of the brief, unembellished gesture of deputy Purucker. This is particularly true since the response related to an offense other than that which the officer was investigating. Thus, his act was not the functional equivalent of interrogation, and defendant's spontaneous declaration was admissible into evidence.

(Emphasis in original.) 101 Mich. App. at 649, 300 N.W.2d at 667. In *Benjamin*, the court also noted, *id.* at n.4:

> There is nothing in the record to indicate that deputy Purucker was aware of any unusual susceptibility of the defendant herein to any particular form of persuasion, whether by word or deed, or that the officer perceived defendant to be unusually disoriented or upset at the time he showed her the knives.

In *State v. Grisby*, 97 Wash. 2d 493, 647 P.2d 6 (1982), Grisby and his eventual codefendant, Frazier, were implicated in a criminal homicide. Police arrested Frazier, who, having been given the *Miranda* warning, refused to talk to the police. While a detective was placing a clear plastic bag of money on a table in Frazier's view, Frazier asked the detective what he was doing with the money. When the detective responded that he was going to place the bag of money with other evidence regarding the homicide investigation, Frazier spontaneously said:

> "That's my money. It's not hot. I didn't steal nothing from that apartment. I shot the people, but I didn't steal nothing. I shot the people, but I didn't steal no drugs or money. The money belongs to me. I feel bad about the kids, but I'm a bad shot. They started it all. They gave me a hot shot. I was sick for three days. They put a gun up to my head and burned some of my money. They had it coming, but I didn't mean to hurt the kids."

Id. at 504, 647 P.2d at 12-13. In holding that Frazier's statements did not violate the "*Miranda* rights," the Supreme Court of Washington stated:

> The statement was made after the interrogation had been

> completed and it was Frazier who asked the question and received an answer. The police did not ask him anything, he simply made the above statement. "[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." [Emphasis in original.] *Rhode Island v. Innis, supra* at 301-02. . . .
>
> These acts occurred while the police officers were separating the physical evidence after the interrogation had terminated. . . . There is nothing in the record to indicate the police should have known these actions were "reasonably likely" to induce the statement from Frazier. The placing of the bag on the desk and the answer to the question posed by Frazier do not constitute the "functional equivalent" of express questioning which the court in *Innis* deemed a prerequisite to the invocation of the *Miranda* safeguards.

97 Wash. 2d at 504-05, 647 P.2d at 13.

In the light of *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), and the decisions mentioned from other jurisdictions, we find that Gibson's statement, made when he saw the revolver displayed by Officer Briese, is constitutionally admissible evidence. Officers went to Eagle Feather's residence to search for contraband or illicit controlled substances and other items related to illegal use or trafficking in controlled substances. The district court may have concluded that Officer Briese's remark was a precautionary measure to alert officers about the possible presence of other firearms on the premises and accessible to Gibson or Eagle Feather, especially since the officers were still in the process of their search. As such measure, Officer Briese's remark was not directed to Gibson. Mere display of the discovered revolver cannot be categorically characterized as "[a] practice that the police should know is reasonably likely to evoke an incriminating response from a suspect . . . ." *Rhode Island v. Innis, supra* at 301. Although Gibson's statement in response to

the discovered and displayed revolver may be on the cutting edge of immeasurable imprudence, Gibson's statement was not the product of interrogation within the meaning of *Miranda*. Rather, Gibson made a spontaneously volunteered statement, "That's my gun," a totally unsolicited and unexpected response under the circumstances. "[S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response." (Emphasis in original.) *Rhode Island v. Innis, supra* at 301-02. Police conduct which results in an unforeseeable or volunteered response by a defendant is not interrogation within the meaning of *Miranda*, requiring the *Miranda* warning before that response is constitutionally admissible as evidence against the defendant.

Most assuredly, Gibson's response to the discovery and display of the revolver was relevant evidence at Gibson's trial. See Neb. Evid. R. 401 (relevant evidence, defined) (Neb. Rev. Stat. § 27-401 (Reissue 1985)).

The district court was correct in overruling Gibson's suppression motion and in admitting Gibson's statement as evidence in Gibson's trial.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES L. METHE, APPELLANT.
422 N.W.2d 803

Filed May 6, 1988. No. 87-767.

1. **Words and Phrases.** To threaten is commonly understood to mean promising punishment, reprisal, or distress.
2. _____. Retaliate means to put or inflict in return.
3. **Convictions: Appeal and Error.** In resolving a challenge to the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in evidence, pass on credibility of witnesses, determine plausibility of explanations, or weigh evidence.
4. **Criminal Law: Motions to Dismiss: Evidence.** On a defendant's motion to

dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.

5. **Criminal Law: Directed Verdict.** In a criminal case, a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character and lacking in probative value that a conviction based thereon cannot be sustained.
6. **Trial: Evidence: Appeal and Error.** It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion.
7. **Rules of Evidence: Other Acts.** Evidence of other crimes may be admissible to prove, among other things, motive, intent, and identity.
8. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule which permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged.
9. **Trial: Evidence: Presumptions: Appeal and Error.** In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

Michael F. Gutowski, for appellant.

Robert M. Spire, Attorney General, and Harold I. Mosher, for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

FAHRNBRUCH, J.

James L. Methe was convicted of intimidation by phone call, in violation of Neb. Rev. Stat. § 28-1310(1)(c) (Reissue 1985), after a Douglas County Court bench trial. On appeal, the Douglas County District Court affirmed Methe's conviction and sentence of 15 days' imprisonment and a $100 fine. Methe appeals. We affirm.

On appeal to this court, the defendant, Methe, assigns as error the trial court's (1) overruling of Methe's motions to dismiss at the end of the State's case and at the end of all the evidence and (2) admission of evidence of Methe's prior

conviction for intimidation by phone call.

At trial, there was evidence that the defendant, at one time, was the employer of Kimberly Becker, the victim in this case. Becker ceased working for the defendant in May of 1982. She obtained employment elsewhere.

Thereafter, Becker began receiving telephone calls, both at home and at work, according to the evidence. The caller would hang up without talking, and Becker complained to the police. After a tap was placed on Becker's telephone by the telephone company, Methe was charged in the Douglas County Court with intimidation by phone call. According to a certified court record introduced in evidence, Methe was found guilty as a matter of law and fined $25 and costs.

Becker testified that approximately 1 month after his conviction, Methe called Becker's place of employment. The victim testified that when she answered, Methe said "he'd had to pay a fine, and he asked . . . what he should do to retaliate." Becker said she felt threatened by Methe's comments, hung up, and called the police. Methe admits making the phone call, but claims he said he had "paid a fine . . . . 'Would you get me in touch with the manager.' "

Section 28-1310(1)(c) makes it unlawful for a person to telephone another and threaten "to inflict injury to any person or to the property of any person." Besides denying Becker's version of what he said, Methe contends that the statement "What should I do to retaliate" is too indefinite and ambiguous to constitute a threat.

We have previously held that "[t]o 'threaten' is commonly understood to mean promising punishment, reprisal, or distress. Webster's Third New International Dictionary, Unabridged 2382 (1981)." *In re Interest of Siebert*, 223 Neb. 454, 456, 390 N.W.2d 522, 524 (1986). "Retaliate" means "to put or inflict in return . . . ." Webster's Third New International Dictionary, Unabridged 1938 (1981). Clearly, the statement "What should I do to retaliate" can be viewed as promising punishment, reprisal, or distress.

The evidence as to what Methe actually said to the victim at the time of his call was in conflict. In finding Methe guilty, it is obvious that the trial judge, who saw and heard the witnesses,

believed the victim's version of the facts rather than the defendant's version. In resolving a challenge to the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in evidence, pass on credibility of witnesses, determine plausibility of explanations, or weigh evidence. *State v. Patrick*, 227 Neb. 498, 418 N.W.2d 253 (1988); *State v. Guy*, 227 Neb. 610, 419 N.W.2d 152 (1988).

In regard to defendant's first assignment of error, on a defendant's motion to dismiss for insufficient evidence of the crime charged against such defendant, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988); *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). Also, in a criminal case, a court can direct a verdict only when (1) there is a complete failure of evidence to establish an essential element of the crime charged, or (2) evidence is so doubtful in character and lacking in probative value that a conviction based thereon cannot be sustained. *State v. Lane, supra*; *State v. Coffman*, 227 Neb. 149, 416 N.W.2d 243 (1987). Applying these two standards in this case, we find that there was sufficient evidence to deny the defendant's motion to dismiss at the close of the State's case in chief. At the close of all of the evidence, there also was sufficient evidence to deny Methe's motion to dismiss the charges against him.

Methe next claims that it was error for the trial court to admit evidence of his prior conviction for intimidation by phone call.

It is within the trial court's discretion to admit or exclude evidence, and such rulings will be upheld on appeal absent an abuse of discretion. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988); *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987); *State v. Clancy*, 224 Neb. 492, 398 N.W.2d 710 (1987). It is Methe's contention that evidence of his prior conviction is irrelevant to the instant case and therefore inadmissible under Neb. Rev. Stat. § 27-402 (Reissue 1985). Evidence of other crimes may be admissible to prove, among other things, motive, intent, and identity. Neb. Rev. Stat. § 27-404(2) (Reissue 1985). Section 27-404(2) is an inclusionary rule which

permits the use of evidence of other crimes, wrongs, or acts if such is relevant for any purpose other than to show the defendant's propensity or disposition to commit the crime charged. *Wilson, supra; State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986); *State v. Robb*, 224 Neb. 14, 395 N.W.2d 534 (1986).

Methe argues that his prior conviction was not needed for identity purposes, since the victim recognized his voice. However, at the time the prior conviction was offered into evidence by the State, it was not known that Methe would admit making the call. The evidence was relevant to corroborate the victim's testimony on the issue of identity. His prior conviction was also relevant to Methe's motive for calling the victim and his intent to intimidate her. The trial court did not abuse its discretion in admitting evidence of Methe's prior conviction for intimidation by phone call.

This court notes that on Methe's first conviction the certified court record reflects that Methe entered a plea of nolo contendere and that the court found Methe guilty as a matter of law. Except under certain circumstances not relevant here, Neb. Rev. Stat. § 27-410 (Reissue 1985) stands for the proposition that a defendant's plea of nolo contendere or a defendant's statements made in connection with such a plea are inadmissible in any civil or criminal action, case, or proceeding against the person who made the plea of nolo contendere.

However, § 27-410 does not prohibit the use of the conviction which results from a nolo contendere plea. Since Methe's trial was to the court, we presume that the trial judge only considered the conviction and not the nolo contendere plea. In a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant. This court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment. *State v. Tomes*, 218 Neb. 148, 352 N.W.2d 608 (1984). It was proper for the trial court to consider Methe's prior conviction.

In this case, there is sufficient material, competent, and relevant evidence to sustain Methe's conviction. The conviction

and sentence of the trial court and the affirmance thereof by the district court are both correct.

AFFIRMED.

LINCOLN COUNTY SHERIFF'S OFFICE AND LINCOLN COUNTY, NEBRASKA, APPELLANTS, V. HELENE HORNE, APPELLEE.

423 N.W.2d 412

Filed May 13, 1988. No. 86-277.

1. **Fair Employment Practices: Discrimination: Proof.** In an individual case of discrimination based on the disparate treatment theory, the employee alleging disparate treatment first has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the employee succeeds, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the treatment of the employee. If the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination.
2. _____: _____: _____. Although, as a general rule, in order to prove a prima facie case of job discrimination it is necessary for the complainant to demonstrate that he or she applied for and was qualified for a job for which the employer was seeking applicants, the requirements of a prima facie case will vary from case to case. When a person's desire for a job is not translated into a formal application solely because of his or her unwillingness to engage in a futile gesture, that person is as much a victim of discrimination as are those who go through the motions of submitting an application.
3. _____: _____: _____. The ultimate burden of persuasion in a job discrimination case remains at all times with the complainant, and the employer bears only an intermediate burden of production. The employer need only explain what has been done, or produce evidence of a legitimate, nondiscriminatory reason for the decision. It is sufficient if the employer's evidence raises a genuine issue of fact as to whether it discriminated against the employee.
4. _____: _____: _____. Assuming the employer establishes an articulated nondiscriminatory reason for disparate treatment of an employee, the employee must maintain the burden of proving that the stated reason was pretextual and not the true reason for the employer's decision; i.e., that the disparate treatment would not have occurred but for the employer's discriminatory reasons.

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

Douglas J. Peterson, Deputy Lincoln County Attorney, for appellants.

Baskins & Boeshart, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

HASTINGS, C.J.

Complainant-appellee was employed by the respondent Lincoln County sheriff's office as a deputy sheriff on January 3, 1963. On December 20, 1982, she filed a complaint with the Nebraska Equal Opportunity Commission (NEOC), alleging that the sheriff's office had violated the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 et seq. (Reissue 1978 & Cum. Supp. 1982), by discriminating against her on the basis of her sex.

The NEOC sustained her complaint and ordered the respondents, the sheriff's office and Lincoln County, to pay her a total of $5,228 in backpay. This represented the difference between the amount paid to her as a female office deputy and the amount paid male deputies for a period of 2 years prior to her resignation in October of 1982. She was also awarded attorney fees in the amount of $2,325. On appeal to the district court, the order of the NEOC was affirmed.

We review this matter de novo on the record. *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987).

When complainant began her employment, she was told by the sheriff, Gordon Gilster, who is now deceased, that she would be paid at the same rate as the other deputy sheriffs. After July of 1964, however, she was consistently paid less than the other deputies, and by the time she quit in 1982, she was receiving approximately $225 to $250 less per month than the male deputies. Whenever Horne would bring this fact to the attention of Sheriff Gilster, he would usually respond that "[m]en are worth more than women," or would refuse to respond at all.

A particular source of frustration for Horne was the sheriff's refusal to send her to law enforcement training to obtain

certification. Completion of the law enforcement training program became a prerequisite for employment as a law enforcement officer on January 1, 1972. Neb. Rev. Stat. § 81-1414 (Reissue 1987). Although Horne was not required to go through the training, she felt that certification from the program would "justify a higher salary" and would lead to "[h]igher qualification" and "possible advancement." She stated that, had she become certified, "at least I'd have felt that maybe I had some prospects," but that without certification, "there was nothing ahead of me." The sheriff had turned down three or four of Horne's requests to attend the training, and he told her that he needed her to stay and run the office and that she was already a deputy and did not need the training.

On December 20, 1982, Horne filed a complaint with the NEOC. She alleged that the sheriff's office, through Lincoln County, had violated the Nebraska Fair Employment Practice Act by discriminating against her on the basis of her sex. The issues involved were whether she had been constructively terminated (i.e., forced to quit) by virtue of the discrimination, whether she had received unequal pay (compared to the male deputies), and whether she had been disparately treated by the denial of the opportunity to become certified as a law enforcement officer.

On November 11, 1983, the NEOC found reasonable cause to believe that there was discrimination based on sex. On February 16, 1984, an official complaint was filed with the NEOC.

A hearing was held before a hearing examiner of the NEOC on June 13, 1984. The hearing examiner received evidence and, on November 12, 1984, issued his recommended order and decision. The hearing examiner found that Horne had made out a prima facie case of intentional discrimination; specifically, that she had not been allowed to become certified, and thus eligible for higher pay, because she was female. The examiner further found that the sheriff's office had offered legitimate reasons for refusing Horne the opportunity to become certified—namely, that as an "office deputy," certification would do her no good—but that these reasons were in fact a pretext for discrimination.

At the close of the hearing, the parties had stipulated that Horne was withdrawing her request for wages from and after November 1, 1982, and waiving any right to reinstatement; that the only damages she was seeking "would be for a period of four years back from . . . December 12, 1982 [sic]."

Accordingly, the hearing officer denied any claim as to constructive termination and for lost pay beyond her termination date of November 1, 1982, but did award her discriminatory pay for the 2 years before 1982, as reflected in his recommended order and decision. This decision was adopted by the NEOC as its final order on March 8, 1985.

The respondents' appeal was heard by the district court, which affirmed the order of the NEOC. In their appeal to this court, they assign the following as error: (1) The district court erred in finding appellee established a prima facie case of discrimination, when appellee offered no evidence that she applied for a different position in the Lincoln County sheriff's office; and (2) the district court erred in finding the appellee produced evidence by a preponderance that she was intentionally discriminated against or that the legitimate nondiscriminatory reason offered by the Lincoln County sheriff was a pretext.

In an individual case of discrimination based on the disparate treatment theory, the employee alleging disparate treatment first has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. If the employee succeeds, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the treatment of the employee. If the employer carries this burden, the employee must then prove by a preponderance of the evidence that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 401 N.W.2d 461 (1987); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

This is the three-pronged analysis which has been promulgated by the U.S. Supreme Court and adopted by this court. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Zalkins Peerless Co., supra.*

The appellants' arguments are essentially assertions that this test was not met, and, therefore, an application of this analysis to the facts in this case is valuable.

In order to show a prima facie case of discrimination, Horne was required to show that she is a member of a protected class, that she was qualified for the training she sought, that in spite of her qualifications she was rejected, and that there is reason to believe this rejection was because she was a member of the protected class. See, *Father Flanagan's Boys' Home, supra*; *McDonnell Douglas Corp., supra*. Further, § 48-1119(3) (Reissue 1978) mandates that the discrimination must have been intentional. The prima facie case is meant to be flexible, and the elements may vary in each case. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978), the Court stated that "[t]he method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Nevertheless, this analysis provides a structure in which to evaluate the sheriff's conduct.

As a female, Horne was a member of a protected class. §§ 48-1101 et seq.

Secondly, she must have been qualified to obtain certification as a law enforcement officer. Although not required to obtain certification (see § 81-1414(1)), there was no evidence that Horne was not qualified to receive the training. Horne was appointed as a deputy sheriff and was sworn in as such. Like the male deputies, she was issued a badge, a nameplate which read "Deputy Sheriff," tear gas, handcuffs, and identification cards showing her to be a deputy sheriff. Additionally, she wore a deputy's uniform which was—although she was required to sew hers herself—identical to the uniforms of the male deputies, and she carried a gun. Although there is some dispute as to whether Horne was a "law enforcement officer" as defined in Neb. Rev. Stat. § 81-1401 (Reissue 1981), there is little doubt that Horne was a sworn deputy and thus, at least in theory, eligible for the law enforcement training program. In spite of her qualifications as

a deputy sheriff, Horne's many requests to attend the training were rejected.

There was a preponderance of evidence which proved that the reason the sheriff denied her requests, despite her qualifications, was that she was female. All of the male deputies, including those who were not considered "patrol officers," had been allowed to seek certification at the training center. In contrast, the two female deputies were not allowed to attend the program, even though their job duties were very similar in nature to some of the male deputies' duties.

Moreover, the refusal to allow the females to be certified was shown to be intentional. Though approached several times by Horne, the sheriff denied her requests. The evidence showed that on many occasions the sheriff had directed comments toward Horne which were "sexist in nature." For instance, the other female deputy witnessed Horne cry "numerous times" because of comments made by the sheriff to Horne that "men were worth more than women." This evidence is enough to show by a preponderance that Horne was intentionally discriminated against on the basis of her sex.

The sheriff's office argues that Horne failed to establish a prima facie case of discrimination because she offered no evidence that she had applied for a position which required law enforcement certification. The sheriff's office cites several cases for the proposition that a plaintiff must prove that she applied for an available position for which she was qualified, but was rejected. Since Horne never applied to be a "patrol deputy" or any other position for which certification was required, the sheriff's office contends that she did not establish her prima facie case. This argument misses the point.

Horne did make an application for which she was qualified—that is, she applied to attend the training center. While *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny state that an element of a prima facie discrimination case is proof that the complainant "applied and was qualified for a *job* for which the employer was seeking applicants," (emphasis supplied) 411 U.S. at 802, it has been stressed that "facts necessarily will vary" in discrimination cases, and "the specification . . . of the

prima facie proof required . . . is not necessarily applicable in every respect to differing factual situations." *Id.*, n.13. The eighth circuit likewise noted that "the requirements of a prima facie case will vary from case to case . . . ." *Wright v. Stone Container Corp.*, 524 F.2d 1058, 1063 (8th Cir. 1975).

Moreover, Horne was in somewhat of a "Catch-22" situation. She was not eligible to apply for a position as, for example, a "patrol deputy," as the sheriff's office now claims she should have, until she was certified from the law enforcement training center. Yet the sheriff's office argues that showing denial of the opportunity to attend the law enforcement training does not constitute a prima facie case of discrimination.

Given the circumstances, Horne should not be required to show that she actually applied for a job position which required certification. The U.S. Supreme Court has resolved that "the . . . assertion that a person who has not actually applied for a job can *never* be awarded . . . relief cannot prevail." *Teamsters v. United States*, 431 U.S. 324, 365, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977). The Court recognized that, even in the absence of an express policy of discrimination, circumstances may excuse the requirement that the complainant actually apply for a job:

> The same message [of discrimination] can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices—by his consistent discriminatory treatment of actual applicants, . . . his recruitment techniques, [or] his responses to casual or tentative inquiries . . . . When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application.

431 U.S. at 365-66.

Considering the conditions in which Horne worked, e.g., the sheriff's "sexist" remarks and his denials of her requests for advancement through certification, it would seem unreasonable to impose upon Horne the burden of proving that not only was she turned down after applying for attendance at the training center, but was rejected in her attempts to obtain a

job requiring certification as well.

The ultimate burden of persuasion remains at all times with the complainant, and the employer bears only an intermediate burden of production. The employer is not required to prove the absence of discriminatory motive in order to eliminate the inference created by the complainant's prima facie case. It need only explain what has been done, or produce evidence of a legitimate, nondiscriminatory reason for the decision. It is sufficient if the employer's evidence raises a "genuine issue of fact" as to whether it discriminated against the employee. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

In this regard, the sheriff's office focused on the difference in job duties carried out by Horne and the male deputies and the assertion that because of these differences, Horne's attendance at the training center would not have been justified.

At the time Horne was hired, there were four deputies, a chief deputy, and the sheriff in the office. Horne was the only female until 1975. More personnel were added over the years, but the structure of the office remained essentially the same until 1976, when jailers, more deputies, and six "town deputies" were added. In 1980, radio dispatchers, deputy supervisors, more jailers, and an investigator were hired.

Although the deputies were all officially "deputy sheriffs," informally the deputies were sometimes referred to as the "tax deputy," the "civil process server," "town marshalls," "patrol deputies," and "office deputies."

Horne, who was occasionally referred to as an "office deputy," was responsible when she started in 1963 for keeping a record of all papers served, making returns on all papers, running the radio, answering the telephone, keeping the prisoners' records, keeping the jail register, figuring the prisoners' board and filing claims for such, and making calls and investigations (mostly in child abuse complaints). Over the years, her job responsibilities increased to include transporting prisoners and mental patients, and making arrests on warrants. When Jean Odbert was hired in 1975, Horne and Odbert

divided the job between them. Horne's job responsibilities continued to increase; she handled all of the foreclosures and sheriff's sales of real property. She also helped on the tax collection work, served civil process, and searched female prisoners.

Horne argues that many of the functions she performed were similar to the duties of the male deputies, and vice versa; for instance, making arrests on warrants, serving process, and transporting prisoners. A former deputy sheriff testified that Horne did "a lot of the same work" as the other deputies; that the tax deputy's job was "very much basically the same thing that [Horne] done [sic]," as was the civil process server's; and that Horne performed equal work which required skill, effort, and responsibility equal to that of one or more of the male deputies.

However, the former deputy sheriff also stressed that much of the job description was different. That is, Horne was not required to do "street work." He stated that there was a "definite difference in our positions as far as the things we have to do" and that he and the other deputies did "a lot of other stuff . . . that was not the same." Horne was not subject to being called out to handle arrests, patrol, conduct criminal investigations, etc.

These differences in duties between Horne and the male deputies are one reason the sheriff's office gives to explain the refusal to allow Horne to be certified; that is, Horne was not required to be certified, as she was not a "law enforcement officer" within the meaning of § 81-1401. Moreover, Horne was not in a position to be assigned as a "patrol deputy."

Section 81-1401(3)'s definition of "law enforcement officer" includes an employee of a county sheriff's office who "is responsible for the prevention or detection of crime or the enforcement of the penal, traffic, or highway laws of the state or any political subdivision thereof for more than one hundred hours per year and is authorized by law to make arrests . . . ." Horne admits that she does not fall within this definition and thus is not required to be certified. However, Horne requested certification so that she would be eligible for "possible advancement." The NEOC found that, without the

certification, Horne was "locked into secretarial/clerical duties wherein she lost essential advancement/increases in salary." Horne argues that because she was a female, she was not allowed to receive certification and thereby be assigned to patrol duties, whereby she would have received a higher salary.

In response, the sheriff's office essentially maintains that certification would have been a futile gesture on Horne's part. Even with certification, Horne would never have been qualified to "move up" as a patrol deputy, and, therefore, her attendance at the training center would have been more or less a waste of time.

Horne was born in 1907. Thus, at the time she first approached the sheriff with a request to be certified, she would have been 68, and by the time she finally gave up her battle in 1982, she was approximately 75. Although the county did not have mandatory retirement, the feasibility of Horne's becoming a patrol deputy at this age is minimal, even if she were certified. In addition, Horne was only 5 feet 1 inch tall, which was another factor which tended to diminish the possibility of her "advancing" to a street deputy position.

Roy Newton, who was chief deputy during the last 3 1/2 years of Horne's employment, testified that had it been his decision, he would not have sent Horne to the school for certification. He stated that the training would not have benefited her or the department, because "To put her on the street [transfer her to a patrol deputy position] at her age . . . wouldn't have been the best decision." He also said that although he would have "considered" a request by Horne to be a patrol deputy, "her ability was in the office and not on the street," and her height would have been a factor against her. Even Horne conceded that in serving arrest warrants, normally "they sent Jean out to make the arrest, she's more impressive in appearance than I am." Since Newton agreed that it would not benefit Lincoln County to have the "office deputy" receive certification and that he would not have foreseen Horne in a patrol position, no good would have come from the sheriff's office's granting Horne the opportunity to attend training. Furthermore, she herself indicated that she was satisfied with her "office job," and, although she would have patrolled if she had been so

assigned, she did not necessarily want to change her position.

The sheriff's office met its burden of producing legitimate, nondiscriminatory reasons for denying Horne's requests to attend the law enforcement training program.

At this phase, Horne is given an opportunity to show that the stated reason is pretextual and not the true reason for the sheriff's decision. This could be shown through direct evidence, including discriminatory statements or statistics, or through comparative evidence. Casenote, *Making the Punishment Fit the Crime: The Eighth Circuit's Treatment of Dual Motive Cases—Bibbs v. Block*, 19 Creighton L. Rev. 941 (1986).

Much of the evidence on this point is similar to the evidence which proved Horne's prima facie case of discrimination. There is little doubt from the record that the sheriff believed that women were worth less than men. The issue is whether that was the real reason Horne was turned down for law enforcement training and, thus, for possible pay raises. Since the sheriff is deceased, the record can only reflect the observations of the sheriff's employees as to the atmosphere which existed in the office at the time of Horne's employment.

There was considerable testimony that, when confronted with the male-female pay discrepancy, the sheriff responded either with silence or comments as to the value of women. Apparently, the sheriff did not attribute the discrepancy to the fact that Horne was not, nor would she be, assigned to "street duty." Instead, inquiries as to the lower pay were met with remarks such as "[m]en are worth more than women."

Horne and Odbert were the only deputies not allowed to attend training. Although the sheriff's office now claims that this decision was made on the basis of Horne's lack of qualifications for actual "law enforcement" work, the reasons given at the time of Horne's requests were that she and Odbert were needed to run the office or that they were already deputies and did not need training.

It should be pointed out that all of the male deputies were allowed to attend the training, including the civil process server, who did "very, very, very little street work."

The final issue is whether these proffered reasons were the actual reasons for the disparate treatment or were merely a

pretext for discrimination.

A pure "pretext model" case depends upon a showing by the plaintiff that the articulated legitimate reasons are nothing but a pretext and that the disparate treatment would not have occurred *but for* the employer's discriminatory reasons. 19 Creighton L. Rev., *supra*.

Although complainant argued that all she wanted was to attend the law enforcement training school, it is not possible for us to turn back the clock. The only issue actually before us is whether the dollar award for disparate wage treatment should be affirmed. Throughout the record, the evidence seems conclusive that each time Horne asked for a raise, she was told by the sheriff that "men were worth more than women." It is difficult to conceive of a more blatant exhibition of sexual discrimination. As such, we believe it is clear that Horne has carried her burden of proving by a preponderance of the evidence that the nondiscriminatory reasons articulated by the respondents were a mere pretext for discrimination.

The judgment of the district court is affirmed. The complainant is awarded $1,000 for an attorney fee in this court. *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

AFFIRMED.

MELVIN O. WORLEY, APPELLEE, V. HENRY F. SCHAEFER II ET AL., APPELLEES, JOHN KRAFT CHEVROLET, INC., A FOREIGN CORPORATION, ET AL., APPELLANTS.

423 N.W.2d 748

Filed May 13, 1988. No. 86-297.

1. **Motor Vehicles: Sales.** Proof of possession of a vehicle, together with a bill of sale which complies with Neb. Rev. Stat. § 60-1417 (Reissue 1978), is sufficient to prove ownership of the vehicle under Neb. Rev. Stat. § 60-105 (Reissue 1984).
2. **Statutes.** Statutes in pari materia should be construed together so as to give force and effect to each whenever possible, but where plain and unavoidable repugnancy exists between the statutes, the latest will control.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

P. Shawn McCann and Edward Noethe of Sodoro, Daly & Sodoro, for appellants.

Barbara Thielen of Taylor, Fabian, Thielen & Thielen, for appellee Melvin O. Worley.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

On Saturday, August 21, 1982, Melvin O. Worley and Henry F. Schaefer II were involved in an automobile-motorcycle accident. The car operated by Worley was a 1973 Plymouth station wagon which he had purchased from Paul Yates, doing business as Paul's Auto Sales (Yates), on August 18, 1982. On that day Worley paid cash for the car, took possession of it, and received a bill of sale for the car. Yates had purchased the car from John Kraft Chevrolet, Inc., on the day before Yates sold it to Worley. At the time of the accident John Kraft Chevrolet had not delivered a title to the vehicle to Yates, and, consequently, Yates had not delivered title to Worley.

Schaefer brought a tort action against Worley, seeking damages for injuries which were alleged to have been caused by Worley's negligence. Worley then filed an action for declaratory judgment to determine whether John Kraft Chevrolet, as holder of title to the automobile, and its insurer, American Alliance Insurance Company, were responsible for any judgment arising out of the Schaefer tort action. Ruling on Worley's motion for partial summary judgment, the district court determined that John Kraft Chevrolet was the owner of the vehicle at the time of the accident. After partial summary judgment was entered, Worley moved for summary judgment on the remaining issue of insurance coverage. The district court determined that Worley was covered under John Kraft Chevrolet's insurance policy and ordered American Alliance Insurance Company to provide a legal defense to Worley for the pending tort action between Schaefer and Worley. The

defendants American Alliance Insurance Company, a capital stock corporation of the Great American Insurance Companies, and its insured, John Kraft Chevrolet, have appealed to this court.

In *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 732, 420 N.W.2d 273, 276 (1988), this court for the first time acknowledged that "the provisions of Neb. U.C.C. art. 2 (Reissue 1980) governing sales are applicable to the sale of a motor vehicle." Until *Dugdale*, cases involving motor vehicle sales disputes were resolved solely by application of the relevant, and sometimes not so relevant, provisions of the Nebraska certificate of title act. See, generally, *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987); *The Cornhusker Bank of Omaha v. McNamara*, 205 Neb. 504, 288 N.W.2d 287 (1980); *Dyas v. Morris*, 194 Neb. 773, 235 N.W.2d 636 (1975). Thus, by recognizing that motor vehicles are "goods" within the definition provided by Neb. U.C.C. art. 2 (Reissue 1980), *Dugdale* set the stage for future cases which necessarily involve competing and conflicting clauses and provisions of the Uniform Commercial Code and the title act.

Facts similar to those in the present case were presented to this court in *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 214 Neb. 226, 334 N.W.2d 168 (1983). In *Fitzgerald*, plaintiff Kwasnieski, an individual who was not a dealer in automobiles, agreed to sell his 1975 Chevrolet pickup truck to defendant Fitzgerald. The two signed the back of the certificate of title to the pickup, but agreed to leave the title with Kwasnieski so that his father could arrange to have the signatures notarized. Fitzgerald took possession of the truck and on the next day was involved in an accident in which a third party was injured. Kwasnieski and his insurer, State Farm Mutual Automobile Insurance Company, brought a declaratory judgment action against Fitzgerald and his insurer for determination of whether Kwasnieski's policy applied to the accident.

In *Fitzgerald*, we said:

> Neb. Rev. Stat. § 60-105(1) (Reissue 1978) provides in part as follows: "No person . . . acquiring a motor vehicle . . . from the owner thereof . . . shall acquire *any right,*

> *title, claim, or interest* in or to such motor vehicle . . . until he shall have had delivered to him physical possession of such motor vehicle . . . and a certificate of title . . . duly executed in accordance with the provisions of this act . . . . No court in any case at law or in equity shall recognize the right, title, claim, or interest of any person in or to any motor vehicle . . . sold or disposed of . . . unless there is compliance with this section." (Emphasis supplied.) The form which the certificate of title must take is provided by statute in Neb. Rev. Stat. § 60-114 (Reissue 1978), and notarization of the signatures is one of the requirements. Reading § 60-114 together with § 60-105, it is clear that a "duly executed" certificate of title requires the seller's signature to be notarized and that absent such notarization the document has not been "duly executed." [Citation omitted.] It must follow, therefore, that a purchaser who receives possession of an automobile without also obtaining a certificate of title properly notarized and duly executed in accordance with the statutes then in effect acquires no "right, title, claim, or interest in or to" a motor vehicle [citations omitted], and does not thereby become the owner of the vehicle in question.

214 Neb. at 231, 334 N.W.2d at 171. The court held that at the time of the accident in question, Kwasnieski was still the owner of the pickup truck and that, as a matter of law, Fitzgerald was operating the truck with Kwasnieski's permission. The provisions of the seller's policy were therefore held to apply.

A similar result was reached in *Boren v. State Farm Mut. Auto. Ins. Co., supra.* The facts in *Boren* are similar to those in *Fitzgerald* except that in *Boren* the seller was a licensed dealer, Misle Chevrolet Company, and the two parties executed a purchase agreement. The significance of this fact will be discussed later in this opinion.

Although it is not clear from the record in this case, the district court apparently relied on *Fitzgerald* in concluding that John Kraft Chevrolet was the owner of the 1973 Plymouth station wagon at the time of the accident and in ruling that, as a matter of law, John Kraft Chevrolet permitted Worley to

operate the car. The appellants have asked this court to reexamine *Fitzgerald* and its progeny in light of the apparent conflict between § 2-401(2) and the passing of title requirements of the certificate of title act.

Section 2-401 provides that, in those instances not governed by other provisions of article 2 and as to which title is "material," "title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . even though a document of title is to be delivered at a different time or place . . . ." The parties may, however, explicitly agree that title will pass otherwise. This provision represents a significant shift away from the prior role that "title" played in the transaction of goods. Article 2 "deals with the issues between seller and buyer in terms of step by step performance or non-performance under the contract for sale and not in terms of whether or not 'title' to the goods has passed." § 2-401, comment 1.

Appellants rely on a recent Montana Supreme Court case, *Safeco Ins. Co. v. Lapp*, ____ Mont. ____, 695 P.2d 1310 (1985), for the proposition that "as between the parties, and for purposes of determining insurance coverage, ownership of a motor vehicle should be governed by the Nebraska Uniform Commercial Code, and not by the Nebraska certificate of title act." Brief for Appellants at 7. In *Safeco*, the defendant Lapp purchased an automobile from Prospector Chevrolet. Before title to the automobile was transferred, Lapp was involved in a collision with another vehicle which killed the driver of the other vehicle. Safeco brought a declaratory judgment action to determine its rights and obligations under a garage liability policy that it issued to Prospector.

The lower court entered a judgment in favor of Safeco. On appeal Lapp asserted that legal title remained in Prospector because all of the steps required for transfer of title under the Montana certificate of title act were not completed. The Montana Supreme Court agreed that the motor vehicle statutes were relevant, but did not think they were determinative on the issue of ownership. The court noted that the Montana Legislature had recently deleted a provision in the motor vehicle code which required judicial invalidation of any motor vehicle

transfer when the parties have not fully complied with the statutory procedures. At the same time, new legislation setting forth the procedure to transfer and register motor vehicles was enacted. The new provisions are nondirective in that they require compliance by the parties, but do not explicitly spell out the effect on title if the parties fail to comply. The Montana court therefore felt it necessary to look to the Uniform Commercial Code for direction on the issue of ownership. The court cited Mont. Code Ann. § 30-2-401 (1987), that state's version of Nebraska's § 2-401, and then held as follows:

> Prospector Chevrolet, Inc. delivered the vehicle to Clive H. Lapp in July 1980. The sale was complete and Lapp became the owner of the vehicle. Lapp had the right to use or dispose of the automobile as he wished. Prospector had relinquished all its legal rights to the vehicle even though it still had the statutory duties relating to transfer of certificate of ownership. We hold the legal title to the automobile passed to Clive H. Lapp on the date of delivery.

____ Mont. at ____, 695 P.2d at 1313.

Nebraska's title act is fundamentally different from Montana's title act in that it contains an invalidating provision, Neb. Rev. Stat. § 60-105 (Reissue 1984), much like the one Montana deleted. Recognizing this, it is necessary to rely instead on the relevant rules of statutory construction to resolve whatever conflict exists between §§ 2-401 and 60-105.

We must first determine the circumstances under which the two provisions actually conflict. In 1969, the Nebraska Legislature amended § 60-105, apparently as a direct response to the problem presented in this case. See Floor Debate, Committee on Public Works, L.B. 1174, 80th Leg. (May 1, 1969). To avoid the problem of the automobile dealers' continued liability after delivery of the vehicle but before passage of title, the Legislature added the following emphasized clause to § 60-105:

> No person, except as provided in section 60-110, acquiring a motor vehicle, commercial trailer, semitrailer, or cabin trailer from the owner thereof, whether such owner be a manufacturer, importer, dealer, or otherwise, shall acquire

> any right, title, claim, or interest in or to such motor vehicle, commercial trailer, semitrailer, or cabin trailer until he shall have had delivered to him physical possession of such motor vehicle, commercial trailer, semitrailer, or cabin trailer and a certificate of title or a manufacturer's or importer's certificate duly executed in accordance with the provisions of this act, and with such assignments thereon as may be necessary to show title in the purchaser thereof *or an instrument in writing required by section 60-1417* . . . .

(Emphasis supplied.) At the time of the events of this case, Neb. Rev. Stat. § 60-1417 (Reissue 1978) set forth all of the necessary information required for a valid bill of sale. The effect of this new clause is that proof of possession of a vehicle, together with a bill of sale which complies with § 60-1417, is sufficient to prove ownership of the vehicle. A duly executed and delivered certificate of title is no longer absolutely necessary to prove ownership under the title act.

Therefore, in the circumstance where the motor vehicle has been delivered and a valid bill of sale is executed, the title act and the U.C.C. do not conflict. Each dictates that the buyer is the owner of the vehicle. It is only when no bill of sale has been executed and no title has been properly executed and delivered that the title act and the U.C.C. actually conflict. In this situation legal ownership has passed to the buyer under the U.C.C., but remains with the seller under the title act.

Statutes in pari materia should be construed together so as to give force and effect to each whenever possible, but where plain and unavoidable repugnancy exists between the statutes, the latest statute will control. *Dugdale of Nebraska v. First State Bank*, 227 Neb. 729, 420 N.W.2d 273 (1988); *State v. Retzlaff*, 223 Neb. 811, 394 N.W.2d 295 (1986). On the facts in this case §§ 60-105 and 2-401 are in harmony with each other. Under § 2-401, when Yates delivered the vehicle to Worley, the sale was complete and Worley became the legal owner. Because the parties also executed a bill of sale in conformity with § 60-1417, Worley was likewise the owner under § 60-105. The 1969 amendment to § 60-105 casts doubt on this court's reliance on *State Farm Mut. Auto. Ins. Co. v. Fitzgerald*, 214 Neb. 226,

334 N.W.2d 168 (1983), in *Boren v. State Farm Mut. Auto. Ins. Co.*, 225 Neb. 503, 406 N.W.2d 640 (1987). If the bill of sale in *Boren* met the requirements of § 60-1417, then the result in *Boren* is erroneous.

Under the foregoing analysis the continuing validity of this court's decisions in *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986), *State Farm Mut. Auto. Ins. Co. v. Fitzgerald, supra*, and *Weiss v. Union Ins. Co.*, 202 Neb. 469, 276 N.W.2d 88 (1979), is questionable. In these cases it appears that no bill of sale was executed. In this situation the U.C.C. and the title act clearly conflict. The title act places legal ownership with the seller, while the U.C.C. places such ownership with the buyer. Because the U.C.C. is the more recent statement of legislative intent, it should control on the issue of ownership at least for the purpose of tort law and liability insurance coverage.

The district court erred in relying on *Fitzgerald* because in that case no bill of sale in compliance with § 60-1417 was executed. In this case Worley was the owner of the vehicle under both the U.C.C. and the title act. The cause must be reversed and remanded with directions to enter an order in accordance with this opinion. Appellee's motion for attorney fees for this appeal pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1984) is denied.

REVERSED AND REMANDED WITH DIRECTIONS.

TERRY W. TANK ET AL., COPERSONAL REPRESENTATIVES OF THE ESTATES OF WILLIS H. TANK AND MARVA LEA TANK, DECEASED, APPELLEES, V. STEVEN M. PETERSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD E. PETERSON, DECEASED, APPELLANT.

423 N.W.2d 752

Filed May 13, 1988. Nos. 86-306, 86-307.

1. **Proof: Trial: Appeal and Error.** All matters expressly or by necessary implication adjudicated by this court become the law of the case on remand for new trial and will not be considered again unless it is shown that the facts

presented at the second trial are materially and substantially different from the facts presented at the first trial. The burden of showing the material and substantial difference in the facts is on the party asserting the difference.

2. **Trial: Evidence: Appeal and Error.** Error in admission of evidence is harmless when the matter is not submitted to the jury for consideration.
3. **Jury Instructions.** Whenever applicable, the Nebraska Jury Instructions are to be used.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

William G. Line and John F. Kerrigan of Kerrigan, Line & Martin, for appellant.

E. Terry Sibbernsen and Debra R. Nickels of Welsh, Sibbernsen & Roach, for appellees.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

PER CURIAM.

Plaintiffs, copersonal representatives of the estates of Willis H. Tank and Marva Lea Tank, brought a consolidated wrongful death action against the personal representative of the estate of Donald E. Peterson. The Tanks were passengers in an aircraft piloted by Peterson which crashed near the Columbus airport on November 25, 1979, killing all on board.

This is the third time this case has been before this court. In *Tank v. Peterson*, 214 Neb. 34, 332 N.W.2d 669 (1983) (*Tank I*), the district court granted defendants' motion for summary judgment on the ground that the plaintiffs' consolidated wrongful death actions were barred by the Uniform Probate Code nonclaim statute, Neb. Rev. Stat. § 30-2486 (Reissue 1979). This court reversed and remanded, holding that while the plaintiffs did voluntarily dismiss the county court action after the nonclaim statute had run and were thus barred from pursuing a claim against the estate, they could nevertheless proceed against the decedent's insurer to the extent of insurance coverage available. The case proceeded to trial and, after the plaintiffs had presented their case in chief, defendant Peterson's motion to strike the testimony of three expert witnesses and his motion for directed verdict were sustained. In

Tank v. Peterson, 219 Neb. 438, 363 N.W.2d 530 (1985) (*Tank II*), this court reversed the trial court's rulings and remanded for new trial, holding that the defendant had failed to establish that the experts' opinions were based on insufficient underlying facts or data and that, as such, there was a jury question on the issue of negligence and proximate cause. Plaintiffs were successful in winning a jury verdict at the second trial, and damages were assessed in the amount of $179,300. The defendant appeals.

In *Tank II* we reported an extended version of the facts adduced at the first trial. At the second trial the plaintiffs relied on substantially the same testimony and documentary evidence. In order to avoid undue repetition, we will discuss only those facts necessary and relevant to the defendant's appeal.

The defendant argues that the trial court erred in failing to strike the testimony of the plaintiffs' experts because (1) they were not qualified; (2) their conclusions were based on insufficient underlying facts or data; and (3) their testimony was not needed to assist the jury in determining any facts in issue. The defendant also urges that the plaintiffs' evidence was insufficient as a matter of law to establish either the gross negligence of Peterson or that such gross negligence was the proximate cause of the accident. All of these issues were either directly or by necessary implication adjudicated on appeal from the first trial, in *Tank II*. All matters expressly or by necessary implication adjudicated by this court become the law of the case on remand for new trial and will not be considered again unless it is shown that the facts presented at the second trial are materially and substantially different from the facts presented at the first trial. *City of Kimball v. United Telephone Co.*, 223 Neb. 549, 391 N.W.2d 135 (1986); *Bass v. Dalton*, 218 Neb. 379, 355 N.W.2d 225 (1984). The burden of showing the material and substantial difference in the facts is on the party asserting the difference. *School Dist. of Gering v. Stannard*, 196 Neb. 367, 242 N.W.2d 889 (1976). The only difference in the facts urged by the defendant as affecting the expert testimony is that at the second trial there was evidence that Peterson's logbook was not current because it did not reflect the flight hours of a

trip to Norman, Oklahoma. This evidence may or may not have affected the weight afforded the expert testimony, but it did not substantially alter the foundation upon which the expert testimony rested. The conclusion in *Tank II* that the plaintiffs' experts' testimony was admissible will therefore not be considered again.

In *Tank II* we held that there was sufficient evidence to create a jury question on the issue of negligence and proximate cause. As we have determined that the experts' testimony was properly admitted, evidence adduced at the second trial is substantially the same as the first. The defendant's contention that the evidence was insufficient as a matter of law is therefore without merit. See *Kline v. Metcalfe Construction Co.*, 148 Neb. 357, 27 N.W.2d 383 (1947).

The defendant also contends that the trial court committed reversible error by admitting testimony as to instrument flight rules (IFR) and by admitting evidence that Peterson failed to overhaul the airplane's engines. The defendant's objection is that this testimony was not related to a material issue in the case because Peterson was not required to fly IFR and because engine failure was not the cause of the accident. While it is true that there was evidence that the weather conditions required only visual flight rules (VFR), there was also testimony that instrument flight was necessary in order to maintain a legal flight altitude between Columbus and Fremont. The testimony as to IFR was therefore relevant and admissible.

The plaintiffs' expert witness Gregory Gorak testified that the plane's engines were past due for inspection and overhaul and that such an overhaul would have cost $8,000 to $10,000 per engine. Gorak testified that when plane engines are overdue for scheduled repair the pilot has no idea when the engines might fail. The defendant moved, unsuccessfully, to strike this testimony because there was no evidence to indicate that engine failure had anything to do with the cause of the accident. Plaintiffs submit that this testimony is relevant because it indicates Peterson was aware that his plane was not properly maintained. This knowledge, plaintiffs contend, could have caused Peterson to be apprehensive about the flight, thereby increasing the likelihood that Peterson would become spatially

disoriented. Standing alone, the testimony in question in no way tends to make the likelihood of spatial disorientation more or less probable and is therefore irrelevant. See Neb. Rev. Stat. § 27-401 (Reissue 1985). All the jury knew was that the plane's engines needed service. It is doubtful that the jury could have made the connection between this fact and the pilot's spatial disorientation without some further testimony from one of the plaintiffs' expert witnesses. This error in admission of evidence was harmless, however, because the matter of engine overhaul was not submitted to the jury for consideration. *Daniels v. Bloomquist*, 258 Iowa 301, 138 N.W.2d 868 (1965).

The remaining assignments of error concern the instructions given to the jury. Instruction No. 2 contains the plaintiffs' allegations of negligence which the trial court determined to be supported by the evidence. The defendant contends that the court erred in submitting the allegation that Peterson failed to perform an adequate takeoff check before the flight, because there was no evidence that mechanical failure caused the accident. The plaintiffs' theory of relevance here is the same as for the engine overhaul testimony. This time, however, Gorak testified that stress can cause spatial disorientation and the lack of a proper preflight check could cause such stress. The plaintiffs' witness thereby supplied the missing link in the evidence necessary to make the preflight testimony relevant. The matter of Peterson's failure to perform an adequate takeoff check was therefore properly submitted.

The defendant further submits that it was error to include in instruction No. 2 the allegations that Peterson failed to have knowledge of the existing weather conditions and that he was not qualified, current, and legal to fly in those conditions. There was evidence in the record that at the time of the takeoff it had been hours since he had obtained a weather briefing and he knew the weather was rapidly deteriorating. As we have said, there was also testimony that the weather conditions required IFR proficiency, which the deceased did not have. The instruction regarding Peterson's negligence given the existing weather conditions was therefore proper.

The defendant asserts that instruction No. 10 on gross negligence was deficient because it did not contain certain

language offered by the defendant. The instruction used was adopted from NJI 7.51, which defines gross negligence within the meaning of the automobile guest statute. The only change made was that "aviation guest statute" was substituted for "automobile guest statute." Because gross negligence means the same thing in the automobile guest statute as in the aviation guest statute, the instruction was proper and comported with the rule that, whenever applicable, the Nebraska Jury Instructions are to be used. Nebraska Jury Instructions ix (1969). See, also, *Jones v. Foutch*, 203 Neb. 246, 278 N.W.2d 572 (1979).

The defendant next assails instruction No. 11 for including regulations on IFR. As we have said, there was testimony that in order to fly between Columbus and Fremont legally, instrument flight proficiency was required. This assignment is without merit.

The defendant argues that the court erred in failing to give his requested instruction on assumption of risk. Instead of the defendant's requested instruction, the court used NJI 2.02A (assumption of risk). As we have said, Nebraska Jury Instructions are to be used whenever applicable. NJI 2.02A adequately describes the defendant's burden in this case to prove assumption of risk, and no further language or explanation was necessary.

The defendant next asserts that the court should have included an instruction informing the jury that no flight plan was required to be filed for the flight. The testimony concerning the need to fly IFR together with the fact that flight plans are required for IFR flight made the necessity of a flight plan a question for the jury. It would have been improper to instruct otherwise.

Finally, the defendant asserts that the Nebraska Jury Instruction on expert testimony, NJI 1.42, which was given by the court, is contradictory. According to defendant, the offending sentence is: "You are not required to take the opinions of experts as binding upon you, but they *are* to be used to aid you in coming to a proper conclusion." (Emphasis supplied.) The defendant argues that while expert opinions *may* be used, they may also be ignored and the instruction therefore

misstates the law. The instruction simply tells the jury that it is to consider the evidence proffered, but that not all of the evidence is binding upon it. It was not error to give NJI 1.42.

There being no error, the judgment of the district court is affirmed.

AFFIRMED.

HASTINGS, C.J., dissenting.

I respectfully dissent from the majority's opinion for the reasons set forth in the dissenting opinion of Boslaugh, J., in *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985), and for the further reason that I cannot agree that the error in the admission of evidence regarding the engine overhaul was harmless.

MARY K. SANCHEZ, APPELLANT, V. FRANK N. DERBY AND BLANCHE CONRAD, APPELLEES.

423 N.W.2d 420

Filed May 13, 1988. No. 86-360.

1. **Expert Witnesses: Appeal and Error.** The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, an abuse of discretion must be shown.
2. **Expert Witnesses.** The expert witness must possess facts which enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.

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

Daniel B. Cullan and Virginia L. Cullan of Cullan, Cullan & Morrison, for appellant.

Edward G. Warin and Lynn A. Mitchell of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellee Derby.

Daniel P. Chesire and James L. Schneider of Kennedy, Holland, DeLacy & Svoboda, for appellee Conrad.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

PER CURIAM.

The sole issue in this case is whether the trial court erred in limiting the testimony of a board-certified neuropsychologist regarding brain damage allegedly suffered by the plaintiff, Mary K. Sanchez, in an automobile accident. We find the trial court was correct in its ruling.

Sanchez sued Frank N. Derby and Blanche Conrad, defendants, for injuries Sanchez allegedly sustained as a result of a rear end automobile collision on Interstate 680 in Omaha on April 21, 1982. Following trial, the jury awarded Sanchez $4,808.20, to be paid by both defendants. We affirm.

At trial, Sanchez called Charles J. Golden, Ph.D., a board-certified neuropsychologist, as an expert witness. Sanchez had been referred to Dr. Golden by her attorney and by Dr. Harold Ladwig, her neurologist. Dr. Golden, a licensed psychologist, first evaluated Sanchez in November 1984. He interviewed and tested Sanchez. Dr. Golden reviewed plaintiff's medical records, which included history of care and treatment at Bergan Mercy Hospital, Immanuel Medical Center, and Omaha Neurological Clinic, as well as records from Sanchez' mental health counselor, a psychiatrist, and her obstetrician-gynecologist. Dr. Golden determined that Sanchez was suffering from a chronic pain syndrome. That means she had a pain problem for more than 6 months which had not responded to medical treatment and that it "was not going away."

In ruling upon an objection, the trial judge held that Dr. Golden would only be permitted to testify that the pain plaintiff was experiencing was tied to soft-tissue injuries received in the accident.

Plaintiff claims that Dr. Golden should have been permitted to testify to his opinion as it is contained in the following offer of proof:

> [T]he client [Sanchez] presents a clinical picture of a somewhat histrionic individual whose premorbid status was that of an individual with marginal coping skills and resources. Since the accident of April 1982 there has been

a significant decline in level of function as well as an exacerbation of her histrionic tendencies. The *most probable causes* [sic] of this behavioral change is *either* (1) a combination of a post traumatic stress disorder and a reaction to chronic pain in a previously marginal personality *or* (2) an organic affective disorder secondary to mild subcortical brain injury (around the orbital frontal areas) which *can* occur in accidents such as this.

While it is possible at this time to state firmly that *one of these causes is indeed the most probable cause of her problems* as the problems clearly date from the time of the accident as well as follow the pattern expected in such disorders, *it is not possible to choose between them* at present. The type of mild subcortical brain dysfunction which *could cause this type of injury cannot [by] itself be easily identified by objective tests which are currently clinically available.* Although the pattern of the disorder (especially the denial, the inability to recognize the nature of her problems, and the somewhat primitive thought patterns associated with her analysis of emotion) is consistent with such a diagnosis, it *can* also represent in this woman an intensification because of a post traumatic stress disorder related to the accident itself and the chronic physical pain which ensued from the accident.

(Emphasis supplied.)

Contrary to plaintiff's contention, the narrow question on appeal is not whether Dr. Golden is qualified as an expert regarding brain damage, but whether the trial judge abused his discretion in excluding the testimony of Dr. Golden on the particular issue in question.

Dispositive of that question is whether Dr. Golden's excluded testimony would supply specialized knowledge which would aid the jury in understanding the evidence or in determining a fact in issue. Neb. Rev. Stat. § 27-702 (Reissue 1985).

The admission or exclusion of expert testimony is largely within the broad discretion of the trial court. To obtain reversal on the grounds of the exclusion of evidence, an abuse of discretion must be shown. See, *Lincoln East Bancshares v. Rierden*, 225 Neb. 440, 406 N.W.2d 337 (1987); *Bay v. House*,

226 Neb. 521, 412 N.W.2d 466 (1987); *Johannes v. McNeil Real Estate Fund VIII*, 225 Neb. 283, 404 N.W.2d 424 (1987); *Aetna Cas. & Surety Co. v. Nielsen*, 222 Neb. 92, 382 N.W.2d 328 (1986); *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986).

Here, the trial judge found that to allow Dr. Golden's opinion testimony with respect to the cause of Sanchez' behavioral change would be to invite a jury to speculate on the testimony of an expert. The expert must possess facts which enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture. *State v. Johnson*, 215 Neb. 391, 338 N.W.2d 769 (1983). Dr. Golden's opinion as stated in the offer of proof is couched in alternatives, one of which is no more than a "possibility" and does not meet the certainty required. See, *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985); *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984); *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981).

The trial judge did not abuse his discretion in excluding Dr. Golden's opinion as set forth in the offer of proof. The verdict and judgment of the trial court should be affirmed.

AFFIRMED.

WHITE, J., dissenting.

The record in this case clearly indicates that the trial judge excluded Dr. Golden's testimony regarding "brain injury" because no "medical doctors" had testified to such an injury. Thus, the exclusion was based on the judge's belief that Dr. Golden was not qualified to render an opinion as to the presence of a brain injury in the plaintiff. I dissent from any suggestion created by the majority opinion that a neuropsychologist is not evidentially equipped, due to the lack of a medical degree, to render an expert opinion regarding the existence of a condition which is clinically known to produce a behavior disorder such as that seen in the plaintiff.

Obviously, plaintiff was attempting to prove that the accident caused certain disabling behavior changes which amounted to a compensable injury. Not all injuries are capable of producing observable physical manifestations. Physicians often must rely solely on a patient's description of symptoms when making a diagnosis. This is equally true for psychologists,

who must diagnose and treat emotional illnesses that they cannot see, hear, or touch. Yet these symptoms (pain, behavior changes, etc.) are real and often debilitating to a patient, both psychologically and physically.

I cannot agree with the majority's conclusion that Dr. Golden's opinion, because it was couched in alternatives, does not meet the required certainty standard. Dr. Golden was prepared to testify that one of only two probable causes existed to explain plaintiff's behavior changes. Both of these causes related to a traumatic injury, and both would be compensable. This court noted in *Marion v. American Smelting & Refining Co.*, 192 Neb. 457, 460, 222 N.W.2d 366, 368-69 (1974), that "it is impossible for a reputable doctor to testify with absolute certainty that one cause and one cause alone is the reason for [a] disability. Absolute certainty is not required. Medical diagnosis is not that exact a science."

Plaintiff should not be denied adequate compensation simply because an alternative diagnosis cannot be ruled out as a probable causation factor. Dr. Golden's opinion regarding a brain injury was not based on mere guess or conjecture. The opinion was based on facts ascertained from interviews, tests, and a medical history review, which ultimately resulted in a diagnosis based on the expertise of this witness. Any questioning of the basis for Dr. Golden's opinion should go to its weight and credibility, not to its admissibility.

The lack of a medical degree should not be an automatic disqualification of an expert's opinion. If the defendants wished to challenge the credibility or integrity of Dr. Golden's opinion, the options of cross-examination and rebuttal expert witnesses are always available. I believe Dr. Golden's testimony should have been allowed.

HASTINGS, C.J., joins in this dissent.

FAHRNBRUCH, J., concurring.

I agree with the majority opinion. The thrust of that opinion is not whether Dr. Golden was equipped to testify as an expert on brain damage. The thrust of the majority opinion is that Dr. Golden's opinion as stated in the offer of proof was inadmissible because it is couched in alternatives, one of which

is no more than a "possibility" and does not meet the certainty required. I concur that Dr. Golden's opinion set forth in the offer of proof was not admissible at trial.

On appeal, a trial judge's reason for excluding expert testimony is not controlling. The issue is whether the trial judge's ruling achieved a correct result. A correct result will not be reversed merely because a trial judge reached that correct result for an incorrect reason. *Parker v. St. Elizabeth Comm. Health Ctr.*, 226 Neb. 526, 412 N.W.2d 469 (1987); *Gordman Properties Co. v. Board of Equal.*, 225 Neb. 169, 403 N.W.2d 366 (1987).

It should further be pointed out that Mary Sanchez, the plaintiff in this case, was permitted through the testimony of Dr. Golden to place before the jury substantial compensable damages.

Dr. Golden was permitted to testify before the jury as to plaintiff's pain, behavior changes, the onset of headaches and pain in plaintiff's back and left hand, numbness in her face, and a variety of other problems. Dr. Golden was asked if the plaintiff suffered from any disorders, to which he responded in the affirmative. He testified that in his opinion the plaintiff was suffering from a chronic pain syndrome; had pain in her neck, headaches that were very frequent and at times continuous, difficulties with anxiety and depression, weakness, and some weakness in her left hand; and that

> her moods would swing from depression to being very happy to going back to depression again fairly unexpectedly and without—not easily predictable. And basically the diagnosis of the chronic pain syndrome means that she had a pain problem for more than six months that had not responded to medical treatment and that was not changing, was not going away.

Dr. Golden further testified that the plaintiff's chronic pain syndrome was caused by the accident she had in April of 1982, the accident that has relevancy to this case.

Dr. Golden was permitted to testify over objection that he had an opinion as to whether the plaintiff's condition he had described as a posttraumatic stress disorder and reaction to chronic pain in a previously marginal personality was a

disabling condition. He then testified:

> At the present time in terms of her capacity to work, we find that it is . . . 100% disabling; that in her current condition at that time as well as now, she would not be able to hold a job successfully. In terms of her overall life adjustment, the disability would be about 35%.

Dr. Golden was also permitted to testify that the cost of treatment for the plaintiff's condition would be in the range of $25,000 to $50,000 and that the treatment would last up to 50 weeks. He also testified that the residual 35-percent disability in the future would last the rest of plaintiff's life as a result "of this incident" if she did not receive proper treatment.

The issue decided by the majority opinion is not the competency of Dr. Golden to testify as to brain damage. I agree with the majority that Dr. Golden's opinion as stated in the offer of proof is couched in alternatives, one of which is no more than a "possibility" and does not meet the certainty required.

LELAND C. ALLEN ET AL., APPELLANTS, V. AT&T TECHNOLOGIES, INC., FORMERLY KNOWN AS WESTERN ELECTRIC COMPANY, A CORPORATION, APPELLEE.

423 N.W.2d 424

Filed May 13, 1988. No. 86-467.

1. **Fair Employment Practices: Discrimination: Proof.** In an age discrimination case brought under the provisions of the Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. §§ 48-1001 et seq. (Reissue 1984), 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.
2. **Appeal and Error.** In an appeal of an action at law tried without a jury, the

Nebraska Supreme Court presumes the controverted facts were decided by the trier of fact in favor of the successful party; accordingly, those findings will not be disturbed on appeal unless clearly wrong, it not being the court's province to resolve conflicts in or reweigh the evidence.

3. **Equity: Appeal and Error.** In an appeal from an action in equity, the Nebraska Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, it will consider, 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. **Fair Employment Practices: Discrimination.** Generally, the disparate treatment theory of discrimination is applicable when the employer has treated some people less favorably than others because of an unlawful criterion such as age, sex, race, or disability.
5. **Fair Employment Practices: Discrimination: Proof.** In a disparate treatment discrimination case, proof of a discriminatory motive is essential, although in some instances such a motive can be inferred from the mere fact of differences in treatment.
6. _____: _____: _____. A plaintiff may establish a prima facie case of age discrimination by virtue of disparate treatment by showing that (1) she or he was in the protected age category, (2) she or he met the applicable qualifications, (3) despite those qualifications she or he was not promoted, and (4) other employees of similar qualifications, who were not members of a protected group, were promoted at the time plaintiff's request for a promotion was denied.
7. _____: _____: _____. To show pretext in an age discrimination by virtue of disparate treatment case, a task which merges with the ultimate burden of persuading the finder of fact that age was a factor, a plaintiff may show either that the employment decision more likely than not was motivated by a discriminatory reason or that the employer's proffered reason is unworthy of credence.
8. **Fair Employment Practices: Discrimination.** The discrimination laws are not intended to diminish traditional management prerogatives and do not ensure the best selection of individuals for promotion; rather, they ensure that the selection be free from discrimination.
9. _____: _____. Employment practices which facially appear to treat different groups neutrally but which in fact fall more harshly on one group than another, and which cannot be justified by business necessity, are discriminatory by virtue of their disparate impact.
10. **Fair Employment Practices: Discrimination: Proof.** Proof of a discriminatory motive is not required to establish a disparate impact case.
11. _____: _____: _____. To prove a prima facie case of disparate impact in an age discrimination suit, the plaintiff must show (1) the occurrence of certain outwardly neutral employment practices and (2) a significantly adverse or disproportionate impact on persons of the protected age produced by the employer's facially neutral acts or practices; the burden then shifts to the employer to show that the employment practice is related to job performance or

justified by business necessity. Should the employer succeed in so doing, the plaintiff may rebut the defendant's reason of business necessity by showing that an alternate practice lacking a discriminatory effect would satisfy the employer's legitimate interests.

12. _____: _____: _____. In order to recover under the disparate impact theory, a plaintiff must do more than merely prove circumstances raising an inference of a discriminatory impact; she or he must point to a clearly identifiable practice and prove its impact.

13. _____: _____: _____. In order to prove a prima facie case of retaliation, a plaintiff must show she or he was not promoted following protected activities of which the employer was aware; this burden is not met by showing merely that complaints were filed with the Nebraska Equal Opportunity Commission.

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

Clyde A. Christian, for appellants.

Thomas F. Hoarty, Jr., and Robert F. Rossiter, Jr., of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

CAPORALE, J.

The 25 plaintiffs-appellants brought individual suits alleging that defendant-appellee, AT&T Technologies, Inc., formerly known as Western Electric Company, in violation of the Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb. Rev. Stat. §§ 48-1001 et seq. (Reissue 1984), bypassed each of them for promotion to his former position of section chief because of age. Some of the plaintiffs additionally claim AT&T Technologies, in violation of § 48-1004(3), retaliated against them for filing a discrimination charge with the Nebraska Equal Opportunity Commission. Following a bench trial, the district court dismissed each of the petitions. In this appeal plaintiffs challenge the district court's (1) findings that AT&T Technologies successfully rebutted plaintiffs' prima facie disparate treatment case and that plaintiffs failed to discharge their ultimate burden of proof in that they did not establish that AT&T Technologies' stated reason for not promoting them was just a pretext for age-based discrimination

by virtue of disparate treatment; (2) failure to find plaintiffs had proved a disparate impact case; and (3) finding that none of the plaintiffs had established a retaliation case. We affirm.

PROVISIONS OF ACT

To the extent relevant to this review, the act protects persons "at least forty years of age but less than seventy years of age," § 48-1003, from employment discrimination "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 act also makes it unlawful for an employer "to discharge, expel or otherwise discriminate against" one who has filed a charge or suit pursuant to its provisions. § 48-1004(3). The Equal Opportunity Commission is empowered to administer the act, § 48-1007, and to initiate actions; if the commission fails to do so, an aggrieved person "may bring a civil action in any court of competent jurisdiction for such *legal or equitable* relief as will effectuate the purposes" of the act. (Emphasis supplied.) § 48-1008. While the commission investigated these cases and concluded there was "reasonable cause" to believe AT&T Technologies violated the act, it instituted no action.

BURDEN OF PROOF AND SCOPE OF REVIEW

Before proceeding with our analysis, we must first determine (1) where the burden of proof lies and (2) the scope of our review.

Burden of Proof

As to the first question, we have said in connection with cases arising under the provisions of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 et seq. (Reissue 1984), 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. E.g., *Lincoln County Sheriff's Office v. Horne, ante* p. 473, 423 N.W.2d 412 (1988) (sex);

Father Flanagan's Boys' Home v. Goerke, 224 Neb. 731, 401 N.W.2d 461 (1987) (disability). We hereby adopt the same burden and method of proof for cases arising under the subject act. By so doing, we conform to the federal practice, *Halsell v. Kimberly-Clark Corp.*, 683 F.2d 285 (8th Cir. 1982), and *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958 (8th Cir. 1978), with respect to the federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (1982), which the subject act closely parallels.

Scope of Review

As to the second matter, we must bear in mind that these are not appeals from a determination made by the Equal Opportunity Commission, as was the situation in *Horne* and *Father Flanagan's Boys' Home, supra*, but, rather, are appeals from original actions instituted in the district court pursuant to the authority contained in § 48-1008. We can find nothing in the record which relates specifically to plaintiff Charles H. Scoles, so we cannot determine what relief he seeks. Seven of the plaintiffs, namely, Anton J. Cuda, Clarence F. Kabat, Bernard J. May, Russell T. Queen, Harold F. Redinger, Charles G. Rehberg, and Joseph F. Sinkule, had apparently retired prior to trial and thus seek only money damages. In addition, four plaintiffs, namely, Dennis D. Behrens, Donald E. Cox, James K. Murphy, and Joseph J. Novak, had been restored to the position of section chief, albeit not as soon as each thinks he should have been, and therefore also seek only money damages. The other plaintiffs, namely, Leland C. Allen, Eugene A. Bartunek, Rolland D. Beetison, Robert L. Donahoo, Jamie R. Fleming, Everest L. Kinloch, Jr., Thomas O. Larsen, John E. Malone, Page E. Nolan, Paul M. Quandahl, Robert K. Sundell, Harold L. Walker, and S.W. Wheeler, seek promotion, that is, a mandatory injunction and monetary damages.

The retired plaintiffs and restored plaintiffs present actions at law. In an appeal from such an action tried without a jury, this court presumes the controverted facts were decided by the trier of fact in favor of the successful party; accordingly, those findings will not be disturbed on appeal unless clearly wrong, it not being our province to resolve conflicts in or reweigh the evidence. *Kubista v. Jordan, ante* p. 244, 422 N.W.2d 78

(1988); *Kuehl v. Diesel Power Equip. Co., ante* p. 353, 422 N.W.2d 361 (1988).

However, the plaintiffs seeking a mandatory injunction present actions in equity, notwithstanding the fact they also seek monetary damages. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988). In an appeal from such an action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, it will consider, 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. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry, supra.*

The complexities presented by the need to apply differing standards of review in a single appeal may be one of the many reasons Neb. Rev. Stat. § 25-703 (Reissue 1985) provides that only actions which might have been joined may be properly consolidated.

EVIDENCE

In 1974 and 1975, AT&T Technologies suffered economic setbacks, forcing it to reduce its Omaha hourly work force by approximately 40 percent. Because of the diminished need for hourly labor, fewer supervisors, including those in the first-level management functioning as section chiefs, were required. The duties of a section chief include maintaining orderly manufacture and production, maintaining quality and efficiency in the work done, ordering inventory, computing the earnings of the employees, keeping attendance records, and the hiring and firing of people through the proper channels. The position requires a knowledge of the product and its quality, as well as a knowledge of the employees.

The number of section chief positions was reduced from 250 to 150. The plaintiffs were among the 100 individuals in the positions eliminated. Persons in those positions had the option of being demoted, taking early retirement, or terminating their employment with AT&T Technologies. Each of the plaintiffs opted for demotion. At the time, none of the plaintiffs questioned the decision that they would be among those

demoted; most of them testified that at the time of demotion they understood AT&T Technologies was suffering economically and that the reason for the demotion was economic, not based on poor performance. Many also testified they were told they would be promoted to their former position once economic conditions improved.

Although the demotions are not at issue, an understanding of the manner in which they were accomplished is helpful. In the beginning, when the bulk of the eliminations were made, AT&T Technologies selected those who had held their positions as section chief for the shortest periods of time. When further eliminations became necessary, AT&T Technologies demoted those with the poorest performance, in other words, the least effective workers.

Between 1970 and 1975, AT&T Technologies used a rating system for section chiefs whereby an individual's performance was rated as "outstanding," "good," or "limited." Only 20 percent of section chiefs achieved an "outstanding" rating; the remainder were rated as "good." The lowest 30 to 40 percent of the "good" section chiefs were demoted, as they were the least effective workers. Earlier practice, however, had been to promote or demote on the basis of length of service.

After 1975, economic conditions improved, and AT&T Technologies began expanding its Omaha work force. When the need for an additional section chief arose, a requisition was filed with AT&T Technologies' human resources committee. The committee then searched through AT&T Technologies' Omaha work force for possible candidates. Once the committee identified possible candidates, it reviewed the qualifications of each. A list of all former section chiefs still employed was also reviewed. Eventually, the committee selected the candidate it considered best and recommended that person to the "small staff," which consisted of several upper-level management employees. The small staff then made a final selection subject to the review of the general manager.

Five factors were used in evaluating each candidate: job experience, military service, education, inclusion on the "management potential inventory," and affirmative action considerations. No single factor controlled the selection; the

ultimate decision rested on a balancing of all the factors. As a position became available, those involved in the decisionmaking process pinpointed what the job required and determined whether a candidate's background provided what was needed. Positions were compared to the candidates; candidates were not compared to each other.

AT&T Technologies stated it adopted that procedure so that it might upgrade its supervisory staff and enhance the caliber of its personnel in order that it might remain competitive.

As we understand the evidence, the first two factors, job experience and military experience, are somewhat synonymous. The nature and type of supervisory experience were the significant considerations in evaluating job experience or military service; thus, mere longtime service as a section chief did not necessarily equate to the best type of supervisory experience.

The management potential inventory was prepared annually by a variety of first- through fourth-level managers for the purpose of identifying employees perceived to have management capabilities. Factors considered in identifying such persons included communication skills, problem-solving ability, creative management ability, the ability to provide direction, the ability to collaborate with others, the ability to help subordinates develop, the ability to engage in long-range planning, adaptability to change, the ability to balance responsibilities, and the ability to remain effective under adverse conditions, as well as social involvement.

While a particular level of education was not a requirement for the section chief's job, a college education was looked upon favorably, as it evidenced oral and writing skills, as well as the ability to learn. AT&T Technologies sponsored a program whereby employees attending college on their own time would be reimbursed for their tuition costs. One of the plaintiffs was informed by a supervisor that an education would be beneficial and that he should pursue one.

Although AT&T Technologies had no set timetable within which to meet affirmative action goals, it had "targets" it worked toward. One of its targets was to have 8 percent of its section chief positions filled by minorities and 20 percent by

women. Thus, sex and race were both factors considered when evaluating candidates for those positions.

It appears that by 1984, 75 section chief positions had been restored; 12 of these positions were filled by persons having had prior section chief experience, including the 4 plaintiffs mentioned earlier, and 21 positions were filled by lateral transfers. Thirty-one of the new section chiefs had military experience; however, it is unclear if that experience was supervisory in nature. Approximately 50 of those appointed as a section chief had been on the management potential inventory, 38 had college degrees, and 5 had a degree not requiring 4 years of schooling. As to the affirmative action statistics, in December 1976, 4.1 percent of the section chiefs were minorities and 2.3 percent were women. By 1977, 6.5 percent of the section chiefs were minorities and 2.4 percent were women; in 1978, 6.3 percent were minorities and 2.8 percent were women; in 1979, the percentages were 7.8 percent minorities and 5 percent women. In 1980, there were 8.4 percent minorities and 6 percent women. In 1981, the numbers were 6.3 percent and 6.3 percent, respectively. In 1982, it was 6.8 percent and 6.1 percent. In 1983, it was 9.7 percent and 9.1 percent. The record does not contain the 1984 statistics; neither does the record tell us the makeup of the 150 section chief positions retained throughout the period of time in question.

Plaintiffs are all white males and at least 40 years of age. Only three have college educations, most did not appear on the management potential inventory, and few had had military experience of a supervisory nature. However, plaintiffs' periods of service with AT&T Technologies ranged from 21 to 42 years, and they had been section chiefs for periods of from 4 to 28 years. Their performances as section chiefs had been rated as good, and some had perfect attendance records. While not one plaintiff testified that those appointed to the position of section chief were unqualified, most expressed the view that he, by virtue of his prior service as a section chief, was better qualified than any one of those appointed to the position.

Plaintiffs also questioned the emphasis on education, as it had not been considered important in the past. However, a witness called as a personnel management expert by AT&T

Technologies explained that the changing business environment made education important, as it exposed people to ideas and information outside their particular line of work and better equipped them to handle multiple demands and ambiguity. He pointed out that skills which were adequate at one time are not necessarily so in the present business environment.

This witness also testified that from a personnel management standpoint, AT&T Technologies' promotion process was a very good one and, in fact, may have been better than that used by most organizations. The consideration of multiple factors and the fact that no single factor was determinative made it difficult for the personal biases of the decisionmakers to creep into the process. Identifying people with management potential by the use of devices such as AT&T Technologies' management potential inventory is a common business practice.

AGE CAUSE

Disparate Treatment Theory

Plaintiffs first contend that AT&T Technologies' promotion practice treated them disparately because of their age. Generally, the disparate treatment theory of discrimination is applicable when the employer has treated some people less favorably than others because of an unlawful criterion such as age, sex, race, or disability. In such a case proof of a discriminatory motive is essential, although in some instances such a motive can be inferred from the mere fact of differences in treatment. *Akins v. South Cent. Bell Telephone Co.*, 744 F.2d 1133 (5th Cir. 1984).

Choosing to follow the lead of the federal courts, we hold that a plaintiff may thus establish a prima facie case of age discrimination by virtue of disparate treatment by showing that (1) she or he was in the protected age category, (2) she or he met the applicable qualifications, (3) despite those qualifications she or he was not promoted, and (4) other employees of similar qualifications, who were not members of a protected group, were promoted at the time plaintiff's request for a promotion was denied. *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958 (8th Cir. 1978), applied to a claim of age discrimination the elements required by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), to prove a

prima facie case of racial discrimination under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. (1982). Accord, *Bell v. Bolger*, 708 F.2d 1312 (8th Cir. 1983). The *Cova* court also observed the federal age discrimination act "does not require that advanced age and substantial length of service entitle employees to special favorable consideration; it requires merely that an employee within the protected age group not be the subject of discrimination because of his or her age." 574 F.2d at 960. We conclude the same is true under the subject act.

As to the plaintiffs seeking promotion, our de novo review of the record convinces us that plaintiffs succeeded in establishing a prima facie disparate treatment case. Accordingly, we must also conclude that the district court's like finding is not clearly wrong as applied to those plaintiffs seeking monetary damages.

Our de novo review of the record also convinces us that AT&T Technologies articulated a legitimate nondiscriminatory reason for not promoting those plaintiffs seeking elevation to their former positions; AT&T Technologies, absent contractual or other constraints, may certainly upgrade its personnel in an effort to remain competitive. That determination again compels the conclusion that the district court's like finding is not clearly wrong as applied to those plaintiffs seeking monetary damages.

We thus reach the question of whether plaintiffs successfully rebutted AT&T Technologies' reason by showing that it is pretextual.

Again, we follow the lead of the federal courts and hold that to show pretext in an age discrimination by virtue of disparate treatment case, a task which merges with the ultimate burden of persuading the finder of fact that age was a factor, a plaintiff may show either that the "employment decision more likely than not was motivated by a discriminatory reason or by showing that the employer's proffered reason is unworthy of credence." *Bell v. Bolger, supra* at 1318. See *Harris v. Misty Lounge, Inc.*, 220 Neb. 678, 371 N.W.2d 688 (1985), for application of the same analysis in a sex discrimination case under the provisions of the Nebraska Fair Employment Practice Act.

The evidence establishes that AT&T Technologies' promotion process is a sound business practice, that factors considered in evaluating candidates are reasonably related to legitimate business concerns, and that the process is so designed as to attenuate the personal biases of the decisionmakers. While plaintiffs question the need for higher education, the fact remains the evidence establishes that better educated managers are better able to deal with the current business environment. More is written about the education aspect of these cases in the *Disparate Impact Theory* analysis which follows.

To the extent plaintiffs urge that AT&T Technologies' affirmative action program may have unjustly kept them from being promoted, we must observe that plaintiffs made no reverse discrimination claim. Moreover, a temporary, voluntary affirmative action plan designed to eliminate conspicuous racial imbalances in traditionally segregated job categories is valid. *Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979). The evidence further establishes that AT&T Technologies has not reached its target for placing women in section chief positions; when the target percentage of minorities was exceeded, it was by less than 2 percent of its 8 percent goal.

AT&T Technologies' promotion practices are not illegitimate or arbitrary. The discrimination laws are not intended to diminish traditional management prerogatives. See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Nor should discrimination laws ensure the best selection of individuals for promotion; rather, they should ensure that the selection be free from discrimination. See *Casillas v. United States Navy*, 735 F.2d 338 (9th Cir. 1984).

We conclude from our de novo review of the record that the plaintiffs seeking promotion failed to discharge their ultimate burden of proof by failing to establish that AT&T Technologies' reason for not promoting them was pretextual. That again necessarily means that the district court's like finding is not clearly wrong with respect to those plaintiffs seeking monetary damages.

Disparate Impact Theory

Plaintiffs also assert that the emphasis AT&T Technologies places on education has a disparate impact upon them because persons 40 years of age and older are less likely to possess post high school educations than are younger persons. By so urging, plaintiffs attempt to bring themselves within the principles announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). In that case, the U.S. Supreme Court held that Title VII of the Civil Rights Act of 1964 proscribes not only overt discrimination, but also practices which are fair in form but discriminatory in operation. Accordingly, it found violative of that act a policy which required a high school diploma and satisfactory performance on two professionally prepared aptitude tests as necessary prerequisites for employment and promotion not shown to have any relation to job performance.

One of the theories of discrimination growing out of *Griggs* has been designated the disparate impact theory. Federal courts have defined this theory as involving employment practices which facially appear to treat different groups neutrally but which in fact fall more harshly on one group than another, *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390 (8th Cir. 1983), and which cannot be justified by business necessity, *Akins v. South Cent. Bell Telephone Co.*, 744 F.2d 1133 (5th Cir. 1984). Some courts have phrased this theory of discrimination in terms of having the plaintiff isolate " 'clearly identifiable employment requirements or criteria,' " which results in a less favorable impact on the protected group. *Hawkins v. Bounds*, 752 F.2d 500, 503 (10th Cir. 1985). See, also, *Am. Fed. of S., C., & Mun. Emp. v. State of Wash.*, 770 F.2d 1401 (9th Cir. 1985).

Unlike the situation in a disparate treatment case, proof of a discriminatory motive is not required to establish a disparate impact case. *Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977).

To prove a prima facie case of disparate impact in an age discrimination suit under the federal act, the plaintiff must show " '(1) the occurrence of certain outwardly neutral employment practices, and (2) a significantly adverse or

disproportionate impact on persons of a particular [age] produced by the employer's facially neutral acts or practices.' " *Palmer v. United States*, 794 F.2d 534, 538 (9th Cir. 1986). The burden then shifts to the employer to show that the employment practice is related to job performance or justified by business necessity. *Gilbert v. City of Little Rock, Ark., supra*. See, also, *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985) (employer forced to prove job relatedness of employment practices); *Hawkins v. Bounds, supra* (once burden shifts to employer, employer must prove practice mandated by business necessity; necessity connotes that exclusionary practice be of great importance to job performance to rebut prima facie case). Although pretext implies a state-of-mind concept, and, as noted earlier, intent is irrelevant in a disparate impact case, the plaintiff may nonetheless rebut the defendant's reason of business necessity by showing that an alternate practice lacking a discriminatory effect would satisfy the employer's legitimate interests. *Gilbert v. City of Little Rock, Ark., supra*. We adopt the same method of analysis for a disparate impact case brought under the provisions of the subject act.

AT&T Technologies suggests that a disparate impact analysis is inapplicable where the selection criteria are subjective or where an employer uses a multifaceted selection process. E.g., *Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981) (concludes subjective evaluation systems cannot alone form the foundation for disparate impact cases); *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982) (states disparate impact analysis inappropriate to challenge multiple employment practices simultaneously). There are other federal jurisdictions, however, which hold to the contrary. E.g., *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183 (5th Cir. 1983), and *Hawkins v. Bounds, supra* (state disparate impact analysis applies to subjective criteria); *Griffin v. Carlin, supra* (concludes disparate impact theory can be used to challenge multicomponent promotion process).

In view of the state of the record, we need not, and therefore do not, determine which of those two conflicting views is to become the law of Nebraska. In order to recover under the disparate impact theory, plaintiffs must do more than merely

prove circumstances raising an inference of a discriminatory impact; they must prove the discriminatory impact at issue. *Palmer v. United States, supra.* That is, they must point to a clearly identifiable practice and prove its impact. *Hawkins v. Bounds, supra.*

Whether evaluating the evidence de novo on the record or whether reviewing the record to determine whether the district court's finding is clearly wrong, the conclusion which is compelled is that plaintiffs have failed to make even a prima facie showing that AT&T Technologies' use of the education factor in evaluating candidates for promotion has had a disparate adverse impact upon them. Even assuming for the purpose of this analysis, but not deciding, that the evidence raises an inference of a discriminatory impact, plaintiffs have failed to establish by a preponderance of the evidence that the use of the education factor prevented any one of them from being promoted. That is to say, there is no evidence from which any fact finder could conclude that but for the lack of a higher education any plaintiff would have been promoted. Such a failure to show a causal connection between the factor at issue and the lack of promotion defeats recovery under the disparate impact theory.

RETALIATION CAUSE

Some of the plaintiffs (from 15 to 17 of them; the record is not clear) also assert that AT&T Technologies retaliated against them for filing complaints with the Nebraska Equal Opportunity Commission for not promoting them.

In order to prove a prima facie case of retaliation, a plaintiff must show she or he was not promoted following protected activities of which the employer was aware. See *Aguirre v. Chula Vista Sanitary Service*, 542 F.2d 779 (9th Cir. 1976).

There is simply no evidence which warrants such a conclusion. Even the prima facie burden is not met by showing merely that complaints were filed with the commission; that is all the evidence shows in this regard.

DECISION

For the reasons discussed, the judgments of the district court are correct; therefore, they are hereby affirmed.

AFFIRMED.

THOMAS W. RUSSELL, APPELLEE, V. BOARD OF REGENTS OF THE UNIVERSITY OF NEBRASKA, APPELLANT.

423 N.W.2d 126

Filed May 13, 1988. No. 86-506.

1. **Appeal and Error.** Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong.
2. **Negligence: Words and Phrases.** One who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent.
3. **Negligence: Invitor-Invitee.** Among the matters which must be considered in determining whether an invitee is guilty of negligence is the effect of distracting events or circumstances.

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

David D. Ernst of Gaines, Otis, Mullen & Carta, for appellant.

Donald J. Loftus, P.C., for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

WOLF, D.J.

This is an appeal by the defendant from the judgment of the district court for the plaintiff in an action brought under the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1981 & Cum. Supp. 1984), for injuries received by the plaintiff when he was injured when he fell on a patch of ice on the University of Nebraska at Omaha campus. On January 24, 1983, the plaintiff, a 47-year-old student at UN-O, was walking from a class building to his car when he fell on a patch of ice on a paved parking lot maintained by UN-O and fractured his right ankle.

The defendant assigns as error each of the following: (1) the court's finding that the defendant was negligent in failing to properly inspect the area; (2) the court's finding that the defendant was negligent in failing to properly maintain the area; (3) the court's finding that the plaintiff was free of any negligence or contributory negligence; and (4) the court's

failing to find that the plaintiff assumed the risk of his fall.

Where a law action is tried to the court without a jury, the finding of the court has the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. *Siefford v. Housing Authority*, 192 Neb. 643, 223 N.W.2d 816 (1974). Also, in *Justice v. Hand*, 227 Neb. 856, 857, 420 N.W.2d 704 (1988), we stated:

> "In a bench trial of a law action, the court, as the 'trier of fact,' is the sole judge of the credibility of witnesses and the weight to be given their testimony. . . . 'In reviewing a judgment awarded in a bench trial, the Supreme Court does not reweigh evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.' "

Earlier in January of 1983, there had been some snowfall, and a maintenance crew of the university had removed the snow from the streets and parking lots. The parking lot upon which this accident occurred was located immediately abutting a paved street and was separated from the street only by a half curb. The parking lot itself was built on a slope and had marked spaces for several cars to be parked parallel to each other but perpendicular to the street. When the maintenance crew had removed the snow from the street and parking lot in this area, it had apparently pushed the snow up the incline to the top and beyond the parking space. On the date of the injury, the snow pile at the top of the parking lot was still approximately 6 feet high. As the plaintiff was walking along the edge of the street, a car approached him, and plaintiff stepped off the street and onto the parking area. After taking only a step or two, he fell, fracturing his right ankle. The plaintiff testified that he did not see the ice before stepping upon it and that it was a patch of ice not as large as the parking stall itself. A member of the rescue team which came to transport the plaintiff to the hospital for treatment also slipped on the ice in the process of trying to pick up the plaintiff. He testified that he did not see the ice and that team members decided to slide the plaintiff down the incline to the street on the ice to avoid being injured themselves.

Other evidence shows that the last snowfall prior to the accident was a 2-inch snowfall on January 19, 1983. The temperature readings at Eppley Airfield showed high temperatures during each day to be 24 °F on the 19th, 27 °F on the 20th, 30 °F on the 21st, 27 °F on the 22d, 35 °F on the 23d, and 31 °F on the 24th, the day of the accident.

The evidence is sufficient to support a finding by the court that the snow piled at the top of the parking area by the maintenance crew began to melt on Sunday, the 23d of January, drained down to the parking stall, and then froze into ice during the evening of the 23d and the morning of the 24th. There being no maintenance crew available on Saturday and Sunday, there was no deicing material spread on the campus or on icy patches during the weekend, and a dangerous condition was created.

Although no witnesses for the defendant testified that they had seen the ice patch or been advised of the ice patch prior to the fall by the plaintiff, there is sufficient evidence to support a finding of negligence of the defendant on the basis that the defendant did, by its act, create a dangerous condition by placing the pile of snow in such a position that normal temperature changes would result in the formation of ice at the location in which the plaintiff fell.

The plaintiff has the burden to prove by the greater weight of the evidence that the defendant either created the condition, knew of the condition, or, by the exercise of reasonable care, would have discovered the condition.

The trial judge specifically found:

> The maintenance people knew, or should have known, that with a high temperature of 35 degrees on January 23, 1983, snow, including portions of the bank at the top of the area where the plaintiff fell, would likely melt to some extent. They likewise knew, or should have known, that the below-freezing temperatures commencing in the early morning hours of January 24, 1983, and continuing right up to the time of this accident would cause the water from melting snow to freeze. In spite of this knowledge, UNO's maintenance people failed to put any deicing material in Lot P and specifically in the area where the plaintiff fell when they had ample time to do so. This was also in

violation of their own standard operating procedures.

It also appears that the UNO maintenance people did not inspect the Lot P area on the morning of January 24, 1983, to determine if melting had occurred and ice formed even though they had ample time to do so.

Based upon the record and the specific findings of the trial judge, this court cannot disturb those findings of negligence on the part of the defendant, because they are not clearly wrong.

The defendant further claims that the plaintiff failed to exercise ordinary care and prudence to avoid obvious dangers and is therefore contributorily negligent.

In *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), we held that when there is some distraction or other reason which will excuse the failure to see that which is in plain sight, it can be said that a person has exercised that degree of care required of an ordinarily prudent person. In that case, the plaintiff testified that when he sensed that a motor vehicle was approaching the ramp he moved to his left to make way for it and that he did not see the icy spot until he was just about to place his foot down, at which point he could no longer stop. In the present case, there is evidence that the plaintiff moved from his direct route to step up on the parking area because of the approaching vehicle. Based upon the circumstances, this appears to be a reasonable reaction by the plaintiff and could detract from his observation and scrutiny of the place to which he was stepping. The trier of fact could consider this in determining whether the plaintiff was exercising that degree of care required of an ordinarily prudent person and could also consider the fact that the member of the rescue team failed to see the ice and only after slipping discovered that it was unsafe to try to lift the plaintiff from that area. Based upon the record, the trial court was not clearly wrong in determining that the danger was not obvious and that the plaintiff did not fail to use ordinary care.

With regard to the defendant's claim that the plaintiff assumed the risk, it is clear that the defendant has failed to prove by the greater weight of the evidence that the plaintiff knew or should have known of the danger involved.

There have been no issues raised as to the compliance by the

plaintiff with the provisions of the State Tort Claims Act or as to the amount of the damages awarded.

The judgment for the plaintiff in the amount of $20,928.01 is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROGER BRUCE RINCKER, APPELLANT.

423 N.W.2d 434

Filed May 13, 1988. No. 87-162.

1. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character.
2. _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1985) permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show defendant's propensity or disposition to commit the crime charged.
3. _____: _____. Evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question.
4. **Rules of Evidence: Other Acts: Time.** The admissibility of evidence concerning other conduct under the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1985) must be determined upon the facts of each case; no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote.
5. _____: _____: _____. The question of whether evidence of other conduct otherwise admissible under the provisions of Neb. Rev. Stat. § 27-404(2) (Reissue 1985) is too remote in time is largely in the sound discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.
6. **Evidence: Appeal and Error.** The admission or exclusion of evidence is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.
7. **Witnesses: Probation and Parole.** A criminal defendant has the right to show a State's witness' bias by virtue of the witness' vulnerable status as a probationer where such status provides a motive to protect the witness' own interests.
8. **Jury Instructions: Appeal and Error.** Prejudicial error regarding jury

instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury.

9. _____: _____. All jury instructions must be read together, and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.
10. **Jury Instructions: Homicide: Indictments and Informations.** Notwithstanding an information charging murder, when evidence can support different and reasonable inferences regarding the degree or grade of criminal homicide, the jury must draw the inference determining the degree of criminal homicide.
11. **Jury Instructions: Homicide.** In order that there be an instruction on manslaughter as a lesser degree of criminal homicide within the charge of murder, there must be evidence which tends to show that the crime was manslaughter rather than murder.
12. _____: _____. When a proper factual basis is present, a court must instruct a jury on the degrees of criminal homicide.
13. _____: _____. Where murder is charged, the court is required, even without request, to instruct the jury on the lesser degrees of criminal homicide for which there is proper evidence before the jury.
14. **Sentences: Appeal and Error.** A sentence within statutory limits will not be set aside absent an abuse of discretion.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

Robert P. Chaloupka of Van Steenberg, Brower, Chaloupka, Mullin & Holyoke, P.C., for appellant.

Robert M. Spire, Attorney General, and Susan M. Ugai, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant-appellant, Roger Bruce Rincker, was charged with murder in the first degree, a violation of Neb. Rev. Stat. § 28-303 (Reissue 1985), and with the use of a deadly weapon to commit a felony, a violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985). A jury found him guilty of manslaughter, a violation of Neb. Rev. Stat. § 28-305 (Reissue 1985), and of using a deadly weapon to commit a felony. He was so adjudged and sentenced to imprisonment for 7 years on the manslaughter conviction and to a consecutive term of 3 to 5 years on the use of

a deadly weapon conviction. Rincker assigns as error the district court's (1) rejection of certain psychiatric evidence, (2) receipt of testimony concerning certain of his prior conduct, (3) refusal to permit cross-examination to show a crucial State's witness was on probation at the time of the killing, (4) instruction to the jury concerning deadly force, (5) instruction to the jury concerning intent, (6) instruction to the jury concerning manslaughter, and (7) imposition of the aforesaid sentences as excessive. The record fails to support any of the assigned errors; thus, we affirm.

BACKGROUND FACTS

At the time of the trial Rincker was living near Hay Springs, Nebraska, where he and his father had been partners in a farming operation since 1975.

In 1980 Rincker married his first and only wife, Vickie. By 1983 the couple had produced two daughters, one of whom was 5 years old and the other 4 years old at the time of trial. Rincker testified that his marriage proceeded normally until 1983, after the birth of their second daughter, at which time his wife began to drink excessively. In April of 1984 she was arrested for driving while intoxicated, and as the result of a later speeding violation was ordered to undergo 30 days of alcohol treatment. She commenced that treatment in South Dakota in December of 1984.

Before his wife commenced treatment, Rincker, in September 1984, filed for dissolution of his marriage. At some point, it is not entirely clear when, Rincker's wife moved out of the family home and lived alone in town; the couple's daughters remained with Rincker. Although Rincker had filed the dissolution action, he nonetheless joined an emotional support group for members of an alcoholic's family and continued to financially maintain his wife.

During the time his wife lived out of the family home, she engaged in a sexual relationship with the victim, Bryant Ferrel. She also had a sexual encounter with Larry Siegrist, a friend and part-time roommate of Ferrel's. In November 1984 his wife informed Rincker of her prior relationships with these two men. Rincker thought the relationship between his wife and the victim had ended before she left for treatment in December

1984, but later learned she had resumed the association.

In December 1984, shortly after his wife had entered treatment, Rincker went to check her residence in town. The house was empty, but Rincker saw a beer keg in the sink which he later spotted beside a shop belonging to the victim, notwithstanding the fact that Rincker had locked his wife's house when he left. Rincker then sought the "aid" of a friend, John Wright, to find the victim and talk with him. Rincker and Wright found the victim at a Hay Springs bar, where Rincker questioned the victim about the keg. After this incident, Rincker heard that the victim stated to another that he, the victim, wished he would have "kicked [Rincker's] butt" at the bar.

Shortly thereafter, Rincker saw the victim in a bar at Chadron and told the victim that Rincker's wife was in treatment for alcoholism and that Rincker wanted his wife to come home to her children. The victim replied that he did not want her anyway.

Over objection, one Vickie Deans, a former bartender at a Hay Springs bar, testified that sometime in February 1985, Rincker came "slamming through the door, [looking] upset," went over to the victim, and said that "if he ever caught him [the victim] with his wife again, he [Rincker] would kill him." Rincker denied ever threatening the victim.

There was testimony that the victim, a 27-year-old wrestler and bull rider, had a propensity for fighting or brawling. Various witnesses testified to the victim's reputation as one who liked to fight and as one who would not back down from a fight. He was 5 feet 10 inches tall and weighed approximately 180 pounds.

On the other hand, witnesses testified that Rincker, who was 34 years old, stood 5 feet 6 inches tall, and weighed approximately 140 pounds, had a peaceable and trustworthy reputation. There was also testimony that when he was younger, Rincker had been involved in 4-H, church, and school activities, and had become an Eagle Scout, earning a "God and Our Country" award. He graduated from the University of Nebraska in 1974 with a degree in animal science before choosing to return to start the farming operation with his

father. At the time of trial, Rincker was an active member of his church and served as a member of the church council. He was also a member of the Junior Chamber of Commerce and active in a Boy Scout group. The evidence also established that Rincker was a devoted father and husband.

Rincker's wife moved back into the family home in April 1985, and Rincker dismissed the dissolution action. Rincker testified that during the period following his wife's return home, the victim began "aggravating" the couple, and that at a dance in August of 1985, the victim challenged Rincker by asking whether Rincker wanted to do something about the victim's sexual relationship with Rincker's wife.

Rincker's wife began drinking again and was back in alcohol treatment by November 1985.

THE KILLING

On July 16, 1986, Rincker's wife returned from visiting her sister in Rapid City, South Dakota. Rincker had spent the day of July 17, 1986, irrigating the fields. When Rincker got home at 7 that night, his wife met him at the door and said she was going to town for cigarettes. Rincker took the children to the fields with him, then returned to put them in bed around 10:15 p.m. His wife had not yet returned, so Rincker also went to bed.

At 2:30 the next morning, he woke up and realized that his wife was not yet home. Becoming worried about her, he left the children sleeping and went to town to find her. He drove by several of her friends' houses but did not spot her car until he reached Siegrist's house, where he found his wife's parked car, along with Siegrist's and the victim's trucks.

Rincker wanted to find his wife and bring her home, and also felt he "just had to know" what she was doing with the two men. Being worried about not being able to get out of Siegrist's house alive, and thinking he could "back off" the victim, Rincker took a hunting knife from his truck and clipped it to the back of his belt. He did not take a gun which he carried in his truck. As he walked up to Siegrist's house, he could hear his wife's voice and could tell that she was drunk. Rincker then entered the darkened house and headed for the only room from which there was light. As he entered the room, he saw his wife, who was clothed, sitting on the bed between Siegrist and the

victim. Both men were naked.

The testimony as to what happened next is in conflict. Rincker testified that the victim rushed for him and that he stabbed the victim in self-defense. Siegrist testified, however, that Rincker rushed toward the victim first. As Rincker's wife had fled the house before the stabbing, Rincker went looking for her. The victim died 2 hours later of a stab wound to the chest, which caused him to bleed to death.

PSYCHIATRIC TESTIMONY

Prior to trial, Rincker was examined by two psychiatrists concerning, among other things, his state of mind at the time of the stabbing. The depositions of both of these psychiatrists were then taken. The State later filed a motion in limine, asking that Rincker be precluded from using the psychiatric testimony on the ground, inter alia, that the psychiatrists would not be testifying that Rincker was suffering from any mental condition which had legal significance.

The trial judge ruled in essence that the psychiatrists would be allowed to state their qualifications, then give an opinion as to whether Rincker, on July 18, 1986, suffered "from intoxication or subnormal mentality or a mental disease existing to such a high degree as to overwhelm reason, judgment and conscience so that he was unable to understand the nature and quality of his act and to distinguish right from wrong." If the answer to this question were in the negative, further testimony would be precluded.

Rincker then offered to prove that one psychiatrist would testify that at the time of the stabbing, Rincker was suffering from an anxiety-ridden neurosis which caused him to panic, and that in that psychiatrist's opinion Rincker acted out of self-defense. Rincker asserts that the failure to admit the foregoing testimony was error, as it bore on his lack of intent to commit the crime.

State v. Vosler, 216 Neb. 461, 345 N.W.2d 806 (1984), is illustrative of this issue. The defendant therein went to the hospital at which his wife was confined, with the intention to commit suicide by shooting himself in her presence. Instead, he shot her paramour after encountering the two embracing. The defense introduced psychiatric testimony as to the defendant's

ability to form the intent to commit the murder, claiming that the shooting was not the result of a prior plan but, rather, was done in response to an "irresistible impulse" provoked by seeing his wife and her paramour together. The defendant argued that the insanity defense instruction should not have been given because the evidence introduced was "directed only toward showing that when he shot his wife's paramour, the act was not done with premeditated malice as required by the crime with which he was charged." *Id.* at 466, 345 N.W.2d at 810. The court agreed that as defendant had not raised insanity as a defense, the jury should not have been instructed as to the elements of such defense. In the course of so deciding, the court also observed, however:

> While evidence of an accused's mental condition at the time the offense was committed is always admissible to prove absence of intent, our law does not recognize as a defense the concept of "irresistible impulse." Therefore, any opinion of a mental health expert based on the theory of "irresistible impulse" is irrelevant and therefore inadmissible for any purpose. [Citations omitted.]

Id. at 468, 345 N.W.2d at 811.

Under the state of the record, we need not, and therefore do not, decide whether the trial judge's ruling would have been correct had the offer of proof established that in the psychiatrist's opinion Rincker's state of mind was such that he could not have formed an intent to kill the victim. In truth and fact, the evidence at issue amounted to nothing more than a statement by the psychiatrist that, considering all the circumstances, he believed Rincker's claim that he acted out of fear for his own safety. As observed in *State v. Matthews*, 301 Minn. 133, 221 N.W.2d 563 (1974), the jury was capable of evaluating the circumstances surrounding the killing and of deciding for itself, without expert advice, whether Rincker reasonably feared for his life when he killed the victim and thus acted in self-defense.

OTHER CONDUCT

Next, Rincker assigns as error the trial court's admission into evidence of Deans' testimony as to the February 1985 incident described earlier, in the BACKGROUND FACTS section of

this opinion. He argues the testimony should have been excluded both because the event was too remote in time to be relevant and because Deans had told the police and had sworn during a deposition only that Rincker threatened to "do something drastic," rather than to "kill" the victim, as she testified at trial.

Neb. Rev. Stat. § 27-404(2) (Reissue 1985) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

It is well established that the foregoing statute is an inclusionary rule permitting the use of relevant evidence of other crimes, wrongs, or acts for purposes other than to prove the character of a person in order to show that such person acted in conformity with that character. Thus, § 27-404(2) permits evidence of other crimes, wrongs, or acts if such is relevant for a purpose other than to show defendant's propensity or disposition to commit the crime charged. *State v. Wilson*, 225 Neb. 466, 406 N.W.2d 123 (1987); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). In applying § 27-404(2) we have said that evidence of other crimes, wrongs, or acts may be admitted where the evidence is so related in time, place, and circumstances to the offense charged as to have substantial probative value in determining the accused's guilt of the offense in question. *State v. Kern, supra.*

Unlike the situation recently presented in *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988), where the evidence of other wrongs concerned events which bore no relationship to the crimes charged, the evidence in question in the present case tends to show Rincker was involved in a long-running dispute with the victim and thus bears on the question of intent, which, because Rincker was charged with first degree murder, was an issue. Therefore, the questioned evidence was relevant.

As to the matter of remoteness, this court noted in *State v. Kern, supra* at 185-86, 397 N.W.2d at 29, that

> the admissibility of evidence concerning other conduct

> must be determined upon the facts of each case and that no exact limitation of time can be fixed as to when other conduct tending to prove intent to commit the offense charged is remote. The question of remoteness in time is largely in the sound discretion of the trial court; while remoteness in time may weaken the value of the evidence, such remoteness does not, in and of itself, necessarily justify exclusion of the evidence.

As noted on numerous other occasions, the admission or exclusion of evidence is a matter within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987). In view of Rincker's position that he armed himself with a knife only because he feared for his life when he entered Siegrist's house, we cannot say the trial court abused its discretion in determining that Deans' testimony was not so remote in time as to be inadmissible.

Rincker's reliance upon *State v. Harrison*, 221 Neb. 521, 378 N.W.2d 199 (1985), and *People v. Lampkin*, 98 Ill. 2d 418, 457 N.E.2d 50 (1983), in arguing otherwise is misplaced. The defendant in *Harrison* was seeking to show his state of mind at the time of the murder by introducing, as an exception to the hearsay rule under the provisions of Neb. Rev. Stat. § 27-803(2) (Reissue 1985), the testimony of a gunshop owner as to the reason defendant had given for buying a gun some 6 to 8 weeks before killing his wife. The trial court properly excluded the testimony because defendant's state of mind when he bought the gun was not a material fact. In *Lampkin*, not only was the threat 6 years old, it was of a general nature and not directed at a particular person; thus, it had no probative value to show defendant's malice against the murder victim.

As to the change in reporting what Rincker said, Deans explained that she had softened Rincker's statement when talking to the police and giving deposition testimony, but later felt guilty about misrepresenting the truth. The matter was for the jury to consider in assessing Deans' credibility, and provided no basis for excluding her testimony.

PROBATIONARY STATUS OF WITNESS

In his third assignment of error Rincker contends the trial court erred in refusing to permit him to show by cross-examination that Siegrist, an eyewitness to the killing and thus a crucial State's witness, was, at the time of the killing, on probation as the result of a drunk driving conviction.

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), held the trial court committed prejudicial error when it refused to permit the defendant therein to cross-examine a crucial prosecution witness to establish that the witness was on juvenile probation at the time of the crimes and of trial. The *Davis* Court ruled that the defendant's right of confrontation under U.S. Const. amends. VI and XIV was paramount to the state's policy of protecting the anonymity of juvenile offenders and that the defendant had the right to show the witness was biased by virtue of his vulnerable status as a probationer and his concern that, because the stolen safe was found on his property, he himself might be a suspect in the burglary charged against the defendant. In so ruling, the *Davis* Court stated: "We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." 415 U.S. at 316-17.

In the case before us, however, not only was Siegrist not himself a suspect, he was not on probation at the time of trial. The very county judge who had placed Siegrist on probation conducted the preliminary hearing which produced the trial resulting in the appeal presently before us. During the course of that preliminary hearing, Siegrist admitted that he had drunk a beer at a bar during the evening preceding the killing. As a consequence, the county judge determined Siegrist had violated a condition of his probation by drinking. That county judge therefore "unsatisfactorily discharged" Siegrist from his probation. As a consequence, Siegrist served 7 days in jail; that jail time would have been suspended had he satisfactorily completed probation. Thus, by the time of trial Siegrist was no longer vulnerable to the State's reprisal because of an earlier probationary status; he had been punished, and the effects of his violation of probation had become final and could not be

enhanced by State action. Indeed, during cross-examination at trial, Siegrist admitted he had also been at another bar the night preceding the killing where he drank "a couple of beers," and further admitted he had omitted relating that fact in his deposition because he had not remembered.

Under those circumstances, we cannot say the trial court abused its discretion in such a manner as to have deprived Rincker of his right to confront Siegrist. See *Amin v. State*, 686 P.2d 593 (Wyo. 1984), which rules that where a prosecution witness was not on probation at the time of the crime or trial, was not an accomplice or suspect, and, although he was the victim, he was not the State's only witness, it was not error to refuse cross-examination to show that the witness had been on juvenile probation.

DEADLY FORCE INSTRUCTION

Rincker requested an instruction which asked the jury to consider in its deliberations the matter of justification or self-defense, and which defined deadly force as in Neb. Rev. Stat. § 28-1406(3) (Reissue 1985):

> Deadly force shall mean force which the actor uses with the purpose of causing or which he knows to create a substantial risk of causing death or serious bodily harm. Purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, shall not constitute deadly force.

In this fourth assignment of error Rincker complains that the instruction given to the jury defined deadly force only by using the first sentence of the foregoing definition. Rincker calls our attention to *State v. Bridger*, 223 Neb. 250, 388 N.W.2d 831 (1986), which held that the refusal to give a requested instruction which defined a word in an essential element of the crime charged was prejudicial error. However, *Bridger* is inapposite for the obvious reason that self-defense is not an essential element of homicide in any degree. Just as obviously, the second sentence of the definition tendered could have no

application because there was no evidence that anyone fired in the direction of another person or at a vehicle. Neither could the third and last sentence of the definition tendered have application, because Rincker did something more than merely threaten to use the knife to cause death or serious bodily harm; he actually used the knife. While the trial court did not use all of the tendered definition of deadly force, it did properly instruct the jury as to when and under what circumstances deadly force is justifiable, including the fact that Rincker could use such force as he "reasonably believed to be immediately necessary, although he may have been in error as to the actual danger, if a reasonable person could also have been so in error." The total instructions given the jury correctly state the law in this regard. As noted in *State v. Copple*, 224 Neb. 672, 699, 401 N.W.2d 141, 159 (1987), quoting *State v. Dondlinger*, 222 Neb. 741, 386 N.W.2d 866 (1986):

> "Prejudicial error regarding jury instructions may not be predicated solely upon a particular sentence or phrase in an isolated instruction, but must appear from consideration of the entire instruction of which the questioned sentence or phrase is a part, as well as consideration of other relevant instructions given to the jury. . . . ' " 'All the instructions must be read together and if the instructions taken as a whole correctly state the law, are not misleading, and adequately cover the issues, there is no prejudicial error.' " ' "

See, also, *State v. Medina*, 227 Neb. 736, 419 N.W.2d 864 (1988); *State v. Ryan*, 226 Neb. 59, 409 N.W.2d 579 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987).

INTENT INSTRUCTION

In the next assignment of error Rincker complains that in its intent instruction to the jury, the trial court omitted the sentence contained in Rincker's requested instruction that "[t]he intent required by [another instruction] is a material element of the crime charged against the defendant." What Rincker's argument overlooks is that another of the trial court's instructions to the jury included as an element of murder in the first or second degree that the killing be done "intentionally." The legal analysis which established the previous assignment of

error to be without merit serves to establish this fifth assignment to be equally meritless.

MANSLAUGHTER INSTRUCTION

Rincker next asserts that as he did not ask for a manslaughter instruction, the trial court erred in instructing the jury concerning that offense. This argument completely ignores the existence of Neb. Rev. Stat. § 29-2027 (Reissue 1985), which provides: "In all trials for murder the jury before whom such trial is had, if they [sic] find the prisoner guilty thereof, shall ascertain in their [sic] verdict whether it be murder in the first or second degree, or manslaughter . . . ." The problem was considered at some length in *State v. Archbold*, 217 Neb. 345, 350, 350 N.W.2d 500, 504 (1984), as follows:

> Notwithstanding an information charging murder, when evidence can support different and reasonable inferences regarding the degree or grade of criminal homicide, the jury must draw the inference determining the degree of criminal homicide. [Citations omitted.]
>
> In order that there be an instruction on manslaughter as a lesser degree of criminal homicide within the charge of murder, there must be evidence which tends to show that the crime was manslaughter rather than murder. [Citation omitted.]
>
> When a proper, factual basis is present, a court must instruct a jury on the degrees of criminal homicide, that is, the provisions of § 29-2027 are mandatory. [Citation omitted.] Where murder is charged, the court is required, even without request, to instruct the jury on the lesser degrees of criminal homicide for which there is proper evidence before the jury. [Citation omitted.]

The jury could well have concluded from the evidence that Rincker's wife was lying on the bed between the victim and Siegrist and that Rincker reacted to that scene without any prior intention to kill the victim. That alone required the trial court to instruct the jury concerning manslaughter. See, also, *State v. Vosler*, 216 Neb. 461, 345 N.W.2d 806 (1984); *State v. Drew*, 216 Neb. 685, 344 N.W.2d 923 (1984).

THE SENTENCES

Rincker claims in his seventh and final assignment of error

that his sentences are excessive.

While it is true that Rincker has no prior criminal record and has a history of good and responsible conduct, the fact remains that he, albeit unintentionally, took a life. In imposing its sentences the trial court listed, among other considerations, the fact it was not convinced Rincker fully understood the seriousness of what he had done and that any sentences imposed must be such as not to depreciate the seriousness of the crimes involved. See Neb. Rev. Stat. § 29-2260 (Cum. Supp. 1986).

Manslaughter is a Class III felony, § 28-305, as is the use of a deadly weapon, § 28-1205, making each offense punishable by imprisonment for a minimum of 1 year and a maximum of 20 years, or a $25,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985). By imposing a prison sentence for a fixed period of 7 years for the manslaughter conviction, the trial court in effect sentenced Rincker to imprisonment on that conviction for an indeterminate period of from 1 to 7 years, less certain good time computations. Neb. Rev. Stat. §§ 83-1,105, 83-1,107, 83-1,107.01, and 83-1,108 (Reissue 1987); *State v. Spotted Elk,* 227 Neb. 869, 420 N.W.2d 707 (1988); *State v. Ryan,* 222 Neb. 875, 387 N.W.2d 705 (1986). Thus, as Rincker observes, the minimum sentence for the weapons conviction is three times greater than the minimum sentence applicable to the killing. Contrary to Rincker's contention, however, this fact does not establish an abuse of discretion. The manslaughter was an unintentional act; bringing the knife to the scene was an intentional act. Without the knife the killing would likely not have occurred. The evidence is that Rincker's entry into Siegrist's house was motivated at least as much by his desire to see what his wife was doing as it was by a wish to bring her home. Neither is there any suggestion that Rincker feared for his wife's life. Under the circumstances, Rincker need not have entered the house but could instead have resolved his fear of entering the Siegrist house by seeking other means to attempt to persuade his wife to return home.

The oft-repeated rule is that a sentence within statutory limits will not be set aside absent an abuse of discretion. *State v.*

Moreno, ante p. 210, 422 N.W.2d 56 (1988); *State v. Lane,* 227 Neb. 687, 419 N.W.2d 666 (1988).

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. MICHAEL ZEMUNSKI, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. MITCHELL WHITELEY, APPELLEE.
423 N.W.2d 443

Filed May 13, 1988. Nos. 88-149, 88-150.

Appeal from the District Court for Phelps County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Glenn A. Clark, Phelps County Attorney, for appellant.

Patrick T. O'Brien of Bauer, Galter & O'Brien, for appellee Zemunski.

Nancy S. Freburg, Phelps County Public Defender, for appellee Whiteley.

CAPORALE, J.

In case No. 88-149 the State charged defendant-appellee, Michael Zemunski, with the felony of burglarizing the "Holdrege Coop" on March 20, 1987, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1985). Defendant-appellee, Mitchell Whiteley, was charged with the same crime in case No. 88-150. The district court sustained a portion of the motion filed by each defendant to suppress the evidence obtained by the police. In these consolidated interlocutory appeals to a single judge of this court, taken pursuant to the provisions of Neb. Rev. Stat. § 29-824 (Reissue 1985), the State claims the district court erred in finding that the arrest of each defendant "was not based upon probable cause and was therefore unlawful requiring the suppression of all evidence seized from the motor vehicle." The decisions of the district court are affirmed.

THE SETTING

On March 24, 1987, a police task force was formed by about 20 southeast Nebraska law enforcement agencies to investigate a series of seemingly related burglaries. Investigator Ronald Osborne of the Nebraska State Patrol participated in this task force, as did Lancaster County Sheriff's Det. Sgt. Robert Marker. According to Osborne, the general modus operandi entailed gaining entry to the burglarized premises by the use of a bar or a screwdriver to spread the doorjamb. When safes were involved, they were "peeled" from top left to bottom right. Most of the time the burglaries occurred late at night or early in the morning, and there was generally more than one burglary in a particular town or general area. Usually, only money was taken.

In the course of the task force investigation, Osborne concluded that 117 burglaries which had occurred in 17 Nebraska counties on 35 separate days between July 1, 1986, and April 1, 1987, fit this pattern. Vehicles in defendant Zemunski's possession had been seen in the vicinity of three of these burglaries. Osborne thus had come to suspect that defendant Zemunski and his friend, defendant Whiteley, were involved in all of the burglaries.

Osborne had become acquainted with defendant Zemunski in February of 1987 in connection with an investigation into an earlier attempted burglary. In the course of this prior investigation, Osborne kept Zemunski under surveillance on February 22, 23, 24, and 25, and on March 1, 2, 4, and 11, 1987. During this time, Osborne observed only that defendants attended the dograces at Council Bluffs, Iowa, together. However, Osborne had been told that defendant Zemunski had been arrested as the result of a Lancaster County burglary and was out on bond and that he was suspected of burglary by the Auburn Police Department and the Otoe County sheriff's office.

At about 2 a.m. on April 2, 1987, Fillmore County Sheriff's Deputy Jeff Brandl, on routine patrol in Grafton, noticed lights on at the town's grain elevator, indicating a possible illegal entry. Brandl notified his office by telephone that a burglary might be in progress at the grain elevator; his office in turn

notified sheriffs' offices in surrounding counties of the possible break-in. However, subsequent investigation disclosed that no entry or burglary had in fact occurred.

The Fillmore County sheriff's office informed Osborne at about 2:20 a.m. that a burglar alarm had been triggered in Grafton. Osborne then called the Lancaster County sheriff's office, arranged to meet Marker at the Pleasant Dale Interstate 80 interchange, and left his home at about 3 a.m. Acting in accordance with Osborne's requests, two additional State Patrol investigators traveled from Lincoln to Grafton on U.S. Highway 6 as Osborne and Marker drove on I-80 toward Grafton, these being the two main routes between Lincoln and Grafton. As noted in the suppression hearing below, "All of this was done in connection with the report that [Osborne] received from the Fillmore County Sheriff in regard to the alarm going off in Grafton."

As Osborne, Marker, and the other police officers traveled to Grafton, they watched for one of the vehicles in defendant Zemunski's possession, a silver Chevrolet station wagon, Nebraska license No. 2-A9185, registered to Micho Investments, an entity owned by defendant Zemunski's father. While still on I-80 looking for the silver Chevrolet, Osborne and Marker received word that no break-in had occurred in Grafton; Osborne testified that he recalled no other radio messages regarding possible burglaries before he and Marker later encountered the silver Chevrolet.

THE STOP

At about 4:50 a.m., upon leaving I-80 at the U.S. Highway 81 interchange, Osborne and Marker observed the silver Chevrolet in the parking lot of a cafe at that location. Osborne and Marker parked nearby and watched the vehicle until "5:20 to 5:30." Shortly after stopping to watch the silver Chevrolet, at around 5 a.m., Osborne received a request "to call the . . . Aurora Police Department." Responding to this request, Osborne placed a phone call to the State Patrol dispatcher in Grand Island, later determined to be one Katherine Engle, from the lobby of the establishment where he and Marker were parked; Engle patched Osborne through to a police official in Aurora, and this official told Osborne about several burglaries

in Aurora. Osborne apparently was not in direct radio contact with Aurora.

According to Osborne, in this phone conversation he learned that a farmers' cooperative, a grocery store, and a lumberyard had been burglarized in Aurora, that a safe in the cooperative had been "peeled," and that money was missing from it. This conversation was hastily terminated when Marker saw the silver Chevrolet leave the cafe parking lot and pull onto the Interstate heading east. Osborne and Marker followed. According to Osborne, he had to vary the speed at which he drove from 40 to 70 miles per hour in order to keep up with the silver Chevrolet.

Osborne testified that he and Marker periodically received radio transmissions from Engle giving them additional information regarding the Aurora burglaries as they followed the suspect vehicle on I-80; however, Osborne admitted that this assertion is not supported by any of the communications records kept by the various police agencies that morning.

Engle noted in her personal log that a Hamilton County sheriff's deputy reported a grocery store and a lumberyard in Aurora had been burglarized. She also noted that Osborne was then in his vehicle near York, "watching a suspect vehicle . . . they had word there may possibly be a break-in at Grafton." Engle eventually contacted Osborne and patched him through to Aurora, but did not monitor the entire conversation between Osborne and the Aurora police. Sometime later, Engle was asked to pass on a description of some evidence from Aurora to Osborne; as she recalled at the suppression hearing below, Aurora police officials asked her to tell Osborne about "some foot prints on a bank bag." Engle identified the source of this information as a police officer in Aurora whose badge number was 4283. In the initial phase of the suppression hearing held on October 16, 1987, Engle testified that it was her understanding that Osborne already had "two suspects in custody at the Pleasant Dale interchange and was proceeding to the, I believe the police department in Lincoln," by the time she passed officer No. 4283's information to him. However, at the second phase of the suppression hearing held on January 21, 1988, Engle testified that she had relayed information to Osborne shortly before 6 a.m.; she initially testified that she could not

remember the nature of the information, but subsequently stated that she had relayed a description of a footprint on a bank bag to Osborne. Engle also testified that after Osborne received this information, "he immediately called Lincoln saying he was stopping the vehicle." In the course of Engle's testimony on January 21, the district court questioned her as follows:

> [Court] Perhaps I don't recall your testimony correctly but I believe that at the prior hearing here that we had in this matter on October 16th, you testified that the conversation with footprints and bank bags that was reported by 4283, that that conversation was after the suspects had already been stopped. Do you remember testifying to that effect?
>
> [Engle] Yes, sir.
>
> [Court] Is your testimony today inconsistent with your prior testimony?
>
> [Engle] I have since recalled two communications.
>
> [Court] At the prior hearing on October 16th, 1987, you testified that there was only one radio conversation between you and Investigator Osborne?
>
> [Engle] Yes, sir.
>
> [Court] And now you're saying there were two such radio conversations?
>
> [Engle] Yes, sir.
>
> [Court] Did this just come to you between — when did this revelation come to you?
>
> [Engle] We had a meeting over at the County Attorney's office in Aurora with all of us involved and I recalled talking to him, I don't recall specifically what I said but I remember what I thought at the time.
>
> [Court] And how was your memory refreshed in this regard?
>
> [Engle] Between all of us we were trying to get — recall between all of us when things happened.
>
> [Court] Now you say "all of us". Who's all of us?
>
> [Engle] There was the dispatcher from Aurora, Phil Wagner, Chief Gage, Osborne, Marker, and Lee Jones is all I can recall being there.

[Court] And this meeting took place when?
[Engle] It was in December.

Hamilton County sheriff's office records indicate that Osborne spoke to Aurora Police Chief William Gage sometime between 5:08 and 5:22 on the morning of April 2, 1987. Shortly after this call was completed, Engle relayed a question for Gage, apparently from Osborne: Had certain brands of cigarettes been taken in the Aurora burglaries? At 5:24 a.m., Engle asked if any footprints were noted at the scenes of the Aurora burglaries, and was told that "a tennis shoe print" had been observed. At 6:03 that morning, Engle called to ask Gage if any of the money taken in the Aurora burglaries had been bundled together with rubber bands, and to inform Aurora that Osborne had two suspects in custody. Later, Gage informed Engle that as far as they knew, no such bundles of money had been taken in the Aurora burglaries. Hamilton County sheriff's office records indicate and Jill Hunnicutt, the dispatcher on duty in that office during the early morning hours of April 2, 1987, recalled no conversation regarding a bank bag between 3:12 a.m. and the time at which Engle advised Aurora that suspects were in custody; further, no request for a description of the "tennis shoe" pattern was noted until 6:08 that morning. During the second phase of the suppression hearing, Gage testified that his only conversation with Osborne on the morning of April 2, 1987, had occurred by phone at 5:22 a.m. and that he did not mention a bank bag or footprints to Osborne during that conversation.

Aurora Police Officer Phillip Wagner testified that he had placed a call to Engle at about 6 a.m. on April 2, 1987, informing her that evidence observed at the scene of the cooperative burglary in Aurora included "tennis shoe prints left on some bank bags at the scene." Later, Engle called Wagner at the cooperative, and he described the footprints. Wagner also testified that he knew when Engle asked for a description of the footprints that Osborne already had suspects in custody.

In the first phase of the suppression hearing, Osborne maintained that he had received detailed information from Aurora before he stopped the silver Chevrolet, although police agency records indicate that information regarding the tennis

shoe pattern observed at the scene of the Aurora burglaries had been passed on to Osborne and Marker after they had stopped the vehicle. In the second phase of the suppression hearing, Osborne maintained that he had received two descriptions of the footprint patterns, one before he stopped the vehicle and the other which he requested for clarification after he had stopped the vehicle.

The description of the tennis shoe patterns observed in connection with the Aurora burglaries was thought to be significant, in that "these were the same shoe designs that had been reported in several of the burglaries" the police task force was investigating. However, Osborne testified that he did not examine the soles of the shoes the defendants were then wearing until after he had placed them under arrest.

Osborne and Marker followed the silver Chevrolet east on I-80 to the Pleasant Dale interchange, about 1 mile west of the Lancaster County border, where the vehicle left the Interstate and proceeded north. Osborne and Marker then activated their lights, and at about 6 a.m. the silver Chevrolet was stopped in the parking area of a Bingo service station located in Seward County, not in Lancaster County.

THE ARREST

Osborne and Marker approached the silver Chevrolet on foot and found the defendants inside. At the initial phase of the suppression hearing, Osborne testified:

> After we had stopped the vehicle, I went up to the drivers side, Detective Marker went up to the passengers side. I determined on the way up that there were two people in the vehicle. When I got to the drivers side I asked the driver of the vehicle for some identification. The driver was Mitchell Whiteley who produced a drivers license. Detective Marker was on the other side of the vehicle. I heard him when we first got there ask the passenger for some identification. I saw the passenger — I didn't hear what the passenger replied but I saw some motions and movements that the passenger was doing.
>
> [Q.] And what motion was that?
>
> [Osborne] He was putting his right hand inside the left part of his coat, under his coat.

[Q.] What did you do at that point in time?

[Osborne] I backed up from the vehicle, backed away from the vehicle.

[Q.] Did you see Investigator Marker?

[Osborne] Yes.

[Q.] What did he do?

[Osborne] He also backed up on the other side.

[Q.] What happened then?

[Osborne] The passenger's hand came out and at that time we got next to the vehicle again. I observed the passenger's hand go in his coat again, I backed up again, Deputy Marker backed up and at that point we asked the two occupants of the vehicle to get out of the vehicle.

[Q.] Could you see inside the vehicle at that time?

[Osborne] Yes.

[Q.] Prior to the time that they got out of the vehicle?

[Osborne] I could see, yes.

[Q.] What did you see?

[Osborne] I saw Mitchell Whiteley in the drivers portion. I saw Michael Zemunski on the passenger side. On the floorboard of the passenger side I saw a screwdriver and what looked like the handle of either — it was a handle about this long (indicating) and then from there it looked like a chisel. Straight down under Mitchell Whiteley's feet or between his feet sticking out approximately an inch and a half from under the drivers seat was what appeared to be part of a money bag.

. . . .

[Q.] And at that time did you arrest them?

[Osborne] We shook them down. After shake down they were arrested, yes.

[Q.] When you shook them down what if anything did you find upon their persons?

[Osborne] A large amount of money.

. . . .

[Q.] What are you talking about a large amount of money?

[Osborne] Over $600.

In an earlier preliminary hearing in Aurora, Hamilton

County, Osborne had testified that he had seen only a large screwdriver in the vehicle. During the second phase of the suppression hearing, Osborne explained the inconsistency thus:

> At the time that I testified and at the time of the stop, I did see a handle but I did not know what the handle — I didn't know what was on the other end of that handle. All I could see was the handle, a screw driver and the bank bag. After the vehicle was searched, I then knew what the handle went to and that was a chisel.

Osborne and Marker then arrested Zemunski and Whiteley for possession of a burglary tool.

THE SEARCHES

After the defendants exited the vehicle, Marker subjected defendant Zemunski to a "pat down" search. At the initial phase of the suppression hearing, Marker testified:

> [Q.] Why did you ask the defendant to get out of the vehicle?
>
> [Marker] Because he was reaching inside his jacket. I don't know what he was reaching for.
>
> [Q.] Did you pat him down once he was outside?
>
> [Marker] Yes, I did.
>
> [Q.] Did you retrieve anything from him at that time?
>
> [Marker] Yes, I did.
>
> [Q.] What did you retrieve?
>
> [Marker] There was a large folded over wad of money and I believe there was $690.
>
> [Q.] How did you find that $690?
>
> [Marker] By reaching in once I had patted him down I felt the bulge under his left side of his jacket and I reached in and took out the money.
>
> [Q.] Did you have any idea what that was when you felt it?
>
> [Marker] No.
>
> [Q.] What did you think it was?
>
> [Marker] I didn't know what it was.

A private citizen saw the defendants being stopped and arrested as she was starting her day's work at the Bingo service station at about 6 on the morning of April 2, 1987. The citizen testified that she is not acquainted with either defendant and

that she saw two officers walk up to the silver Chevrolet and exchange a few words, after which they "got the fellows out and had them turn around, frisked them, handcuffed them," and put them in an automobile. Then another automobile pulled up, at which time the now four officers got the defendants "out of the first car and repeated the performance and put them into the second" automobile. The officers then went to the silver Chevrolet, opened all four of its doors, and searched it, spending about a half hour in the process. The search included looking under the seats, and she saw them take several plastic bags out of the vehicle, but she did not know what was in the bags.

Marker, however, testified that he did not search the vehicle at the Bingo service station. Osborne also denied having searched the vehicle at the service station. The parties have further stipulated that if Officers Al Cherry and Larry Ball of the Lancaster County sheriff's office were to testify, they too would deny having searched the vehicle at the service station.

In any event, at Osborne's direction a tow truck was called from Lincoln, and the silver Chevrolet was towed to Lincoln. Osborne subsequently applied to the county court for Lancaster County for a warrant to search the vehicle, as well as the residences of defendants Zemunski and Whiteley. Osborne's affidavit in support of this application recited facts including descriptions of burglaries which occurred in Nebraska City on March 15, 1987, Seward on March 23, 1987, Fairbury on March 27 and 28, 1987, and Aurora on April 2, 1987, tending to show similarities in method and linking these burglaries to one another; and evidence, apparently gathered independently of the events of April 2, 1987, recited herein, to the effect that defendant Whiteley was seen at the location of one of the Fairbury burglaries "during the early morning hours of March 28, 1987." The county court was not told the vehicle had been first stopped in Seward County, and it issued a warrant authorizing searches of the vehicle and both residences.

THE SUPPRESSION ORDERS

So far as is relevant to these appeals, the district court found in each case that while the stop of the defendant at the Bingo service station in Seward County was based upon articulable

facts supporting a reasonable suspicion and was therefore valid, the subsequent arrest of the defendant was not based on probable cause and was therefore unlawful. As a consequence, the district court suppressed all the evidence obtained from the person of the subject defendant as a result of the arrest. (While the same order was entered in each case, so far as the record reveals, the only item of evidence obtained from the search of the defendants was the $690 found on defendant Zemunski.) The district court also found that the searches made of the vehicle, both before and after the search warrant was obtained, were unlawful and thus suppressed all evidence obtained from those searches.

ANALYSIS

Scope of Review

The trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings are clearly erroneous. *State v. Gibson, ante* p. 455, 422 N.W.2d 570 (1988); *State v. Blakely,* 227 Neb. 816, 420 N.W.2d 300 (1988). Moreover, it must be recognized that the trial court has observed the witnesses testifying regarding such a motion. *State v. Blakely, supra*; *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987). Thus, the trial court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence; it is not the function of a reviewing judge to reweigh the evidence or resolve conflicts in the evidence. See *State v. Blakely, supra.*

Arrest Finding

Neb. Rev. Stat. § 29-404.02 (Reissue 1985) provides, among other things, that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. The lawfulness of a warrantless arrest must be based on probable cause, which exists where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed; if the facts available to the officer at the time of arrest would warrant a person of reasonable caution in the belief that such action was appropriate, then probable cause exists. *State v. Moore*, 226

Neb. 347, 411 N.W.2d 345 (1987); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981).

Regarding the "stop and frisk" exception to the usual requirement of a warrant, this court noted in *State v. DeJesus*, 216 Neb. 907, 915, 347 N.W.2d 111, 116 (1984):

> This particular exception of a warrantless search and seizure was adopted by the U.S. Supreme Court in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The Court in that case held that a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion.
>
> As stated in *Terry, supra* at 29: "The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."
>
> The standard is whether a reasonably prudent man under the circumstances would be warranted in the belief that his safety or that of others was in danger, and each case will have to be decided on its own facts.

Under *DeJesus*, the standard to be applied is clearly one of probable cause: Under the circumstances, did the officer have probable cause to believe that his safety or that of others was in danger? It has long been the rule in Nebraska, as this court stated in *State v. Aden*, 196 Neb. 149, 152, 241 N.W.2d 669, 671 (1976), that

> [i]t is not only the personal knowledge of the officer who makes the search and seizure which may be used to test probable cause, but added thereto may be the collective knowledge of the law enforcement agency for which the officer acts. However, in that case there must have been some communication of knowledge to or direction to act from the department or officer having that knowledge to the officer making the search and seizure.

(Citations omitted.)

In this case the record is devoid of any fact, discovered by Osborne and Marker or communicated to them by any other

officer, reasonably raising an inference that either defendant Zemunski or defendant Whiteley might have been armed at the time of the stop. Osborne, who had recently maintained surveillance on defendant Zemunski for almost 2 weeks, reported no indications of weapons possession; there is no evidence that any of the hundred or so burglaries in which Osborne suspected the defendants were involved had been accomplished through the use or threat of force against another person; defendant Zemunski's act of reaching into the inner pocket of his jacket is more reasonably understood to be an effort to comply with the officers' request for identification than a gesture of threat. As the Supreme Court observed in *Terry v. Ohio*, 392 U.S. 1, 29, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968),

> We need not develop at length in this case . . . the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. . . . Suffice it to note that such a search, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of crime.

(Citations omitted.)

On these facts we are unable to conclude that the district court was clearly in error in determining that the officers' search of the defendants' persons was improper, and, therefore, the evidence seized from defendant Zemunski must be suppressed.

Search Findings

The next issue relates to the searches of the silver Chevrolet. The requirements which must be satisfied to uphold a warrantless search of and seizure from an automobile under the plain view doctrine are that the police officer must lawfully make the "initial intrusion" or otherwise properly be in a position from which he can view a particular area, that the officer must discover the incriminating evidence "inadvertently," and that it must be "immediately apparent" to the officer that the items observed may be evidence of a crime, contraband, or otherwise subject to seizure. *State v. Hansen*, 221 Neb. 103, 375 N.W.2d 605 (1985).

As noted earlier, the defendants were originally arrested for the felony of possessing a burglary tool. Neb. Rev. Stat. § 28-508 (Reissue 1985) provides:

> (1) A person commits the offense of possession of burglar's tools if:
>
> (a) He knowingly possesses any explosive, tool, instrument, or other article adapted, designed, or commonly used for committing or facilitating the commission of an offense involving forcible entry into premises or theft by a physical taking; and
>
> (b) He intends to use the explosive, tool, instrument, or article, or knows some person intends ultimately to use it, in the commission of an offense of the nature described in subdivision (1)(a) of this section.
>
> (2) Possession of burglar's tools is a Class IV felony.

In order to validate the seizure of items at that time and the subsequent arrest of the defendants, therefore, it is necessary for Osborne and Marker to have had probable cause to believe that defendants Zemunski and Whiteley possessed an item described in § 28-508 and that they did so with the intent required by that statute.

In considering this point, *Carpenter v. Sigler*, 419 F.2d 169 (8th Cir. 1969), a federal habeas corpus action following conviction in the courts of this state, see *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967), *cert. denied* 392 U.S. 944, 88 S. Ct. 2288, 20 L. Ed. 2d 1406 (1968), is instructive. Therein, the police officers of a town where there had been a series of burglaries noticed an automobile cruise slowly around the business district during the early morning hours. The officers stopped the vehicle and noted a set of pry bars under the seat rather than in a toolbox. This court held that under those circumstances, probable cause existed to arrest the occupants for possession of burglar's tools. Notwithstanding the fact that Carpenter's arrest was triggered by a set of pry bars in plain view, not the mere and ordinary screwdriver found in this case, the U.S. Court of Appeals for the Eighth Circuit felt constrained to point out:

> The probable cause was supplied by the hour of the encounter [approximately 3:30 a.m.], the absence of

> explanation of why the tools were in the petitioner's possession, the location of the tools in the front of the auto under the seat rather than in a tool box in a more conventional place, and the series of burglaries which had taken place in Blair [where the defendants were arrested] prior to the morning in question.

419 F.2d at 172. In this case defendants Zemunski and Whiteley were arrested, not while cruising, presumably "casing" a target business, but while driving down a public highway, and not in the vicinity of the Aurora burglaries but many miles away. On the basis of this record it cannot be said that possession of an ordinary screwdriver, even if kept under the automobile seat, is such a fact as would warrant a person of reasonable caution to believe that the offense of possession of burglar's tools had been committed. *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). Thus, the district court was not clearly in error in determining that what Osborne then saw was not such an item as to make it "immediately apparent" to the officers that the items they observed were evidence of a crime, contraband, or otherwise subject to seizure.

Moreover, during an investigatory stop, officers may search a suspect's vehicle in order to secure their safety or the safety of another if they have a reasonable belief, based on articulable facts, that they or other persons are in danger. *State v. Gross*, 225 Neb. 798, 408 N.W.2d 297 (1987). The search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the officer possesses a reasonable belief, based on specific and articulable facts, which reasonably warrants the officer to believe the suspect may gain immediate control of weapons. *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983). Insofar as, by all reports, defendants Zemunski and Whiteley were in handcuffs by the time Osborne and Marker turned their attention to the vehicle, it cannot be said the requirements of *State v. Gross, supra*, and *State v. Pierce and Wells, supra*, were met.

It therefore cannot be concluded that the district court was clearly in error in determining that there was no probable cause

for Osborne and Marker to seize any item from the vehicle without a warrant. It follows that Osborne was without authority to seize the vehicle itself; his act of ordering the vehicle towed from Seward County to Lancaster County was therefore unlawful, *Morfeld v. Bernstrauch*, 216 Neb. 234, 343 N.W.2d 880 (1984), and the district court was not clearly in error so to find.

The remaining issue concerns the search of the silver Chevrolet made under color of warrant. Neb. Rev. Stat. § 29-812 (Cum. Supp. 1986) provides in relevant part:

> A search warrant authorized by sections 29-812 to 29-821 may be issued by any district court judge or Supreme Court Judge of the State of Nebraska for execution anywhere within the State of Nebraska. A similar search warrant authorized by sections 29-812 to 29-821 may be issued by any judge of the county court within his or her district . . . within the county wherein the property sought is located.

Osborne requested and received the search warrant at issue from the county court for Lancaster County; Lancaster County is located in judicial district No. 3, while Seward County is located in judicial district No. 5. Neb. Rev. Stat. § 5-105 (Cum. Supp. 1986). Thus, this is not a situation such as was presented in *State v. Kleinberg, ante* p. 128, 421 N.W.2d 450 (1988), where officers in good faith executed a warrant containing a ministerial error; Osborne was simply without authority to order the vehicle towed to Lancaster County. It therefore cannot be said that the district court was clearly wrong in finding that the search of the vehicle in Lancaster County under color of the Lancaster County court warrant was improper, and thus ruling that evidence seized pursuant to that search was inadmissible.

DECISION

Accordingly, the decisions of the district court must be affirmed.

AFFIRMED.

CLARENCE W. LEIBBRANDT ET AL., APPELLANTS, MANUEL RUF ET AL., APPELLEES, V. LEAH LOMAX ET AL., APPELLEES.
CLARENCE W. LEIBBRANDT ET AL., APPELLANTS, V. LEAH LOMAX ET AL., APPELLEES.
423 N.W.2d 453

Filed May 20, 1988. Nos. 86-191, 86-192.

1. **Schools and School Districts.** Neb. Rev. Stat. §§ 79-402 and 79-402.03 (Reissue 1981) provide alternative methods for creation of a new school district from existing school districts.
2. _____. Under Neb. Rev. Stat. § 79-402 (Reissue 1981), action by a county or state reorganization committee, approving or disapproving a school district reorganization plan, is advisory only and a recommendation which does not bind a county superintendent concerning a change in a school district's boundaries.
3. _____. When the county superintendent has determined that the reorganization petition has sufficient valid signatures, the superintendent's duty to carry out the petitioned reorganization is mandatory under Neb. Rev. Stat. § 79-402 (Reissue 1981).

Appeal from the District Court for Furnas County: JACK H. HENDRIX, Judge. Affirmed.

W. Wesley Lubberstedt, P.C., for appellants.

Marvin O. Kieckhafer of Kay and Kay, for appellees Lomax et al.

John R. Higgins, Jr., of Paine, Huston, Higgins & Martin, for appellees Raymond C. Haag et al.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In consolidated cases, appellants challenge the existence of a new Class II school district created by merger and reorganization of two Class II districts—School District No. 001 of Furnas County (Wilsonville) and School District No. 11 of Red Willow County (Beaver Valley).

Apparently in response to a request by voters of the school district, in the fall of 1983 the Beaver Valley board of education unanimously signed a petition to change that school district's boundaries by merger with Wilsonville, another Class II school

district, resulting in a new Class II school district. The merger petition, signed by the Beaver Valley board, was presented to the Wilsonville board of education at its special meeting on November 29, 1983. The Wilsonville board of education unanimously signed that petition for creation of the new Wilsonville-Beaver Valley Class II school district.

Regarding creation of a school district from existing districts, Neb. Rev. Stat. § 79-402 (Reissue 1981) provides:

> The county superintendent shall create a new district from other districts, or change the boundaries of any district upon petitions signed by sixty per cent of the legal voters of each district affected; *Provided*, that petitions must contain signatures of at least sixty-five per cent of the legal voters of each district affected if the proposed change has been disapproved by both the state and county committees for school district reorganization; *and provided further*, that when area is added to a Class VI school district, or when a Class I school district, which is entirely within a Class VI school district, is taken from a Class VI school district, the Class VI district will be deemed to be an affected district. Petitions proposing to create a new school district or to change the boundary lines of existing school districts shall, when signed by at least sixty per cent of the legal voters in each district affected, be submitted to the county committee for school district reorganization. The county committee shall, within forty days, review and approve or disapprove such proposal and submit it to the state committee for school district reorganization. The state committee shall, within forty days, review and approve or disapprove the proposal and return it, with any recommendations deemed advisable, to the county committee. The county committee shall, within fifteen days of receipt of the returned proposal, consider the action of the state committee, and determine whether to give final approval or disapproval to the proposal. The county committee shall also, within fifteen days of receipt of the returned proposal, advertise and hold a public hearing at which the recommendations and action of the state and county

committees shall be presented to the legal voters in attendance. The county committee shall hold the petitions for ten days following the hearing, at the end of which time the committee shall file the petitions with the county superintendent. The county superintendent shall, within fifteen days, advertise and hold a hearing to determine the validity and sufficiency of the petitions. Upon determination, as a result of the hearing, that sufficient valid signatures are contained in the respective petitions, the county superintendent shall proceed to effect the changes in district boundary lines as set forth in the petitions; *Provided*, that any person adversely affected by the changes made by the county superintendent may appeal to the district court of any county in which the real estate, or any part thereof, involved in the dispute is located. If the real estate is located in more than one county, the court in which an appeal is first perfected shall obtain jurisdiction to the exclusion of any subsequent appeal. A signing petitioner shall be permitted to withdraw his name therefrom and a legal voter shall be permitted to add his name thereto at any time prior to the end of the ten-day period when the county committee files such petitions with the county superintendent. Additions and withdrawals of signatures shall be by notarized affidavit filed with the county superintendent.

Neb. Rev. Stat. § 79-402.03 (Reissue 1987) provides:

> In addition to the petitions of legal voters pursuant to section 79-402, changes in boundaries or the creation of a new district from other districts may be initiated and accepted by:
>
> (1) The board of education of any Class III, IV, V, or VI district; and
>
> (2) The board of education of any Class I or II district in which is located a city or incorporated village.

Neb. Rev. Stat. § 79-402.06 (Reissue 1981) states: "Petitions presented pursuant to sections 79-402.03 to 79-402.05 shall be subject to the same requirements for content, hearings, notice, review, and appeal as petitions submitted pursuant to section 79-402."

Pursuant to § 79-402, the Wilsonville-Beaver Valley petition was submitted to the county reorganization committee in Furnas County for Wilsonville and in Red Willow County for Beaver Valley. Because the proposed merger involved school districts in two counties, a special reorganization committee was necessary. See Neb. Rev. Stat. § 79-426.09(2) (Reissue 1987).

The Furnas County committee published notice that its meeting would be held on December 20, 1983, to select three of its members for the special reorganization committee, but inclement weather prevented the meeting of the Furnas County committee. Faced with the 40-day limit for approval or disapproval of the reorganization plan, see § 79-402, without a formal meeting, the chairman of the Furnas County committee appointed members from that committee to serve on the intercounty special reorganization committee. On December 23, the Furnas County committee approved and confirmed the chairman's appointments to the intercounty special reorganization committee. After published notice, the Furnas-Red Willow special reorganization committee met on January 5, 1984, and approved the Wilsonville-Beaver Valley plan for merger and reorganization contained in the petition. The special committee then submitted the petition to the state committee for approval. On February 17, the state committee disapproved the petition and returned it to the special committee, which, on March 6 by a "show of hands" vote rather than a roll call vote, disapproved the Wilsonville-Beaver Valley petition. However, as required by § 79-402, the special committee held a hearing on March 6 and later, in further compliance with § 79-402, filed the petition with the county superintendents in Furnas County and Red Willow County.

On March 14, appellants commenced an action in the district court for Furnas County, case No. 86-191 in these consolidated appeals, and sought an injunction to prevent further action on the reorganization petition. On May 3, the court denied injunctive relief to the appellants.

The county superintendents met on May 10 to consider the Wilsonville-Beaver Valley petition, verified the validity of signatures on that petition, and changed the school districts'

boundaries in accordance with the Wilsonville-Beaver Valley petition, thereby creating the new Class II district in question. Appellants appealed from the superintendents' May 10 action and requested that the district court "stay" any further reorganization proceedings during the pendency of their appeal (case No. 86-192). Before any action was taken by the district court, the special reorganization committee, pursuant to Neb. Rev. Stat. § 79-402.09 (Reissue 1987), appointed a board of education for the new Class II district. On July 30, the district court entered an order which stayed any further proceedings by the county superintendents and the county committees during pendency of appellants' appeal in the district court. In each case in the district court, all parties interested in upholding the new district's existence filed a motion for summary judgment. The district court entered summary judgment, affirming the county superintendents' action, which resulted in the new Wilsonville-Beaver Valley Class II school district. In granting the summary judgment, the district court found: "[The] Reorganization Committees violated the Open Meetings Laws in more than one particular, but the actions of the Committees were advisory only and not determinative of the validity of the Petition to change the boundary lines. This determination was the sole responsibility of the County Superintendents."

Appellants contend that the Furnas County reorganization committee and the intercounty special reorganization committee failed to comply with the Nebraska "Public Meetings Laws," Neb. Rev. Stat. §§ 84-1408 to 84-1414 (Reissue 1981 & Cum. Supp. 1984). In particular, appellants question two committee meetings or, more precisely, question the Furnas County committee's action in December 1983 without a formal meeting and the "show of hands vote" at the special reorganization committee's meeting on March 6. Appellants point to § 84-1413(2) (Reissue 1981) of the Nebraska Public Meetings Laws, which in part provides: "Any action taken on any question or motion duly moved and seconded shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting."

Appellants then rely on § 84-1414 (Cum. Supp. 1984), which

in part provides: "Any motion, resolution, rule, regulation, ordinance, or formal action of a public body made or taken in violation of the provisions of [the Nebraska Public Meetings Laws] shall be declared void by the district court . . . ."

Why the appellants, who oppose the reorganized Wilsonville-Beaver Valley school district, want to nullify the special reorganization committee's disapproval of the reorganization is unexplained, but becomes unimportant under the circumstances.

Action taken in violation of the Nebraska Public Meetings Laws is subject to nullification by a district court under § 84-1414. *Grein v. Board of Education*, 216 Neb. 158, 343 N.W.2d 718 (1984).

However, in the present appeals, the Nebraska Public Meetings Laws have no bearing on the disposition compelled by the statutes governing merger and reorganization of Class II school districts.

Appellants raise no question concerning the correctness of action by the school boards in signing the petition for merger and reorganization of the Wilsonville-Beaver Valley school districts. Further, appellants do not challenge the action taken by the county superintendents, who changed the school districts' boundaries in accordance with the petition for merger and reorganization.

Sections 79-402 and 79-402.03 provide alternative methods for creation of a new school district from existing school districts. By § 79-402, a school district's legal voters may petition for a change of the district's boundaries. By § 79-402.03, a school district's board of education may initiate or accept a proposed change of a district's boundaries or the creation of a new district by merger of existing districts. Action under § 79-402.03 may be characterized as a board-to-board petition for a change of a school district's boundaries or merger of existing school districts. The board-to-board petition is as efficacious as a petition by a school district's legal voters to effect a school district's boundary change or merger involving another district. In the appeals now before us, the board-to-board petition was utilized rather than a petition by the legal voters of the respective school districts. As far as a

petition's content, hearings, notice, review, and any appeal concern a board-to-board petition, the provisions of § 79-402 apply. See § 79-402.06. As previously mentioned, appellants do not complain that any board of education or county superintendent failed to comply with the provisions of § 79-402.

In *Moser v. Turner*, 180 Neb. 635, 144 N.W.2d 192 (1966), this court expressed the roles and functions of a county or state reorganization committee in relation to a county superintendent acting under § 79-402:

> Apparently the provisions for review of the action of the county superintendent by the county and state committees stemmed in part from the desire to keep them informed of the changes being made by the electors by the petition method. Certainly under section 79-402, R.S. Supp., 1965, it was not intended thereby to divest the authority of the county superintendent under the petition method. The office of the reorganization committees in proceedings to change the school districts before the county superintendents is shown in Lindgren v. School Dist. of Bridgeport, 170 Neb. 279, 102 N.W.2d 599, where this court said: "It is contended that the proceedings are void in that the state committee on reorganization did not have its report before the county committee on reorganization at the time it held its hearing on the proposal to transfer the lands in question. Such report was filed with the county superintendent when the hearing was held to determine the sufficiency of the petitions. We point out that the consideration of the proposal to transfer lands by the state and county committees is advisory only. Such committees have no part in determining whether or not the transfer shall be made other than to make recommendations thereon. . . ."

Id. at 643, 144 N.W.2d at 197.

Although the special reorganization committee at the county level and the state reorganization committee rejected the Wilsonville-Beaver Valley petition and reorganization plan, any action by those reorganization committees was only "advisory." *Moser v. Turner, supra.* Whether the county or state

reorganization committee has approved or disapproved a petition, § 79-402 requires that the county committee, and the intercounty special reorganization committee in the present appeals, must consider the state committee's action and determine whether to approve or disapprove the reorganization plan set out in the petition. After a public hearing and elapse of 10 days, § 79-402 further requires that the county committee must file the reorganization petition with the county superintendent, who then holds a hearing to determine the validity and sufficiency of the petition. Thus, as reflected in § 79-402, rejection or disapproval by a county or state reorganization committee is immaterial to eventual submission of a petition to the county superintendent for disposition.

When the county superintendent has determined that the reorganization petition has "sufficient valid signatures," the superintendent's duty to carry out the petitioned reorganization is mandatory under § 79-402. This court, in *Eriksen v. Ray*, 212 Neb. 8, 12, 321 N.W.2d 59, 62 (1982), observed:

> Under the petition method, once a sufficient number of legal voters of each district have signed a petition, the superintendent must then act in accordance with the statute. See Neb. Rev. Stat. § 79-402 (Reissue 1976). Under the petition form of reorganization, the provisions of the statutes are mandatory and jurisdictional and the failure to comply with the requirements set out in the statutes generally causes the action taken by the county superintendent to be void. See *State ex rel. Larson v. Morrison*, 155 Neb. 309, 51 N.W.2d 626 (1952). Likewise, where proper petitions are filed, it is the mandatory duty of the superintendent to hold a hearing and, if the petitions are sufficient, to change the boundaries as requested. See *School Dist. No. 49 v. Kreidler*, 165 Neb. 761, 87 N.W.2d 429 (1958).

See, also, *Olsen v. Grosshans*, 160 Neb. 543, 71 N.W.2d 90 (1955); *Cacek v. Munson*, 160 Neb. 187, 69 N.W.2d 692 (1955).

Under the circumstances, when the county superintendents determined that the Wilsonville-Beaver Valley reorganization petition had "sufficient valid signatures," the superintendents were statutorily obligated to carry out the reorganization plan

in accordance with the petition submitted by the school districts. See *School Dist. No. 49 v. Kreidler*, 165 Neb. 761, 777, 87 N.W.2d 429, 439 (1958): regarding school districts to be reorganized under § 79-402 but located in different counties, "superintendents, acting multilaterally and not unilaterally, have jurisdiction and the mandatory duty to order the changes requested" by a petition for change in boundaries or merger of the school districts.

What this court has stated in *Eriksen v. Ray, supra*, concerning a petition by a school district's legal voters is equally applicable to a petition by a school district's board of education pursuant to § 79-402.03, as the provisions applicable to that statute existed when the county superintendents acted on the Wilsonville-Beaver Valley petition.

We note the provisions of § 79-402.06 (Reissue 1987):

> Petitions presented pursuant to sections 79-402.03 to 79-402.05 shall be subject to the same requirements for content, hearings, notice, review, and appeal as petitions submitted pursuant to section 79-402, except that a petition presented pursuant to section 79-402.03 shall not become effective unless it is approved by a vote of a majority of the members of the state committee for school district reorganization. If such petition is not approved, the final hearing by the county committee for school district reorganization and the county superintendent shall not be held. Any person adversely affected by the disapproval shall have the right of appeal under section 79-402.

Section 79-402.06 (Reissue 1987) became effective on July 10, 1984, that is, after the county superintendents' action from which the appellants have appealed to the district court and this court.

The district court correctly granted summary judgments to the appellees because, on the material submitted to the district court, there was no genuine issue as to any material fact and appellees were entitled to judgments as a matter of law. See, Neb. Rev. Stat. § 25-1332 (Reissue 1985) (summary judgment); *Krul v. Harless*, 222 Neb. 313, 383 N.W.2d 744 (1986).

Appellants' claim for an attorney fee allowable under the

Nebraska Public Meetings Laws, see § 84-1414, is obviously without merit in view of the inapplicability of the Nebraska Public Meetings Laws under the circumstances.

AFFIRMED.

MARCIA LEE CARROLL, APPELLEE, V. EDWIN CHARLES MOORE, APPELLANT.
423 N.W.2d 757

Filed May 20, 1988. No. 86-375.

1. **Constitutional Law: Due Process.** Due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.
2. **Constitutional Law: Due Process: Right to Counsel.** Under the U.S. Constitution, it is presumed that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty.
3. _____: _____: _____. Under the U.S. Constitution, the test that governs the due process right to court-appointed counsel is whether the absence of counsel deprives an indigent defendant of fundamental fairness. That test, in turn, involves an analysis of three separate factors: the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions.
4. **Constitutional Law: Due Process: Right to Counsel: Paternity.** Due process requires that an indigent defendant has an absolute right to court-appointed counsel in paternity proceedings.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded for further proceedings.

Roberta S. Stick, for appellant.

Patrick M. Heng, Deputy Lancaster County Attorney, for appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

BOSLAUGH, J.

This was an action by the plaintiff, Marcia Lee Carroll,

against the defendant, Edwin Charles Moore, to establish that the defendant was the father of the plaintiff's child born June 24, 1982. The plaintiff alleged that she had made application to the office of the county attorney for determination of paternity and support pursuant to Neb. Rev. Stat. § 43-512.02 (Reissue 1984).

The defendant's "answer" consisted of a letter enclosing a copy of a news article relating to two paternity suits then pending in this court.

Pursuant to a motion by the plaintiff, on July 5, 1985, the trial court ordered the plaintiff, the defendant, and the child to submit to blood tests. On the same day, the trial court wrote to the defendant, advising him that the court would appoint counsel for the defendant if he was indigent. On July 22, 1985, the defendant wrote to the court, stating that he would need appointed counsel.

At a hearing on August 19, 1985, the trial court advised the defendant that the court would not appoint counsel for him and that if the defendant wanted representation it was his responsibility to hire his own counsel. The court also advised the defendant that his "answer" would be treated as a general denial. The court allowed the defendant to use a blood test made in a previous case in lieu of a new test as ordered on July 5.

The case came on for trial on March 26, 1986, with the defendant appearing pro se.

The following report of the result of the test done on blood drawn from the defendant on July 9, 1985, and from the plaintiff and the child on July 23, 1985, was received in evidence without objection:

PATERNITY CASE REPORT

12-AUG-85

CHART NO. : 468791

CHILD : . . . SEX : . . .

DATE OF BIRTH : 6-24-82 PLACE OF BIRTH : ,

MOTHER : CARROLL MARCIA L DATE OF BIRTH : 6-5-47

PUTATIVE FATHER : MOORE EDWIN C DATE OF BIRTH : 8-9-50

RESULTS

CHILD				SAMPLE NO. 4380					
ABO	A1	RH	R1R1	MNS	NSNS	KELL	kk	Fy	bb
Jk	aa	Lu		P		Di		Gm	
Km		ACP	BB	ESD	11	ADA	11	AK	11
GPT	22	GLO	12	PGD	AA	HAPT	11	PGM1	1+2+
GC	11	BF	SS	PI	M1M3	TNF	C1C2	C3	SF
MOTHER				SAMPLE NO. 4381					
ABO	O	RH	R1R1	MNS	NSNs	KELL	kk	Fy	bb
Jk	aa	Lu		P		Di		Gm	
Km		ACP	AB	ESD	12	ADA	11	AK	11
GPT	22	GLO	22	PGD	AA	HAPT	11	PGM1	1−2+
GC	11	BF	SF	PI	M2M3	TNF	C1C1	C3	SF
PUTATIVE FATHER				SAMPLE NO. 4321					
ABO	A1	RH	R1r	MNS	MNSs	KELL	kk	Fy	0
Jk	aa	Lu		P		Di		Gm	
Km		ACP	BB	ESD	11	ADA	11	AK	11
GPT	12	GLO	12	PGD	AA	HAPT	11	PGM1	1+
GC	11	BF	SF	PI	M1M1	TNF	C1C2	C3	SS

TYPE I EXCLUSIONS: NONE
TYPE II EXCLUSIONS: NONE

EXCLUSION RATE FOR CAUCASIANS	0.99901474
EXCLUSION RATE FOR BLACKS	0.99989253
EXCLUSION RATE FOR HISPANICS	0.99947333
PROBABILITY OF PATERNITY =	0.99991596
ODDS OF PATERNITY	11898. : 1

The letter accompanying the report stated that "99.99% of the male population has been excluded by this testing. Mr. Edwin Charles Moore has odds of 11,898 to one in favor of being the biological father of [the child]. This is a probability of paternity of 99.99%."

The trial court found that the defendant was the natural father of the child and fixed the child support at $75 per month commencing April 1, 1986, and increasing to $125 per month on June 1, 1986, and continuing until the child reaches the age

of 19, marries, dies, or becomes self-supporting, or until further order of the court.

The defendant has appealed and contends that the trial court erred in refusing to appoint counsel for the defendant and in ordering child support in the amount of $125 per month.

The principal issue is whether an indigent person who is alleged to be the father of a child is entitled to the appointment of counsel in a paternity proceeding. Nebraska has no statute providing for the appointment of counsel under those circumstances. The defendant contends that the due process clauses of the Constitutions of the United States and this state require that he be furnished counsel.

In *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), the mother of an illegitimate child who was a recipient of public assistance alleged that the defendant was the father of the child. The mother was provided with counsel by the state in order to initiate the paternity suit. The defendant's counsel was furnished by a legal aid group for the purpose of requesting that the trial court order blood grouping tests. A state statute then in effect provided that the costs of blood tests were chargeable to the moving party. The defendant asserted indigency and asked the state to subsidize the costs of the tests. The trial court denied the defendant's motion, and no tests were performed. The defendant was subsequently found to be the child's father and ordered to pay support. The appellate court affirmed the denial of the defendant's motion, finding that neither due process nor equal protection rights had been violated in denying the defendant's motion.

On certiorari to the U.S. Supreme Court, the defendant contended that his due process rights were violated when the state refused to pay for blood grouping tests requested by an indigent. The court, citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971), stated that " 'due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a *meaningful opportunity to be heard.*' " (Emphasis supplied.) 452 U.S. at 5-6.

In determining whether or not an indigent paternity

defendant's opportunity to be heard would be rendered "meaningless" by the denial of blood testing at the state's expense, the Court noted that "[s]ince millions of men belong to the possible groups and types, a blood grouping test cannot conclusively establish paternity. However, it can demonstrate nonpaternity . . . . It is a negative rather than an affirmative test with the potential to scientifically exclude the paternity of a falsely accused putative father." 452 U.S. at 7. The Court recognized a 1976 joint report of the American Bar Association (ABA) and the American Medical Association (AMA) which confirmed the fact that blood grouping tests were available to exonerate innocent putative fathers. The ABA-AMA report recommended use of the "seven blood test 'systems'—ABO, Rh, MNSs, Kell, Duffy, Kidd, and HLA." 452 U.S. at 8. These systems were found to be " 'reasonable' in cost and to provide a 91% cumulative probability of negating paternity for erroneously accused Negro men and 93% for white men." *Id.* The Court, citing Justice Brennan in *Cortese v. Cortese*, 10 N.J. Super. 152, 76 A.2d 717 (1950), wrote:

> "[I]n the field of contested paternity . . . the truth is so often obscured because social pressures create a conspiracy of silence or, worse, induce deliberate falsity.
>
> "The value of blood tests as a wholesome aid in the quest for truth in the administration of justice in these matters cannot be gainsaid in this day. Their reliability as an indicator of the truth has been fully established. The substantial weight of medical and legal authority attests their accuracy, not to prove paternity, and not always to disprove it, but 'they can disprove it conclusively in a great many cases provided they are administered by specially qualified experts' . . . ."

452 U.S. at 8.

In deciding the process which was constitutionally due the defendant, the Court considered the three factors set out in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976): (1) the private interests at stake; (2) the risk of erroneous results under current procedures, considered with the probable value of the suggested procedural safeguard; and (3) the governmental interests at stake.

The Court found that putative fathers' private interests in paternity proceedings were "substantial," 452 U.S. at 13, and included pecuniary interests (in avoiding support obligations), liberty interests (threatened by noncompliance with support orders), and interests relating generally to the creation of a parent-child relationship. "Just as the termination of such bonds demands procedural fairness, . . . so too does their imposition. . . . [B]oth the child and the defendant in a paternity action have a compelling interest in the accuracy of such a determination." *Little v. Streater*, 452 U.S. 1, 13, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981).

The Court's conclusion that erroneous results are possible without the aid of blood testing is reflected in the following passage:

> Given the usual absence of witnesses, the self-interest coloring the testimony of the litigants, and the State's onerous evidentiary rule and refusal to pay for blood grouping tests, the risk is not inconsiderable that an indigent defendant in a Connecticut paternity proceeding will be erroneously adjudged the father of the child in question. . . . Further, because of its recognized capacity to definitively exclude a high percentage of falsely accused putative fathers, the availability of scientific blood test evidence clearly would be a valuable procedural safeguard in such cases. . . . Unlike other evidence that may be susceptible to varying interpretation or disparagement, blood test results, if obtained under proper conditions by qualified experts, are difficult to refute. Thus, access to blood grouping tests for indigent defendants such as appellant would help to insure the correctness of paternity decisions in Connecticut.

(Citations omitted.) 452 U.S. at 14.

Finally, the governmental interests were found to be "legitimate" but " 'hardly significant enough to overcome private interests as important as those here.' " *Id.* at 16, citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

Following the analysis of the *Eldridge* factors, the Court held that the denial of the aid of a blood test to indigent defendants

in state-initiated paternity suits resulted in the denial of a " 'meaningful opportunity to be heard,' " and thus the due process requirement of fundamental fairness was violated. 452 U.S. at 16.

While *Little* did not address the issue of appointed counsel for indigent defendants in paternity suits, it demonstrated the magnitude of what is involved in a determination of paternity. One of the more important statements of the Court was the apparent approval of the ABA-AMA report. Thus, an indigent defendant on whom blood tests are to be performed is initially entitled to a group of tests known as the RCA tests, which include ABO, Rh, and MNS. If these tests do not *exclude* the defendant as the father, the Kell, Kidd, and Duffy systems, three additional RCA tests, should then be performed. If again paternity is not excluded, an HLA test should be conducted. It has been reported that the RCA tests (Rh, ABO, MNS, Kidd, Duffy, and Kell) will exclude no more than 65 to 70 percent of men who are not the biological father, but the HLA test *alone* will exclude over 90 percent of putative fathers. Roberts, *Establishing a Family: Blood Tests and the Paternity Determination Process*, 18 Clearinghouse Rev. 1290 (1985). The article stressed that

> [b]ecause of the quasi-criminal nature of most paternity proceedings and/or the potential res judicata effect of the judgment in subsequent criminal proceedings, these cases undoubtedly require that the HLA test as well as the RCAs be provided. To hold otherwise would allow those with adequate resources the opportunity to use tests guaranteed to exclude over 90 percent of the wrongly accused, while the indigent would have access to tests that exclude only 65 percent of the falsely named. This 25 percent or more disparity is of constitutional dimension.

Id. at 1295.

An additional study demonstrated that with use of the seven-system approach suggested by the ABA-AMA report, the cumulative chance of exclusion for a falsely accused man would be 90 to 95 percent. In other words, this seven-tier testing system should exclude the innocent man 90 to 95 percent of the time and may wrongly include the innocent man as the

biological father 5 to 10 percent of the time. Boonlayangoor, Telischi & Paulsen, *Paternity Blood Testing: Analysis, Interpretation and Selection of a Program to Verify Parentage*, 75 Ill. B.J. 278 (1987). "The *critical factor* influencing the power of these tests is the *number of* systems used." *Id.* at 281. The more systems that are included in the testing program the higher is the likelihood of excluding nonfathers and including the true father. The article cited a study which analyzed the results of paternity tests conducted at Cook County Laboratory, where it was found that by using RCA testing only—ABO, Rh, MNSs, Kell, Duffy, and Kidd, "the number of men wrongly identified as being the father could be as high as 37 percent." *Id.*

It has been recognized that the scientific value of blood testing results is dependent on the skills of the individual administering the test as well as on the numerous procedural safeguards that must be observed.

The discussion in *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), demonstrates the importance of the assistance of counsel to defendants in paternity cases. Counsel would function to (1) inform the defendant of the availability of the testing; (2) ensure that both the RCA and HLA tests were performed; (3) analyze the conditions under which the tests were performed; and (4) arrange for an expert to testify as to the test results and any other relevant information.

The record in this case is not clear as to whether the type of blood testing required under the ABA-AMA model was performed. The report which was received in evidence shows that ABO, Rh, MNS, Kell, and Fy tests were performed. The report does not show whether an HLA test was done. If only RCA tests are performed, counsel representing a putative father might be able to challenge the accuracy of the tests.

In *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), decided the same day as the *Little* case, the U.S. Supreme Court held that the right of an indigent parent to appointed counsel in child termination proceedings should be decided on a case-by-case basis.

In the *Lassiter* case, the indigent mother, who was serving a sentence for second degree murder, apparently did not allege

indigency or request the appointment of counsel. Her rights were terminated, and on appeal to the North Carolina Court of Appeals, she claimed indigency and that the due process clause required court-appointed counsel. The appeals court denied her claim, and the North Carolina Supreme Court in turn denied review.

Although *Lassiter* involved the issue of court-appointed counsel in a context other than paternity, the decision has some application to the facts in this case.

The *Lassiter* Court reviewed various contexts in which the right to appointed counsel issue had been recognized: (1) *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972), held that counsel is required before indigent defendants may be sentenced to prison, even if the crime is petty and the term is brief.

(2) *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), held that in delinquency proceedings where commitment to an institution may result, the juvenile has a right to appointed counsel despite the civil, not criminal, nature of the proceedings.

(3) *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973), held that the appointment of counsel for indigent probationers at a probation revocation hearing must be determined on a case-by-case basis.

(4) *Scott v. Illinois*, 440 U.S. 367, 99 S. Ct. 1158, 59 L. Ed. 2d 383 (1979), held that actual imprisonment differs from the threat of imprisonment, and thus actual imprisonment is the requirement for finding a constitutional right to counsel.

The Court then stated that

> [i]n sum, the Court's precedents speak with one voice about what "fundamental fairness" has meant when the Court has considered the right to appointed counsel, and we thus draw from them the presumption that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured.

452 U.S. at 26-27.

The Court, basically, promulgated a test to be used in

resolving due process claims regarding the right to court-appointed counsel. Focusing on the three *Eldridge* factors—private interests, governmental interests, and risk of error— the Court wrote:

> The dispositive question . . . is whether the three *Eldridge* factors, when weighed against the presumption that there is no right to appointed counsel in the absence of at least a potential deprivation of physical liberty, suffice to rebut that presumption and thus to lead to the conclusion that the Due Process Clause requires the appointment of counsel when a State seeks to terminate an indigent's parental status.

452 U.S. at 31.

The Court found that a parent's private interests in a termination proceeding are "commanding" and that the risk of an erroneous determination is a possibility:

> [T]he ultimate issues with which a termination hearing deals are not always simple, however commonplace they may be. Expert medical and psychiatric testimony, which few parents are equipped to understand and fewer still to confute, is sometimes presented. The parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation.

Lassiter v. Department of Social Services, 452 U.S. 18, 30, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981).

In evaluating the state's interests, the Court reasoned that

> [i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State's interest in the child's welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal . . . .
>
> . . . [T]hough the State's pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here, particularly in light of the concession in the respondent's brief that the "potential costs of appointed counsel in termination proceedings . . .

> is [*sic*] admittedly *de minimis* compared to the costs in all criminal actions."

452 U.S. at 28.

Beginning with the presumption that the petitioner was not entitled to court-appointed counsel (because she was not faced with even a potential liberty deprivation should her parental rights be terminated), the Court then balanced the *Eldridge* factors against this presumption and found that the decision as to whether due process required the appointment of counsel for indigent parents in a termination proceeding was a decision best left to the trial court, subject to appellate review.

From the *Lassiter* case and from *Little v. Streater*, 452 U.S. 1, 101 S. Ct. 2202, 68 L. Ed. 2d 627 (1981), it is apparent that under federal due process, the right of an indigent to court-appointed counsel may be found in *either* a civil or criminal context. If a State's paternity process could directly lead to incarceration, *Lassiter* would provide an absolute right to appointed counsel. On the other hand, if incarceration is an indirect consequence, or only a possibility, the *Eldridge* balancing factors must be invoked and balanced against the presumption that counsel will not automatically be appointed if incarceration is not an immediate threat. *Little* seems to hold that the mere *possibility* of incarceration following a paternity determination weighs heavily in favor of appointing counsel.

Numerous state courts have confronted the specific issue of court-appointed counsel for indigent paternity defendants, the majority basing their holdings on principles enunciated in the *Little* and *Lassiter* decisions.

In *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. App. 1982), the mother, while receiving welfare benefits, commenced an action to have the defendant declared the father of her child born out of wedlock. The plaintiff was represented by the deputy prosecuting attorney, and the indigent defendant appeared pro se. The lower court, finding paternity actions civil in nature, held that no direct deprivation of the defendant's liberty was involved should he be found to be the father of the child, thus leading to the presumption that paternity defendants have no automatic right to court-appointed counsel. The *Eldridge* factors were balanced against this presumption, and as a result,

the court held the due process clause demands not only the appointment of counsel for *all* indigent paternity defendants, but also that "[b]ecause this right would be meaningless if such a defendant did not know of the right, we further hold that the court must advise the paternity defendant in this situation of his right to appointed counsel if he is indigent." 439 N.E.2d at 1372-73.

In the analysis of the *Eldridge* factors, the court focused primarily on the possibility of error should a defendant proceed without counsel. It noted:

> The legislature has recognized the complexity of these proceedings and the importance of their outcome to the State and has afforded the mother and child the assistance of counsel in prosecuting their claim. However, by intervening heavily on behalf of one side, the State has upset the balance of a traditionally private dispute. The chances that the significant consequences of fatherhood will be imposed on the incorrect man dramatically increase if, because he is unable to afford counsel, he offers a legally inept or no defense. . . .
>
> The fact-sensitive nature of the paternity proceedings and the importance of blood tests further demonstrate the necessity for the timely assistance of counsel to ensure that the putative father is apprised of his right to request blood tests and to inform him of their significance. The value of blood tests in exonerating innocent putative fathers has been recognized.

(Citations omitted.) *Id.* at 1371, citing *Little* as well as the joint report of the ABA-AMA recommending the series of seven tests in determining the probability of paternity. The court concluded, stating,

> An indigent defendant's right to a free blood grouping test may be rendered meaningless without counsel to advise him of the right to demand such a test, to explain its significance, to ensure that the test is properly administered and to ensure that the results are properly admitted into evidence.

439 N.E.2d at 1372.

In *Corra v. Coll*, 305 Pa. Super. 179, 451 A.2d 480 (1982), the

defendant, who was named as the putative father of a child born out of wedlock, claimed indigency and sought court-appointed counsel under the federal due process clause. Unlike the court in *Kennedy*, the Pennsylvania court found that despite the civil nature of paternity suits, the threat of future imprisonment (based on a determination of paternity at an earlier proceeding) was significant and was a strong factor in the determination that court-appointed counsel is necessary. The court stated:

> It is our belief that the creation of a parent-child relationship is an example of the type of situation which demands a flexible application of due process. Accordingly, we analyze the due process requirements of *Mathews v. Eldridge* against a strong presumption that court-appointed counsel is constitutionally required for indigent defendants in a paternity proceeding.

451 A.2d at 485. The court also recognized that

> [o]nce paternity is established, that finding is *res judicata* and cannot be relitigated in a subsequent proceeding. . . . Consequently, denial of court-appointed counsel at the initial paternity proceeding may result in defendants being sent to jail without ever having had a meaningful opportunity to be heard on the issue of their paternity.

451 A.2d at 486.

As in *Kennedy*, the *Coll* court noted that because a complainant in a support action, upon request, is entitled to representation by the district attorney, the defendant's need for counsel is readily apparent.

> A paternity proceeding often becomes an adversary contest between a complainant, backed by the resources of a skilled attorney, and the uncounselled accused father. Under these circumstances, the contest is undeniably tilted in favor of the complainant. Since many indigent defendants may be illiterate and unfamiliar with courtroom procedure, that imbalance is exacerbated yet further.

451 A.2d at 487.

The court's analysis of the defendant's private interests resulted in the finding that the creation of a parent-child

relationship and the threat to the defendant's liberty interests should he be found to be the father and ordered to pay support, as well as the potential financial impact on the defendant, were very significant. In noting the potential for erroneous results should the defendant be denied counsel, the court found that the defendant's *access* to free blood testing was not enough and that " 'the importance of blood tests magnifies the necessity for the timely assistance of counsel, to ensure that the defendant is apprised of his right to request blood tests and to inform him of their significance.' " 451 A.2d at 486, citing *Hepfel v. Bashaw*, 279 N.W.2d 342 (Minn. 1979).

The court held the following in regard to the governmental interests at stake:

> Thus, not only the defendant's interest but also the state's interest is best served by a hearing at which a defendant accused of parentage is represented by an attorney. It is furthermore clear that the state's future administrative burdens would be lessened since a correct determination of paternity increases the chance that the adjudged parent will comply with support obligations. Accordingly, while the state will incur the added expense of providing indigents with court-appointed counsel, this expense is outweighed by the salutary aspects of having counsel present at the paternity proceeding.

451 A.2d at 488.

Finally, the court held:

> There is no situation of more monumental importance, or more worthy of due process protection, than the creation of a parent-child relationship. In recognition of this, the legislature has conferred legal representation on a complainant upon the request of the court, or a Commonwealth or local public welfare official. We find no reason why an indigent defendant, accused of parentage, should not also be provided with the assistance of experienced counsel.

Id.

In *State, ex rel., v. Toner*, 8 Ohio St. 3d 22, 456 N.E.2d 813 (1983), the mother, an AFDC recipient, had filed a complaint alleging the defendant was the father of her child. The

defendant, an indigent, moved that the lower court appoint counsel, and was denied. The defendant then obtained the services of the American Civil Liberties Union for the sole purpose of asserting his constitutional right to court-appointed counsel. The court, deciding on state and federal due process grounds, found that any indigent paternity defendant facing the State as an adversary must be afforded court-appointed counsel.

In considering the *Eldridge* factors, the court found the private interests to be "substantial" and the state's financial interests as "hardly significant enough to overcome the private interests involved." 8 Ohio St. 3d at 24, 456 N.E.2d at 815. The risk of error concerned the court, as it stated:

> Given the value of the right to blood grouping tests . . . which right could feasibly go unasserted by one unfamiliar with the law, and the likelihood that expert witnesses will be called to testify should blood grouping tests be ordered . . . it appears that one unknowledgeable of his rights and unskilled in the art of advocacy could easily go astray in conducting his defense. It can only be assumed that court-appointed counsel would provide adequate protection against these dangers.

Id. Finally, the court held that

> these substantial interests and the integrity of the paternity determination itself could easily be damaged if the appellant herein were to be denied counsel during the proceedings. Emphasizing the fact that the paternity case below was initiated at the state's insistence and prosecuted at the state's expense, we realize that appellant is presented with a formidable task if he should be required to defend himself.

8 Ohio St. 3d at 23, 456 N.E.2d at 814-15. See, also, *Keeney v. Lawson*, 19 Ohio App. 3d 318, 484 N.E.2d 745 (1984), where the court found an indigent paternity defendant constitutionally entitled to state-funded blood testing and counsel, and also found that the rule should be applied retroactively.

In *Lavertue v. Niman*, 196 Conn. 403, 493 A.2d 213 (1985), a mother, assisted by the state, brought an action against a

putative father to establish paternity. The defendant claimed indigency and unsuccessfully moved for appointment of counsel. The defendant, found guilty and ordered to pay support, appealed the decision, arguing the state and federal due process clauses constitutionally mandated the appointment of counsel. The court, citing *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), stated:

> The test that governs the due process right to court-appointed counsel is whether the absence of counsel deprives an indigent defendant of " 'fundamental fairness.' " . . . That test, in turn, involves an analysis of three separate factors: "the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decisions."

196 Conn. at 407-08, 493 A.2d at 216.

The court identified private interests of both the putative father and the child, finding that the defendant has a potential loss of liberty if found guilty and later defaults on child support. Both the defendant and the child were found to have significant financial and proprietary interests. The state's interests were found to be conflicting—acting as parens patriae in protecting the child's welfare in assuring that an accurate result is reached, countered with an economic focus toward minimizing costs and time in resolving paternity suits. The state argued that the risk of error was inconsequential should indigent defendants be denied counsel because all defendants have access to blood testing information. The court, unpersuaded by the argument, wrote, "The use of scientific evidence itself may contribute to the risk of error because it increases the complexity of the litigation. The state's provision of counsel for the mother is, in part, a recognition of this fact." *Id.* at 410, 493 A.2d at 218. In summary, the court found the role of attorneys in paternity proceedings to be multifaceted:

> Counsel would alert the defendant of his right to have blood tests performed, advise him about the kinds of tests available and inform him of the procedures that must be followed to obtain accurate results. Counsel would also be able to challenge test results submitted by the state. An

> attorney would develop defenses independent of the blood test evidence, such as lack of access to the mother or the existence of another potential father. . . . An attorney would conduct discovery, counsel the defendant on the possibility of reaching a pretrial settlement, subpoena witnesses and conduct cross-examination. The record in this case discloses the likelihood that a pro se defendant's own inartful questioning and failure to obtain witnesses will substantially impair the truth-finding function of the trial court.

Id. at 411, 493 A.2d at 218.

Although all of the cases are not in agreement, we believe the better rule is that due process requires that an indigent defendant in a paternity proceeding be furnished appointed counsel at public expense.

Since the plaintiff in this case was not a recipient of public assistance, the state did not *initiate* her paternity action. However, the plaintiff filed her claim pursuant to § 43-512.02, which provides:

> (1) Any child, or any relative of such a child, may file with the county attorney, . . . county welfare office, or other county office designated by the Department of Social Services an application for the same child support collection or paternity determination services as are provided to dependent children and their relatives under sections 43-512 to 43-512.10 by the Department of Social Services, the county attorney, and the clerk of the district court.

As a result, the plaintiff was assisted by the Lancaster County attorney's office in prosecuting her claim. Thus, the fact that the state did not *initiate* the suit is irrelevant. The state's involvement on behalf of the plaintiff is obvious throughout the course of the proceedings.

Although Nebraska statutes provide that paternity actions are civil in nature, Neb. Rev. Stat. § 13-111 (Reissue 1983), they have been described as "penal in some aspects." *Lockman v. Fulton*, 162 Neb. 439, 443, 76 N.W.2d 452, 455 (1956).

Even though a defendant's physical liberty is not *immediately* at risk if adjudged to be the father of a child in a

paternity proceeding, he can lose his physical liberty in *later* proceedings which arise out of and are based on the initial paternity determination. Criminal sanctions for nonsupport can attach to "[a]ny person who intentionally fails, refuses, or neglects to provide proper support which he knows or reasonably should know he is legally obliged to provide to a . . . minor child . . . ." Neb. Rev. Stat. § 28-706(1) (Reissue 1985).

Furthermore, Neb. Rev. Stat. § 43-1406 (Reissue 1984) provides that in a child support proceeding, a father may be held liable for support, and "Failure on the part of the father to perform the terms of such decree shall constitute contempt of court and may be dealt with in the same manner as other contempts." As a result, the defendant may be subject to being fined or imprisoned. Neb. Rev. Stat. § 25-2121 (Reissue 1985).

In addition to a potential threat of imprisonment, a determination of paternity in a state-initiated paternity suit would be res judicata and therefore not open to attack in a later proceeding involving collateral issues such as nonpayment of support. A final judgment on the merits by a court of competent jurisdiction is conclusive upon the parties in any later litigation involving the same cause of action. *Graham v. Waggener*, 219 Neb. 907, 367 N.W.2d 707 (1985).

The threat of future incarceration resulting from a finding of paternity is significant in determining the need for counsel. The paternity suit is the only opportunity for the putative father to be heard on the issue. The future threat to the defendant's liberty is significant.

The risk of error should indigent paternity defendants go unrepresented is apparent. Counsel is necessary to inform the defendant of his right to a jury trial, as well as his right to blood testing. Beyond this point, the need for counsel escalates. The assistance of counsel is necessary to assist the defendant in presenting his case by taking pretrial depositions; retaining witnesses, both expert and lay; conducting the defendant's case at trial through direct and cross-examination of witnesses; establishing defenses; and so on. The risk of a one-sided trial where the plaintiff is assisted by counsel highly specialized in the area is undeniable.

The interest of the state is primarily pecuniary and of less

import than the overriding interest of *all* parties, including the state, for an accurate and fundamentally fair determination of paternity.

We conclude that due process requires that an indigent defendant has an absolute right to court-appointed counsel in state-initiated paternity proceedings. The concepts of "fundamental fairness" and "meaningful opportunity to be heard" which are integral to the notion of due process make the right to counsel mandatory.

It is unnecessary to consider the other assignment of error.

The judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DENNIS VAN FOSSEN, APPELLANT, V. BOARD OF GOVERNORS, CENTRAL TECHNICAL COMMUNITY COLLEGE AREA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

423 N.W.2d 458

Filed May 20, 1988. No. 86-481.

1. **Evidence: Proof: Words and Phrases.** Facts ascertained from proof adduced at an evidentiary hearing which relate to a specific party are "adjudicative facts."
2. **Administrative Law: Words and Phrases.** The governing board of a technical community college area which exercises its discretion based upon adjudicative facts acts "quasi-judicially."
3. **Administrative Law: Final Orders.** As a general rule the quasi-judicial actions of a governing board of a technical community college area which are interlocutory, incomplete, provisional, or not yet effective are not final.
4. **Administrative Law: Constitutional Law.** Combining investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with direction.

Mark D. McGuire of Crosby, Guenzel, Davis, Kessner & Kuester, for appellant.

Thomas A. Wagoner, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff in error, Dennis Van Fossen, appeals the judgment of the district court, which affirmed the decision of defendant in error, the board of governors of Central Technical Community College Area, terminating Van Fossen's employment as the result of a reduction in force. Van Fossen's five assignments of error raise two issues: (1) whether the board provided him the due process required by U.S. Const. amend. XIV and Neb. Rev. Stat. §§ 79-1254.02, 79-1254.05, and 79-1254.06 (Reissues 1981 & 1987), and (2) whether the record supports the board's decision. In view of our determination that Van Fossen should have been afforded a hearing, we reverse the judgment of the district court and remand with direction without reaching the second issue.

Section 79-1254.02 (Reissue 1987) requires that the contracts of technical community college teachers be deemed "renewed and in force and effect until a majority of the board votes, sixty days before the close of the contract period, to amend or terminate the contract for just cause." The statute further provides that the teacher be given notice of, among other things, a reduction in force and requires that, upon a teacher's request, a hearing be held at which "evidence shall be presented in support of the reasons given for considering amendment or termination of the contract, and the teacher . . . shall be permitted to produce evidence related thereto. The board shall render the decision to amend or terminate a contract on the evidence produced at the hearing."

Section 79-1254.05 (Reissue 1987) requires that a board such as the defendant in error adopt a reduction in force policy, and further provides that no such policy "shall allow the reduction of a permanent or tenured employee while a probationary employee is retained to render a service which such permanent employee is qualified by reason of certification and endorsement to perform or where certification is not applicable, by reason of college credits in the teaching area."

Section 79-1254.06 (Reissue 1981) provides that before a reduction in force shall occur, the board must "present competent evidence demonstrating that a change in circumstances has occurred necessitating" a reduction. Moreover, any "alleged change in circumstances must be specifically related to the teacher" to be affected as the result of the reduction in force, and the board, "based upon evidence produced at the hearing required by sections 79-1254 to 79-1262, shall be required to specifically find that there are no other vacancies on the staff for which the employee to be reduced is qualified by endorsement or professional training to perform." (The extent to which then existing statutes, other than § 79-1254.02, encompassed within the designated sections apply need not be addressed, as § 79-1254.02 itself requires a hearing.)

Thus, before the board may terminate a teacher's employment because of a reduction in force, it must establish, via proof at a hearing, (1) a change in circumstances necessitating a reduction in force, (2) that the change in circumstances specifically relates to the teacher to be affected, and (3) that there are no vacancies on the staff for which the teacher to be affected is qualified. Facts ascertained from proof adduced at an evidentiary hearing which relate to a specific party, in this case Van Fossen, the teacher to be eliminated, are adjudicative facts. *State v. Freeman*, 440 P.2d 744 (Okla. 1968); *Marshall v. Sawyer*, 365 F.2d 105 (9th Cir. 1966). It is therefore clear that although, absent statutory or contractual provisions to the contrary, the selection of a teacher to be eliminated from the staff through a reduction in force is an executive or administrative function, *Dykeman v. Board of Education*, 210 Neb. 596, 316 N.W.2d 69 (1982), a decision rendered pursuant to the statutory hearing is quasi-judicial in nature. *Van Pelt v. St. Bd. Comm. Colleges*, 195 Colo. 316, 577 P.2d 765 (1978); *Coffey v. Milwaukee*, 74 Wis. 2d 526, 247 N.W.2d 132 (1976). Consequently, the board's decision to terminate Van Fossen's employment, unless he waived his right to a hearing, is reviewable by a proceeding in error. *Thomas v. Lincoln Public Schools, ante* p. 11, 421 N.W.2d 8 (1988); *Dykeman v. Board of Education, supra.*

With the foregoing jurisdictional and statutory background, we proceed to a review of what transpired in this case. On April 22, 1985, at a scheduled public meeting, the board received a report from its business officer, Larry Glazier, indicating that the college could expect a reduction of $397,429 in revenue during the forthcoming fiscal year and a $177,351 reduction in its operations fund. Shortly after receiving Glazier's report, the board turned its attention to personnel matters, at which time Glazier translated the aforementioned expected reduction in its operations fund to a 3.91-percent annual budget shortfall.

The board then considered Van Fossen's contract of employment at its Platte County campus. Although the record is silent on the point, we assume, because the board appears to have treated him as such, that Van Fossen was a permanent, nonprobationary employee. (Probationary employees may be discharged without cause. Neb. Rev. Stat. § 79-1254.09 (Reissue 1981).) Based on Glazier's reports and on a representation by Dennis Tyson, vice president of educational services, that "there has been a change in circumstances," the nine board members present voted unanimously to approve reduction in force resolutions as to Van Fossen and two other teachers. In relevant part, the Van Fossen resolution read as follows:

> NOW, THEREFORE, BE IT RESOLVED, that the board, subject to a final decision to be made following a hearing if one is requested, finds that there is a reasonable basis to believe that the contract held by Dennis Van Fossen for the 1984-85 school year should be terminated as of the 14th day of August, 1985, because there has occurred a change in circumstances. These circumstances include but are not limited to lower student enrollment in special needs, reduction in revenues from state aid, and reduction in revenues from federal aid.
>
> BE IT RESOLVED FURTHER, that based upon the foregoing reasons and subject to the teacher's right to hearing, the board tentatively finds that the foregoing conditions of lower enrollment and revenue constraints may constitute just cause to terminate the contract of Dennis Van Fossen as of August 14, 1985. There are no

other full-time vacancies on the staff for which the reduced instructor is qualified by endorsement or professional training to perform.

BE IT RESOLVED FURTHER, that the Secretary shall and the same is hereby directed to notify the teacher on or before the 26th day of April, 1985, of the above action of the board and of his right to request a hearing within five (5) days of receipt of said notice of the tentative decision as evidenced herein. Said notification to be sent by certified mail, properly addressed, postage prepaid, and return receipt requested.

BE IT RESOLVED FURTHER, that upon conclusion of the hearing, if one is requested, or in any event on or before June 14, 1985, the board shall by a majority vote make a final decision in regard to the above action for the ensuing school year.

BE IT FURTHER RESOLVED, that if Dennis Van Fossen's contract is terminated as of August 14, 1985, by reason of reduction in force, he will be entitled to the benefits of Section 79-1254.07 of the Nebraska Revised Statutes, a copy of which section is attached hereto.

Dated this 22nd day of April, 1985.

Immediately following approval of the foregoing resolution, the board took up two other "reduction in force" actions, voting unanimously in each case "that the reduction in force of [a named employee] go into effect August 15, 1985," and adopting the following statement:

> Having complied with Nebraska law in regard to the reduction in force of [the named employee], the Central Community College Board of Governors by this vote hereby terminates [whatever relationship it has had with the named employee] as of the end of the working day of August 14, 1985.

Pursuant to the board's instructions, Van Fossen was notified in writing of the board's action regarding the resolution applicable to him. The letter of notification read:

> You are hereby notified that on the 22nd day of April, 1985, at a regular meeting of the Central Community College Board of Governors, said board passed a

> resolution terminating your employment as of the 14th day of August, 1985, as a result of a reduction in force due to lower student enrollments and a reduction in revenues from state and federal aid.
>
> You are hereby further notified that you have, pursuant to the Revised Statues [sic] of the State of Nebraska, the right to file a written request with the board for a hearing before the board in regard to this matter. Said request should be made, if at all, within five (5) days of receipt of this notice. Upon receipt of your request, the board will schedule a hearing to be held within ten (10) days thereafter and will give you written notice of the time and place of said hearing.
>
> Following a hearing, if one is requested, and in any event on or before the 14th of June, 1985, the board shall meet and by a majority vote of all members of the board make its final decision in regard to the foregoing specified actions of your contract.
>
> You are further notified that if your contract is terminated as of August 14, 1985, by reason of reduction in force, you will be entitled to the benefits of Section 79-1254.08 [sic] of the Nebraska Revised Statutes, a copy of that section is attached hereto.
>
> Dated this 22nd day of April, 1985.

Van Fossen requested a hearing. On June 11, 1985, the college's personnel manager, Douglas Adler, wrote to Pat Shafer, an employee of the Nebraska State Education Association acting on behalf of Van Fossen, informing her that Glazier and either Adler or college president Dr. Joseph Preusser would testify at Van Fossen's hearing regarding budgetary and enrollment factors contributing to the perceived need to reduce the teaching staff. In addition, Adler provided Shafer with copies of working papers showing budget and enrollment figures for the college and Van Fossen's special needs program.

On June 24, 1985, at a scheduled public meeting, the board called a hearing pursuant to Van Fossen's request. Shafer objected to holding the hearing on the basis that the April 22 minutes established that the board had already made up its

mind to terminate Van Fossen's employment, thereby making any further hearing meaningless.

After some discussion, during which one board member commented he had expected and would like to hear from Van Fossen, but that if Van Fossen would rather not address the board, it needed to move on, the board voted to sustain Van Fossen's objection. The hearing was thus closed, and the board returned to its regular meeting. Shortly thereafter, Preusser stated that "the administration would present information to the board as to why the reduction of Dennis VanFossen [sic] was recommended." However, the board's attorney observed that the evidence the staff had put together would be the same as that presented in narrative form at the April meeting, and thus advised the board to pass the same motion as it had with respect to the other reduction in force terminations of employment.

The 10 members of the board present at the meeting then, apparently without any further presentation by the college administration, unanimously approved the following motion:

> [T]hat in consideration of Dennis VanFossen's [sic] objection to the conduct of the hearing he requested and in consideration of the board's sustaining his objection, the recommendation is that the reduction in force of Dennis VanFossen [sic] go into effect August 15, 1985, and that the following statement be approved:
>
> Having complied with Nebraska law in regard to the reduction in force of Dennis VanFossen [sic], the Central Community College Board of Governors by this vote hereby terminates the contract of Dennis VanFossen [sic] as of the end of the working day of August 14, 1985.

The foregoing evidence clearly demonstrates that, contrary to Van Fossen's contention, the board did not decide on April 22 to terminate his contract but, rather, merely expressed an intention to explore that option in an attempt to achieve a reduction in its teaching staff so as to accommodate reasonably anticipated budgetary constraints. The language of the board's resolution regarding Van Fossen makes it plain that his termination was then contemplated, "subject to a final decision to be made following a hearing if one is requested." The board's April 22 decision to consider Van Fossen's termination at a later

time was expressly "subject to the teacher's right to hearing," and the board only "tentatively" found that "the foregoing conditions of lower enrollment and revenue constraints *may* constitute just cause to terminate the contract of Dennis Van Fossen as of August 14, 1985." (Emphasis supplied.)

Lending further support to the conclusion that no final decision was made with respect to Van Fossen on April 22 is the fact that the minutes of that meeting disclose that in addition to the "reduction in force" resolutions regarding Van Fossen and others, the board, in separate actions, voted unanimously to finalize the reduction in force terminations of two other employees, effective August 15, 1985. This circumstance establishes the distinction between the board's practice of notifying a teacher of a contemplated, prospective reduction in force and its implementation of the reduction itself. The language the board used on June 24, 1985, to finalize Van Fossen's termination was substantially identical to that used on April 22 to finalize the termination of the two other employees just mentioned, and was unlike that used in the "reduction in force" resolution to notify Van Fossen and the world that termination of his employment contract was then contemplated but not yet a fait accompli.

Contrary to the view urged by Van Fossen, the language in the letter of April 22, 1985, to the effect that "said board passed a resolution terminating your employment as of the 14th day of August, 1985," is not dispositive of the issue. This statement inaccurately described the board's action but neither transformed an option then under consideration into a decision made nor prejudiced Van Fossen in any way, inasmuch as the letter went on to explain in detail the hearing to which Van Fossen was entitled and the fact that "[f]ollowing a hearing, if one is requested, and in any event on or before the 14th of June, 1985, the board shall meet and by a majority vote of all members of the board make its final decision . . . ."

As noted in *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 235 N.W.2d 223 (1975), as a general rule the quasi-judicial actions of a board such as is involved here which are interlocutory, incomplete, provisional, or not yet effective are not final.

Van Fossen's objection to the conduct of the hearing appears to have been premised on the notion that once the board determined there was a reasonable basis to believe his contract should be terminated, it could no longer discharge its adjudicative functions. It is, however, an established principle that combining investigative and adjudicative functions does not necessarily create an unconstitutional risk of bias in administrative adjudication. *Dieter v. State, ante* p. 368, 422 N.W.2d 560 (1988); *Buhrmann v. Sellentin,* 218 Neb. 288, 352 N.W.2d 907 (1987). As noted in *Trade Comm'n v. Cement Institute*, 333 U.S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948), it cannot be assumed that administrative adjudicators whose views are formed on the basis of an ex parte investigation have so closed their minds that they would be impervious to evidence, cross-examination, and arguments. In *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975), the U.S. Supreme Court said:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication . . . must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Accord, *Hortonville Dist. v. Hortonville Ed. Assn.*, 426 U.S. 482, 96 S. Ct. 2308, 49 L. Ed. 2d 1 (1976); *Nevels v. Hanlon*, 656 F.2d 372 (8th Cir. 1981).

It is clear, therefore, that Van Fossen's objection to conducting the hearing was improvidently sustained. Nor can we conclude that the objection, likely made merely to preserve for the record the matter of the board's perceived bias, see *Irwin v. Board of Ed. of Sch. Dist. No. 25*, 215 Neb. 794, 340 N.W.2d 877 (1983), amounted to a withdrawal of his earlier request for a hearing and thus constituted a waiver of his statutory rights. Consequently, the board had an obligation to conduct the

hearing and adduce evidence establishing its right to terminate Van Fossen's employment contract pursuant to the provisions of the relevant statutes.

Thus, we must reverse the judgment of the district court and remand the cause with the direction that the district court vacate the action of the board and direct it to hold the hearing required by law.

REVERSED AND REMANDED WITH DIRECTION.

SCHUYLER STATE BANK, APPELLEE, V. THEOFIL J. CECH, DEFENDANT AND THIRD-PARTY PLAINTIFF, APPELLANT, DAVID W. FLORY ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

423 N.W.2d 464

Filed May 20, 1988. No. 86-508.

1. **Banks and Banking: Loans.** A violation of Neb. Rev. Stat. § 8-141 (Reissue 1983) does not nullify a bank loan which exceeds the limit imposed by that statute.
2. **Banks and Banking: Loans: Debtors and Creditors: Guaranty.** A bank may recover for a loan which exceeds a statutorily imposed limit for a bank loan. Such status as a loan in excess of a statutory limit is not a defense for a debtor or the debtor's guarantor in an action to recover the statutorily excessive loan.
3. **Banks and Banking: Actions: Loans: Liability: Pleadings: Damages.** For a cause of action against bank directors who may be liable under Neb. Rev. Stat. § 8-143 (Reissue 1983) for a bank loan, a plaintiff must factually allege that (1) the loan exceeds the limit imposed by Neb. Rev. Stat. § 8-141 (Reissue 1983); (2) the directors participated in or knowingly assented to the violation of § 8-141; (3) the plaintiff is a person entitled to relief under § 8-143, namely, "the bank, its shareholders, or any other person"; and (4) the plaintiff has sustained damages as the result of the loan in excess of the limit prescribed by § 8-141.
4. **Demurrer: Pleadings: Words and Phrases.** As used in Neb. Rev. Stat. § 25-806(6) (Reissue 1985) concerning a demurrer, a statement of "facts sufficient to constitute a cause of action" means a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
5. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts

alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.

6. **Statutes: Proximate Cause: Liability: Damages.** Violation of a statute must be a proximate cause of an injury if liability for damages is to be predicated on such violation.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Affirmed.

Lawrence H. Yost and David C. Mitchell of Yost, Schafersman, Yost, Lamme & Hillis, P.C., for appellant.

Terrence L. Michael and William G. Dittrick of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellees Flory et al.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

PER CURIAM.

In the "Second Cause of Action" of its petition, Schuyler State Bank alleged that Schuyler Farm Supply, Inc. (Farm Supply), gave the bank five promissory notes in the aggregate principal of $1,228,531 and that, after credit for payments, principal of $1,130,318 was unpaid on Farm Supply's notes. The bank also alleged other advances of $167,993 to Farm Supply, none of which had been repaid. The total principal of Farm Supply's indebtedness was $1,298,311. Theofil J. Cech had given his unconditional guaranties for Farm Supply's debts to the bank. On the basis of those guaranties, the bank sought a judgment.

Under Neb. Rev. Stat. § 25-331 (Reissue 1985), Cech filed a third-party action against David W. Flory, James L. Hampl, Ernest J. Krejci, Gerald Krejci, and Ronald J. Krejci, directors of the bank.

In his third-party complaint, Cech alleged that the bank's loans and advances to Farm Supply "exceeded 25% of the paid-up capital, surplus, and capital notes and debentures of Schuyler State Bank, contrary to Nebraska law." Cech alleged that he was a "creditor or otherwise interested party at the time the loans and advances were made by virtue of his alleged

guarantee relationship" with the bank. According to Cech, the third-party defendants, as the bank's directors, "participated in or knowingly assented to all of the loans and advances" to Farm Supply which were the subject of the second cause of action in the bank's petition. Cech then alleged:

> As a consequence of the excess loans and advances made by the directors, Theofil J. Cech may sustain damages. Said damages will be as a result of his alleged guarantee to Schuyler State Bank, in which event Theofil J. Cech will be entitled to a judgment against the directors equal to any judgment which may be rendered against him based upon his alleged guarantee of the loans and advances as set forth in plaintiff's Second Cause of Action.
>
> WHEREFORE, the Third Party Plaintiff prays that in the event a judgment should be rendered against him in these proceedings that he then have judgment against the Third Party Defendants and each of them for his damages as set forth herein and for the costs of this action.

The directors filed a joint demurrer, claiming that Cech's third-party complaint did not state facts sufficient for a cause of action. See Neb. Rev. Stat. § 25-806(6) (Reissue 1985). The court sustained the directors' demurrer and, when Cech elected not to replead and to stand on his third-party complaint, dismissed Cech's third-party action.

Neb. Rev. Stat. § 8-141 (Reissue 1983) provides in part:

> No bank shall directly or indirectly loan to any single corporation, firm, or individual, including in such loans all loans made to the several members or shareholders of such firm or corporation, for the use and benefit of such corporation, firm, or individual, more than twenty-five per cent of the paid-up capital, surplus, and capital notes and debentures of such bank.

Neb. Rev. Stat. § 8-143 (Reissue 1983) states:

> If the directors of any bank shall knowingly violate or knowingly permit any of the officers, agents, or servants of the bank to violate any of the provisions of section 8-141, all rights, privileges, and franchises of the bank shall be thereby forfeited. Before such charter shall be declared forfeited, such violation shall be determined and

> adjudged by a court of competent jurisdiction in a suit brought for that purpose by the director in his own name. In case of such violation, every director who participated in or knowingly assented to the same shall be held liable in his personal and individual capacity for all damages which the bank, its shareholders, or any other person shall have sustained in consequence of such violation.

In *Bank of College View v. Nelson*, 106 Neb. 129, 183 N.W. 100 (1921), the bank sued on a promissory note for a loan which exceeded the limit imposed by a statute similar to § 8-141. This court enforced both the promissory note and an agreement regarding the underlying debt represented by the promissory note, and stated:

> The general rule is that an excessive borrower cannot prevent the collection of his debt by pleading and proving a violation of the statute. . . . The statute does not declare that excessive loans are void. They are generally enforced. In the present case both parties had performed the contract to such an extent that a heavy loss fell on the borrowers through failure of the lender to perform fully all of its obligations. Where the law permits a bank to enforce a contract for an excessive loan, it should not be permitted to escape liability for the damages resulting from its failure to fully perform such a contract.

Id. at 130, 183 N.W. at 101.

Therefore, a violation of § 8-141 does not nullify a bank loan which exceeds the limit imposed by that statute.

Similar to our holding in *Bank of College View v. Nelson, supra*, the majority of jurisdictions recognize that a bank may recover for a loan which exceeds a statutorily imposed limit for a bank loan and that such status as a loan in excess of a statutory limit is not a defense for a debtor or the debtor's guarantor in an action to recover the statutorily excessive loan. See, *Gold-Mining Co. v. National Bank*, 96 U.S. 640, 24 L. Ed. 648 (1877); *In re Hartley*, 52 Bankr. 679 (Bankr. N.D. Ohio 1985); *First Am. Nat. Bank of Iuka v. Alcorn, Inc.*, 361 So. 2d 481 (Miss. 1978); *State of Arizona v. Versluis*, 58 Ariz. 368, 120 P.2d 410 (1941); *Burns v. Corn Exchange Nat. Bank*, 33 Wyo. 474, 240 P. 683 (1925); *Blochman Com. etc. Bk. v. F. G. Invest.*

Co., 177 Cal. 762, 171 P. 943 (1918); *Caroline State Bank v. Radtke*, 213 Wis. 110, 250 N.W. 763 (1933); Annot., Liability of Guarantor of Obligations to Bank as Affected by Limitation of Amount Which Bank May Legally Loan, 92 A.L.R. 341 (1934); Annot., Noncompliance by Bank with Statutory Provisions Relating to Loans or Discounts as Defense to Recovery of Loan or Enforcement of Its Security, 125 A.L.R. 1512 (1940); 10 Am. Jur. 2d *Banks* § 684 (1963).

In this case, however, Cech does not use the alleged violation of § 8-141 as a defense to the bank's action. Rather, Cech, relying on § 8-143, asserts a cause of action against the bank's directors and seeks damages in the event he is liable to the bank as the result of his guaranties for Farm Supply's indebtedness. To dispose of this appeal, we assume, but neither decide nor hold, that Cech, as a guarantor, is "any other person" entitled to recover damages in accordance with § 8-143.

Section 25-331 authorizes a third-party action by a defendant, as a third-party plaintiff, against a person, initially not a party to the action, who is or may be liable to the initial defendant for all or part of the plaintiff's claim against the defendant. A third-party claim under § 25-331 may be asserted when a third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant. *Church of the Holy Spirit v. Bevco, Inc.*, 215 Neb. 299, 338 N.W.2d 601 (1983). The basic function of third-party practice is the original defendant's seeking to transfer to the third-party defendant the liability asserted by the original plaintiff. *Church of the Holy Spirit v. Bevco, Inc., supra*. See, also, *AgriStor Credit Corp. v. Radtke*, 218 Neb. 386, 356 N.W.2d 856 (1984); *Life Investors Ins. Co. v. Citizens Nat. Bank*, 223 Neb. 663, 392 N.W.2d 771 (1986).

Since Cech may be liable to Schuyler State Bank as a result of his guaranties, Cech's liability may be transferred to the bank's directors as third-party defendants in a third-party action under § 25-331.

When a third-party complaint fails to state facts sufficient to constitute a cause of action, such complaint is subject to a demurrer. See, § 25-806(6); *Schweitz v. Robatham*, 194 Neb. 668, 234 N.W.2d 834 (1975).

For a cause of action against bank directors who may be liable under § 8-143 for a bank loan, a plaintiff must factually allege that (1) the loan exceeds the limit imposed by § 8-141; (2) the directors participated in or knowingly assented to the violation of § 8-141; (3) the plaintiff is a person entitled to relief under § 8-143, namely, "the bank, its shareholders, or any other person"; and (4) the plaintiff has sustained damages as the result of the loan in excess of the limit prescribed by § 8-141. See *Department of Banking v. McMullen*, 134 Neb. 338, 278 N.W. 551 (1938).

As used in § 25-806(6) concerning a demurrer, a statement of "facts sufficient to constitute a cause of action" means "a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff." *Johnson v. Ruhl*, 162 Neb. 330, 334-35, 75 N.W.2d 717, 720 (1956). See, also, *Rhoads v. Columbia Fire Underwriters Agency*, 128 Neb. 710, 260 N.W. 174 (1935).

When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. See, *Hebard v. AT&T, ante* p. 15, 421 N.W.2d 10 (1988); *Ambroz v. Cornhusker Square Ltd.*, 226 Neb. 899, 416 N.W.2d 510 (1987); *Abboud v. Lakeview, Inc.*, 223 Neb. 568, 391 N.W.2d 575 (1986); *Fisher v. Housing Auth. of City of Omaha*, 214 Neb. 499, 334 N.W.2d 636 (1983); *State ex rel. Warren v. Kleman*, 178 Neb. 564, 134 N.W.2d 254 (1965).

We now examine Cech's third-party complaint to determine whether it states facts sufficient to constitute a cause of action against the directors of Schuyler State Bank.

Violation of a statute must be a proximate cause of an injury if liability for damages is to be predicated on such violation. See, *Davis v. Wolfe*, 263 U.S. 239, 44 S. Ct. 64, 68 L. Ed. 84 (1923); *St. L. & Iron Mtn. Ry. v. McWhirter*, 229 U.S. 265, 33 S. Ct. 858, 57 L. Ed. 1179 (1913); *Daggett v. Keshner*, 284 A.D. 733, 134 N.Y.S.2d 524 (1954); 73 Am. Jur. 2d *Statutes* § 437 (1974). Cf. *Stapleton v. Norvell*, 193 Neb. 71, 75, 225 N.W.2d

409, 412 (1975): "Negligence consisting in whole or in part of the violation of statutes or ordinances, like other negligence, is without legal consequence unless it is a contributing cause of the injury for which recovery is sought." (Citing *Hersh v. Miller*, 169 Neb. 517, 99 N.W.2d 878 (1959).)

Schuyler State Bank seeks a judgment against Cech as the result of his contractual liability from his guaranties for Farm Supply's indebtedness to the bank. Because a bank loan exceeding the limit imposed by § 8-141 is not void, but may be recovered in an action against the debtor or the debtor's guarantor, Cech may be liable for the entire balance on the bank loans to Farm Supply, irrespective of the limit imposed by § 8-141. Assuming the enforceability of Farm Supply's debts to the bank, then Cech's guaranties are a cause of his damages. In view of his reliance on § 8-143 for a cause of action against the bank's directors, Cech would have no cause of action if the bank loans to Farm Supply had been within the limit imposed by § 8-141. Therefore, Cech's third-party action relates to his liability for an amount exceeding the limitation prescribed in § 8-141, which Cech seeks to transfer to the bank's directors. Although he alleges that the bank loans initially exceeded the limit of § 8-141 and, therefore, violate that statute, Cech does not allege that the balances of those loans are any amount exceeding the limit imposed by § 8-141. Cech's third-party complaint, by its own contents or reference to other pleadings, does not specify or otherwise indicate the amount of the paid-up capital, surplus, capital notes, and debentures of Schuyler State Bank. Without identification of that amount, the monetary limitation, to be ascertained for application of § 8-141, cannot be computed and, therefore, is unknown. Since Cech's third-party complaint does not contain an allegation that Cech may be liable for an amount in excess of the limit imposed by § 8-141, Cech did not allege that a violation of § 8-141 has caused or may cause damage to him, which is a necessary element of the cause of action under § 8-143.

The district court correctly sustained the demurrer of the third-party defendants and, when Cech elected not to plead further, properly dismissed Cech's third-party complaint.

AFFIRMED.

ERNEST WILBURN BRINKLEY, APPELLEE AND CROSS-APPELLANT, V. DARLENE LENORE BRINKLEY, APPELLANT AND CROSS-APPELLEE.
423 N.W.2d 129

Filed May 20, 1988. No. 86-584.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed.

Earl D. Ahlschwede of Ahlschwede, DeBacker & Truell, for appellant.

James D. Livingston of Cunningham, Blackburn, VonSeggern, Livingston & Francis, for appellee.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

PER CURIAM.

This is an appeal from the specific awards in a decree of dissolution of marriage. The trial court ordered that the parties' real estate was to be sold and the net proceeds divided equally between the parties; ordered that the money in the savings accounts in the parties' individual names be set over to each; and divided personal property pursuant to an agreement entered into by the parties. The trial court granted the respondent an award of alimony of $12,000, to be paid at the rate of $200 per month, but did not award the respondent attorney fees and did not award her any interest in the petitioner's pension income. The respondent assigns as error the trial court's failure to award to the respondent any of the petitioner's pension income; the trial court's failure to award to the respondent any money from the sale of the parties' real estate based on her contribution to the value of that real estate from money respondent brought into the marriage; and the trial court's failure to award to the respondent any attorney fees. The petitioner cross-appeals from the trial court's award of $12,000 in alimony to the respondent.

In *Guggenmos v. Guggenmos*, 218 Neb. 746, 748-49, 359 N.W.2d 87, 90 (1984), we set forth the proper standard of review in dissolution of marriage cases regarding the division of property and the awarding of attorney fees:

> [W]e now state that the division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion. In our de novo review, where the evidence is in conflict, we will give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another.

The ultimate test for division of marital property and an award of alimony is one of reasonableness. *Applegate v. Applegate*, 219 Neb. 532, 365 N.W.2d 394 (1985).

Upon de novo review we conclude that the record fails to show an abuse of discretion in regard to the division of property or the award of alimony. The judgment is therefore affirmed. The parties are to pay their own costs and attorney fees.

AFFIRMED.

ROY G. BREELING ET AL., APPELLEES AND CROSS-APPELLANTS, V. CLAUDIA G. HANSEN CHURCHILL, APPELLANT AND CROSS-APPELLEE.

423 N.W.2d 469

Filed May 20, 1988. No. 86-671.

Restrictive Covenants. A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

Paul R. Stultz of Martin & Martin, for appellant.

Julie A. Frank of Pollak & Frank, for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

CHEUVRONT, D.J.

Claudia G. Hansen Churchill appeals from an order granting an injunction and requiring her to remove a satellite dish from her property.

The satellite dish was installed in the rear yard of a residence, located in the Piedmont Subdivision, Douglas County, Nebraska, which was purchased by Churchill in April of 1984. The satellite dish consists of a plate or dish that is 9 to 10 feet in diameter, with a small cone in the center. The property in Piedmont is subject to restrictive covenants that were filed of record on August 22, 1972. Paragraph 14 of these covenants provides:

> Outside Antennas Prohibited. No outside radio, television, Ham broadcasting, or other electronic antenna or aerial shall be erected or placed on any structure or on any lot. If used, any such antenna or aerial shall be placed in the attic of the house or in any other place in the house where it will be concealed from public view from any side of the house.

Subsequently, a number of homeowners in the Piedmont Subdivision filed this action, asking that Churchill be required to remove the satellite dish. Following trial, the district court found that paragraph 14 of the restrictive covenants applied to the satellite dish and ordered Churchill to remove it within 30 days.

In her first and second assignments of error, Churchill contends that the district court's findings that the prohibition of antennas in the protective covenants applied to satellite dishes and that a satellite dish is an antenna for the purpose of these covenants are contrary to the evidence and the law.

The testimony and other evidence at trial established that satellite dishes were not in use in the early 1970s, when the covenants were drafted. One of the developers of Piedmont who participated in preparing the covenants testified that it was the developers' intention to prohibit all outside unsightly antennas, including new or different types.

In *Lund v. Orr*, 181 Neb. 361, 363, 148 N.W.2d 309, 310-11 (1967), we said:

> A restrictive covenant is to be construed in connection with the surrounding circumstances, which the parties are supposed to have had in mind at the time they made it; the location and character of the entire tract of land; the purpose of the restriction; whether it was for the sole benefit of the grantor or for the benefit of the grantee and subsequent purchasers; and whether it was in pursuance of a general building plan for the development of the property.

The restrictive covenants of Piedmont, read as a whole, not only specifically prohibit all outdoor antennas, they evidence a broad concern for aesthetics and prohibit many uses of the property within the subdivision which would detract from the appearance of the area as a whole. It is clear that in light of the surrounding circumstances, the character of the entire area, and the purposes of the restrictions, it was intended that structures such as a satellite dish were not to be permitted. We find that the restriction prohibiting all "outside radio, television, Ham broadcasting, or other electronic antenna or aerial" includes a satellite dish.

Churchill next alleges that the district court erred in determining that there was irreparable harm. However, where there has been a breach of a restrictive covenant, it is not necessary to prove that the injury will be irreparable. *Wessel v. Hillsdale Estates, Inc.*, 200 Neb. 792, 266 N.W.2d 62 (1978). In *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976), we said: "Injunction is an appropriate remedy for breach of restrictive covenants, a remedy at law being inadequate and leading to a multiplicity of actions and the subversion of the plan of development protected by such covenants." (Syllabus of the court.)

Finally, Churchill argues that the Federal Communications Commission has preempted the protective covenants by a rule adopted February 14, 1986, at F.C.C. docket 85-87, 47 C.F.R. § 25.104 (1987). However, this rule only applies to local zoning or other regulations that treat satellite dishes differently from other antennas. Even if such rule applied, the treatment here is

not different, but the same. Churchill's claim that the enforcement of this covenant abridges her first amendment right of freedom of speech is without merit.

The appellees have assigned as error the district court's order vacating and setting aside a default judgment against Churchill originally granted in this matter. In light of our decision, we do not address this issue.

The district court was correct in finding that the restrictive covenant prohibited the erection of a satellite dish, and in granting the permanent injunction. The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GARY R. CLARK, APPELLANT.
423 N.W.2d 471

Filed May 20, 1988. No. 87-475.

1. **Criminal Law: Joinder: Trial: Appeal and Error.** A trial court's ruling on a motion for consolidation of prosecutions properly joined will not be disturbed in the absence of an abuse of discretion.
2. **Criminal Law: Joinder: Trial.** If the offenses charged are of the same or similar character, or are based on the same act or transaction, the offenses may be joined in one trial.
3. **Criminal Law: Joinder: Trial: Proof.** The right to a separate trial is statutory and depends upon a showing that prejudice will result from a joint trial. The burden is on the party challenging the joint trial to demonstrate how and in what manner he or she was prejudiced.
4. **Confessions: Appeal and Error.** A determination by the trial court that a statement was made voluntarily will not be disturbed, absent an abuse of discretion.
5. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed, absent an abuse of discretion.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly, for appellant.

Gary R. Clark, pro se.

Robert M. Spire, Attorney General, and Marie C. Pawol, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from the district court for Douglas County. Separate informations were filed in the district court against defendant, Gary R. Clark, and Roy Nist. The charges against defendant were filed in two separate informations. The first charged a sexual assault in the first degree on September 6, 1986, and the second charged the use of a knife in the commission of that felony. The two informations against defendant were consolidated for trial without objection by defendant.

The information against Roy Nist charged the same crimes on the same date. The informations against defendant and the information against Nist were consolidated for trial, over defendant's objection.

After jury trial, defendant and Nist were found guilty. Defendant was sentenced to a term of 10 to 15 years on the sexual assault charge and to a consecutive term of 5 to 10 years on the charge of use of a knife in the commission of a felony.

Defendant appeals, contending that the district court erred in sustaining the State's motion to consolidate the cases against the defendant and codefendant Nist; in overruling the defendant's motion in limine to keep out of evidence the circumstances and statements concerning the defendant's arrest; in overruling defendant's motion to suppress certain statements; and in imposing an excessive sentence. We affirm.

The record shows that in the early evening of September 6, 1986, the victim, a 17- year-old male, was sitting outside of a gas station in Omaha waiting for a telephone call. He was approached by the 35-year-old defendant and the defendant's 27-year-old nephew, Roy Nist. After initial conversation, defendant offered the victim a drink from a pint of vodka which defendant had taken out of his coat pocket. The parties

then moved behind the gas station, where they conversed and drank.

The group decided to go to Nist's nearby apartment. There, the parties continued to engage in friendly conversation. After about 15 minutes, however, the defendant began to make sexual advances toward the victim. Nist then locked the apartment door. The victim then took a knife out of his back pocket in order to put it in his jacket. At defendant's request, the victim gave defendant the knife.

The victim testified defendant told the victim that he was going to "cut [him] up." The defendant then pushed the victim toward the back of the apartment, into the bathroom. While Nist stood nearby with the knife, the defendant ordered the victim to take off his clothing. Defendant struck the victim in the back of his head and neck until he complied with defendant's order. The defendant then forced the victim to engage in both anal and oral sex, while Nist stood nearby with the knife at the victim's throat. Nist left the bathroom. Defendant then forced the victim into Nist's bed, where Nist lay "sleeping or passed out," and again sexually assaulted the victim. The victim was able to escape after the defendant fell asleep. As the victim was leaving the apartment, he encountered Nist's neighbors. He informed the neighbors that he had been raped, and the neighbors helped the victim call the police.

Police officers arrived at the scene, where they found the defendant lying naked on the bed with Nist, who was clothed. The officers informed both parties that they were under arrest. At that point, the defendant and Nist became very violent and shouted obscenities. After a violent struggle, the defendant was eventually taken to the police station. The defendant refused to dress and was taken to the police station with a sleeping bag draped over his unclothed body.

The defendant and Nist were transported to the police station in separate vehicles. In the police cruiser, Nist "would kind of mellow out, and then he would become violent again, kicking around." The officers transporting Nist did not give Nist any *Miranda* warnings, nor did they question him. Suddenly, Nist stated, "[D]id that kid call you? Hey, man, he was scared. You should have seen his face and heard him

scream. I bet he was in pain afterwards. I fucked his face, I fucked his mouth, I fucked him in the ass. . . . Yeah, man, it was something else."

At the police station, the defendant was informed of his *Miranda* rights by Officer Mary Eggers. In response to the question, "Knowing your rights in this matter, are you willing to make a statement to me now?" Clark responded, "You tell me what happened." After Officer Eggers had routinely explained the allegations of the charge, defendant told the officer that he did not "have sex with guys," and requested a lawyer. Officer Eggers then informed the defendant that he was to be booked on a sexual assault charge. Defendant responded, "Is there any way I can get out of this?" Without any further questioning by Officer Eggers, the defendant asked, "Did he say we forced him to come there?" There was no further conversation. The defendant again asked for a lawyer, and no further conversation took place.

The physician who examined the victim soon after the incident testified that the victim's injuries were consistent with the victim's contentions.

In his first assignment of error, the defendant contends that the district court erred in sustaining the State's motion to consolidate the cases against defendant and Nist. Prior to trial, defendant objected to the State's motion to consolidate, asserting that the statement made by Nist while en route to the police station would unfairly incriminate the defendant, particularly if Nist had used the word "we" rather than "I," in describing his actions. Evidence at the trial was that Nist used the word "I." The court sustained the motion to consolidate, and the cases were consolidated for trial. We determine the court did not err in so acting.

Neb. Rev. Stat. § 29-2002(3) (Reissue 1985) states in part: "The court may order two or more indictments, informations, or complaints, or any combination thereof, to be tried together if . . . the defendants, if more than one, could have been joined in a single indictment, information or complaint." In *State v. Vrtiska*, 225 Neb. 454, 465, 406 N.W.2d 114, 122 (1987), we stated:

If the offenses charged are of the same or similar

character, or are based on the same act or transaction, the offenses may be joined in one trial. See, *State v. McGuire*, 218 Neb. 511, 357 N.W.2d 192 (1984); *State v. Cole*, 218 Neb. 1, 352 N.W.2d 154 (1984); *State v. Rodgers*, 186 Neb. 633, 185 N.W.2d 448 (1971). A trial court's ruling on a motion for consolidation of prosecutions properly joinable will not be disturbed in the absence of an abuse of discretion.

There is no constitutional right to a separate trial. The right is statutory, as set out in § 29-2002(4), and depends upon a showing that prejudice will result from a joint trial. *State v. Clark*, 189 Neb. 109, 201 N.W.2d 205 (1972). The propriety of a joint trial involves two questions: (1) whether the consolidation is proper because the defendants could have been joined in the same indictment or information, and (2) whether there was a right to severance because the defendants or the State would be prejudiced by an otherwise proper consolidation of the prosecutions for trial. *State v. Brehmer*, 211 Neb. 29, 317 N.W.2d 885 (1982). The burden is on the party challenging the joint trial to demonstrate how and in what manner he or she was prejudiced. *State v. Anderson and Hochstein*, 207 Neb. 51, 296 N.W.2d 440 (1980).

With regard to the first question, we have held that " 'two charges arise out of the same act or transaction if they are so closely linked in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge.' " *State v. Brehmer, supra* at 37, 317 N.W.2d at 890. The charges in the present case could have been joined in the same information. Both defendant and Nist were charged with the same offenses, and the same facts needed to be adduced in order to prove each of the offenses. The offenses are part of a factually related transaction or series of events in which both of the defendants participated. Cf. *State v. Lee*, 227 Neb. 277, 417 N.W.2d 26 (1987).

Joinder was proper in the present case, and we further determine that the defendant has failed to demonstrate that he was prejudiced by the joint trial. The testimony at trial, as related by the police officers in whose presence Nist made the statement set out above, showed that the statement referred

only to Nist's involvement in the charged offenses. Even assuming, however, that the statement made by Nist was incriminating toward the defendant, we determine that the statement was not erroneously admitted. In *Bruton v. United States*, 391 U.S. 123, 885 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court held that the admission of a codefendant's statement inculpating another defendant at a joint trial constitutes error where the declarant codefendant does not testify in the trial, regardless of the fact that the trial court gave instructions that the incriminating statement could be considered only against the declarant codefendant. See, also, *State v. Saltzman*, 194 Neb. 525, 233 N.W.2d 914 (1975). *Bruton* would not control this case because Nist testified at the trial, as did defendant Clark, and defendant had every opportunity to cross-examine Nist. Further, the court instructed the jury that evidence relating to one defendant cannot be considered against the other defendant. Defendant's first assignment of error is without merit.

In his second assignment of error, the defendant contends that the district court erred in "overruling a motion in limine to keep out of the State's case in chief the circumstances and statements surrounding the arrest of the Defendant." After a hearing prior to trial, the court held that the defendant's statements to the police were spontaneous and volunteered, and therefore admissible at trial; and that the circumstances surrounding defendant's arrest were also admissible.

We first note that the denial of a motion in limine does not in itself constitute reversible error. *State v. Tomrdle*, 214 Neb. 580, 335 N.W.2d 279 (1983). When such a motion is denied, the moving party must also object at trial and base his or her complaint on the trial record. *Tomrdle, supra.* Error may not be predicated on a ruling which admits evidence unless a substantial right of a party is affected and a timely objection appears of record stating the specific ground of objection, if the specific ground was not apparent from the context. Defendant has not, therefore, set out an accurate assignment of error, but since defendant made a trial objection to some of the testimony, defendant's contention will be reviewed.

As stated in 22A C.J.S. *Criminal Law* § 628 at 472 (1961),

"Ordinarily, evidence of the arrest of accused, and of the attending circumstances, is relevant and admissible where such circumstances logically tend to connect accused with the perpetration of the crime . . . ." In this case, the arrest of defendant was particularly relevant. When the first police cruiser arrived, the victim met the two officers from that cruiser in the alley behind the building containing the apartment where the victim said the assault occurred. The victim told the officers that the two men who assaulted him were asleep in a bed in one of the apartments and that one of the sleeping men was clothed and the other naked. Other officers arrived, and a search was made of the row of apartments by the officers' shining a flashlight into the apartments that did not have the solid door closed. In that search the officers found defendant, unclothed, and Nist, clothed in bib overalls and a shirt, asleep on a bed in one of the apartments.

The officers shouted "police," entered the apartment, and Officer Donald Casey quickly put one handcuff on Nist. Officer Casey testified that defendant then jumped up with his fists clenched and began jumping around and screaming, but Casey then subdued and handcuffed him.

Officer Casey then assisted Officer James Alexander in arresting defendant. Casey testified that defendant was "bucking and kicking . . . just totally trying to get away, kicking and screaming, probably 10 to 15 minutes total time." Defendant was naked the whole time, although the officers tried to get him to put on some clothes. Defendant was finally removed from the apartment with the sleeping bag draped over him.

Officer Alexander testified that in the apartment, after he shook defendant's leg to waken him, defendant "lunged up from the bed" and stated to the officer, "I'm going to fuck you in the ass." When asked to describe what happened next, Officer Alexander succinctly testified, "At that time the fight was on." When defendant was finally subdued, Officer Alexander testified, in full agreement with Officer Casey, defendant was transported to the police station with only a sleeping bag draped over him.

Defendant contends that the evidence of his arrest and the

attendant circumstances was improperly admitted. As to the arrest itself, that evidence was admissible, as stated above, because it was relevant to the identification of defendant as one of the perpetrators of the crime. As to defendant's conduct during the arrest process, evidence of such conduct, in this case, is admissible as an excited utterance and as evidence tending to show defendant's state of mind at the time the alleged crime was committed, just shortly before his arrest, and showing defendant's consciousness of guilt. Defendant's second assignment of error is without merit.

In his third assignment of error, the defendant contends that the district court erred in overruling the defendant's motion to suppress certain of his statements. The motion to suppress is not in the record before us, but the motion was apparently addressed to statements made at the police station. In ruling on defendant's oral motion to suppress prior to trial, the court found that the statements made to the officers were voluntary and spontaneous, and therefore admissible.

We first note that the trial court's findings of fact with regard to the correctness of rulings on motions to suppress will not be set aside unless clearly wrong. *State v. Swoopes*, 223 Neb. 914, 395 N.W.2d 500 (1986).

The record shows, as set out above, that at the police station, investigating Officer Eggers duly advised the defendant of his *Miranda* rights. There is no dispute that during his conversation with Officer Eggers, the defendant made two requests for an attorney. Defendant contends that once he requested an attorney, all "further questionning [sic]" should have stopped. Defendant further contends that Officer Eggers questioned the defendant in order to "elicit a response." Brief for Appellant at 8-9.

Once an accused requests the assistance of counsel, the interrogation of that individual must stop, but the protection afforded the accused once counsel has been requested may be waived if done knowingly, freely, and voluntarily. *State v. Last*, 212 Neb. 596, 324 N.W.2d 402 (1982). *Miranda* does not protect an accused, even though he has requested counsel, from a spontaneous admission made under circumstances not induced by the investigating officers or during conversation not initiated

by the officers. *State v. Last, supra*; *State v. Pittman*, 210 Neb. 117, 313 N.W.2d 252 (1981). Voluntariness is the ultimate test to use an accused's statement, admission, or confession as evidence in a criminal prosecution, and depends on " 'the totality of the circumstances.' " *State v. Robertson*, 219 Neb. 782, 787, 366 N.W.2d 429, 433 (1986). A determination by the trial court that a statement was made voluntarily will not be disturbed, absent an abuse of discretion. *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983).

The record of the hearing on defendant's motion to suppress shows that Officer Eggers propounded only one question to the defendant. After the defendant was advised of his *Miranda* rights, Officer Eggers asked the defendant if he was willing to make a statement. The defendant responded by advising Eggers that he did not remember anything, and saying, "You tell me what happened." Officer Eggers advised defendant of the allegations that the victim had made. Defendant then said, "I don't have sex with guys." Defendant said he "wanted to see his lawyer." Officer Eggers then advised defendant that he was to be booked on the charge of first degree sexual assault. The officer asked no further questions. Defendant then said, "Is there any way I can get out of this?" Defendant immediately said the three were drinking together and then asked the officer, "Did he [the victim] say we forced him to come there?" The officer then again advised defendant of the victim's allegations. Defendant now contends that all "further questionning [sic]" should have stopped at the point defendant requested a lawyer. Brief for Appellant at 8. Our examination of the record shows that the police questioning did stop. Defendant himself engaged in questioning Officer Eggers. As the statements made by the defendant were freely and voluntarily made, there was no abuse of discretion on the part of the trial court in admitting the statements. Defendant's third assignment of error is without merit.

In his fourth and final assignment of error, the defendant claims that the sentence imposed by the district court was excessive. Defendant was sentenced to 10 to 15 years on the sexual assault charge and 5 to 10 years on the use of a knife to commit a felony charge. First degree sexual assault is a Class II

felony, punishable by a term of imprisonment of from 1 to 50 years. The use of a knife to commit a felony is a Class III felony, punishable by a term of imprisonment of from 1 to 20 years. Defendant's sentences were well within the statutory limits. A sentence imposed within the statutory limits will not be disturbed on appeal, absent an abuse of discretion. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Perdue*, 222 Neb. 679, 386 N.W.2d 14 (1986).

There was sufficient competent evidence upon which the jury could find the defendant guilty of the crimes charged, and there was no error in the trial of the case. The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY R. WILEY, APPELLANT.
423 N.W.2d 477

Filed May 20, 1988. No. 87-607.

Postconviction: Right to Counsel. Where the record shows a justiciable issue of law or fact is presented to the district court in a postconviction action, an indigent defendant is entitled to the appointment of counsel.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Reversed and remanded with directions.

William L. Binkard, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Randy R. Wiley, defendant herein, appeals from an order entered by the district court for Dakota County denying his request for postconviction relief. Wiley pled guilty to assault in the first degree, a Class III felony, in violation of Neb. Rev.

Stat. § 28-308 (Reissue 1985), and was sentenced to an indeterminate term of incarceration of not less than 5 nor more than 15 years. Wiley's conviction and sentence were affirmed on direct appeal. *State v. Wiley*, 225 Neb. 55, 402 N.W.2d 311 (1987).

On May 26, 1987, the district court held an evidentiary hearing on the defendant's motion to vacate and set aside judgment and sentence. At this time the court also considered defendant's motion for court-appointed counsel. After arguments were heard from Wiley and from the deputy county attorney for Dakota County, the court denied the defendant's motion for appointed counsel. The evidentiary hearing proceeded, with defendant Wiley representing himself.

The record indicates that Richard McCoy was the defendant's attorney at trial. McCoy filed a motion to withdraw after the case was concluded in district court. John C. Kinney was then appointed to represent Wiley on appeal. Kinney filed a brief with this court; however, before oral arguments were to be presented, Kinney withdrew from the case and was later disbarred. Dennis R. Hurley was then appointed to argue Wiley's appeal before this court. As noted in the opinion on direct appeal, the Kinney brief argued that Wiley's district court counsel was ineffective. Because ineffective assistance of counsel was not specifically assigned as error, this court did not consider the matter. *State v. Wiley, supra.*

Wiley contends, inter alia, that the district court erred in not appointing counsel to represent the defendant at the postconviction hearing. Under Neb. Rev. Stat. § 29-3004 (Reissue 1985), appointment of counsel to represent indigent defendants in postconviction proceedings is within the discretion of the district court. We have held that the failure of the court to provide court-appointed counsel in postconviction proceedings is not error in the absence of an abuse of discretion. *State v. Nicholson*, 183 Neb. 834, 164 N.W.2d 652 (1969). However, this court held in *State v. Pilgrim*, 184 Neb. 457, 168 N.W.2d 368 (1969), that where the record shows a justiciable issue of law or fact is presented to the court in a postconviction action, an indigent defendant is entitled to the appointment of counsel. The court in *Nicholson* determined that failure to

appoint counsel was not prejudicial, because the issues presented therein had been previously litigated.

In the instant case, the issue of ineffective assistance of trial counsel was not presented at trial and not properly presented on direct appeal. We believe that the defendant's petition presented a justiciable issue to the district court for postconviction determination, and we therefore hold that the district court abused its discretion in failing to appoint counsel to represent the defendant at the postconviction evidentiary hearing. The merits of the appellant's remaining assignments of error need not be considered at this time. The cause is reversed and remanded with directions to appoint counsel and hold a new evidentiary hearing on the motion to vacate and set aside judgment and sentence.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. MATTHEW R. TRACY, APPELLANT.

423 N.W.2d 479

Filed May 20, 1988. No. 87-633.

Appeal and Error. Where the appellant's brief does not contain specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the judgment will be affirmed in the absence of any plain error this court may note.

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

Matthew R. Tracy, pro se.

Robert M. Spire, Attorney General, and Linda L. Willard, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The defendant, Matthew R. Tracy, appeals from an order of the district court for Douglas County denying his motion for

postconviction relief. The record before us contains no bill of exceptions, nor does defendant's brief contain any assignment of error.

Where the appellant's brief does not contain specific assignments of error as required by Neb. Rev. Stat. § 25-1919 (Reissue 1985) and Neb. Ct. R. of Prac. 9D(1)d (rev. 1986), the judgment will be affirmed in the absence of any plain error this court may note. *Nebraska Mut. Ins. Co. v. Farmland Indus.*, 227 Neb. 93, 416 N.W.2d 221 (1987).

Without a bill of exceptions, we cannot review the record for plain error, as we are unable to determine with accuracy the facts and details regarding the defendant's original conviction, sentence, and appeal. Therefore, the judgment of the district court denying the defendant's motion for postconviction relief is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JIM D. BLANKENFELD, APPELLANT.
423 N.W.2d 479

Filed May 20, 1988. No. 87-661.

Postconviction: Appeal and Error. Except for the specific provisions set out in Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), a motion for postconviction relief cannot be used to secure review of issues which were known to defendant at the time of his trial, plea, sentencing, or commitment.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Mariclare Thomas of Oglesby, Brown, Thomas, Peterson & Orton, for appellant.

Robert M. Spire, Attorney General, and Sharon M. Lindgren, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This case began in the municipal court of Lincoln (now part of the county court for Lancaster County, see Neb. Rev. Stat. § 24-503 (Cum. Supp. 1986)), where defendant was arraigned on May 16, 1984, and charged with driving a motor vehicle while his license was suspended and with driving while intoxicated, third offense. Defendant pled not guilty. On January 24, 1985, defendant pled guilty to the charge of driving while intoxicated, third offense, and the other charge was dismissed. On February 15, 1985, after a presentence investigation, defendant was sentenced to 6 months in the county jail and to pay a fine of $500, and his driver's license was permanently revoked.

Defendant appealed to the district court, where the case was docketed as docket 68, page 58, which is the same district court docket in which this appeal was lodged. The district court affirmed the judgment and sentence of the municipal court on June 24, 1985. Defendant appealed from the district court order to this court, alleging on appeal here only that "[t]he District Court abused its discretion in refusing to place the Appellant on probation" and "in imposing a sentence which was excessive . . . ." When this appeal was presented to this court, the presentence report showed that defendant had been convicted of drunk driving 12 times, refusing to take a chemical test when requested 4 times, and driving while his license was suspended 2 times, and had been charged for such offenses 25 times. He had served county jail terms nine times for periods ranging from 7 days up to 6 months. He had served 1 year in the Nebraska penitentiary in 1974 and two consecutive terms of 1 to 2 years in the penitentiary in 1980.

Defendant's appeal that his 1985 sentence was excessive was denied by this court, and the judgment of the district court was affirmed. The affirmance was made under Neb. Ct. R. of Prac. 7A (rev. 1986), without opinion, and is shown at 221 Neb. xxii (case No. 85-520, Dec. 18, 1985). That judgment and sentence against defendant had thus become final on January 8, 1986, and on that day our mandate was forwarded to the district court. The mandate stated in part:

WHEREAS, in a late action in your court, captioned:

State of Nebraska, plaintiff, v. Jim D. Blankenfeld, defendant, you rendered judgment.

And, WHEREAS, the defendant prosecuted an appeal to this court. ON CONSIDERATION WHEREOF, the judgment which you rendered has been affirmed by the Supreme Court....

Now, THEREFORE, you shall, without delay, proceed to enter judgment in conformity with the judgment and opinion of this court.

After the mandate was received, the clerk of the district court signed and filed a commitment in the case as follows:

TO THE SHERIFF OF LANCASTER COUNTY, NEBRASKA:

On March 13, 1985, the County Attorney on behalf of the State of Nebraska, filed a certain complaint against Jim D. Blankenfeld for DWI.

On June 24, 1985, the Court affirmed the judgment of Municipal Court as to the guilt of said defendant.

On June 24, 1985, said defendant was sentenced by the Hon. William D. Blue as follows:

"It is therefore considered, ordered and adjudged by the Court that said defendant is guilty as charged in the complaint filed herein,

Defendant present with attorney S. Brennan. Attorney for plaintiff present. Motion to affirm judgment granted. Judgment affirmed. Sentence imposed as follows: Defendant inprisoned [sic] to County Jail for (6) six months and is fined $500.00 and costs. Defendant ordered not to drive any motor vehicle in Nebraska for any purpose for remainder of defendant's lifefrom [sic] the date of this order, and defendant's operator's license and all privileges of driving a motor vehicle in Nebraska are ordered revoked permanently....

On January 29, 1986 Judge Blue made the following entry: Mittimus to issue. Defendant now is in County Jail on another charge.

YOU ARE THEREFORE ORDERED TO EXECUTE THE SENTENCE AND ORDER OF THE COURT.

Signed and sealed this 29th day of January, 1986.

The nine-page transcript in this case then shows a "Motion To Set Aside Conviction." In that motion, filed June 10, 1987, defendant prays that

> the Court set aside the conviction on the above-entitled matter for the reason that sentence was never properly imposed on the Defendant in the instant matter and that it would unconstitutionally deny equal protection under the law to the Defendant, and for such other relief as is permitted by law.

(In passing, we note that this motion was filed in the name of "Jim D. Blankenfeld, Defendant." The notice of appeal, praecipe for transcript, praecipe for bill of exceptions, and statement of the issues are filed in the name of James Blankenfeld. We further note that in 1977, defendant was arrested and gave the arresting officer the name of James R. Ferguson. When arrested on December 25, 1986, on the charges set out in our case No. 87-784, defendant gave his name as James L. Ferguson. In pleadings filed in case No. 87-784, defendant's name has been set out as James Blankenfeld and James A. Blankenfeld. So there will be no further confusion, the defendant's name, as shown in the presentence reports available to this court, is Jim Dale Blankenfeld. He is usually charged as Jim D. Blankenfeld, and his current attorney refers to him by the name of "James" or "James A.")

A hearing was held on defendant's motion to set aside his conviction. Evidence was adduced showing defendant's plea in the municipal court of guilty to the charge of driving while intoxicated, third offense, and showing two earlier convictions of defendant. The evidence before the district court further showed that the municipal court judgment and conviction had been affirmed by the district court on June 24, 1985, and sentence imposed identical with that imposed in the municipal court. The evidence also showed that this sentence had been affirmed in this court and that, after our mandate had been sent to the district court, the district court, on January 29, 1986, had directed a mittimus to issue and noted that "Defendant now is in County Jail on another charge." The evidence shows that defendant began to serve the 6-month sentence in this case on February 4, 1986. Defendant completed serving his term on

June 23, 1986, after the allowance of 42 days' good time. Defendant also paid the costs and fine imposed.

Then, as set out above, on June 10, 1987, defendant filed the motion to set aside his conviction in this case.

Defendant's sole assignment of error is set out in his brief as the following:

> The district court of Lancaster County, Nebraka [sic] erred in ruling that Neb. Rev. Stat, Section 29-613 (Reissue 1985), vested in the district court, acting as an intermediate appellate court, the jurisdictional authority to execute on appellate mandate a judgment of conviction and sentence was not required to remand the appellate mandate for execution of final judgment of conviction and sentence by the court which originally rendered said judgment pursuant to Neb. Rev. Stat., Section 29-2305 (Reissue 1985).

In the conclusion of his brief, defendant requests this court

> to reverse the District Court of Lancaster County in overruling its [sic] Motion to Set Aside the Judgment and remand the case to the District Court with instructions to remand the appellate mandate issued by the Supreme Court on January 10, 1986, to the Court which rendered it, the County Court of Lancaster County, Nebraska.

Brief for Appellant at 19.

The relief requested by defendant's counsel seems to invite this court to set in motion another round of litigation to enable defendant to continue to flout the law, as defendant has done since his driver's license was first revoked on March 29, 1968. We decline the invitation, and affirm.

The judgment and sentence of the district court, as set out above, was appealed to this court and was affirmed on December 18, 1985. This court, by its mandate, informed the district court that "the judgment which you rendered has been affirmed" and directed the district court "to enter judgment in conformity with the judgment and opinion of this court." When the district court received this mandate, which, in effect, reinstated the judgment of the district court as set out above, the district court issued its "Commitment" order, set out above, to the sheriff of Lancaster County and ordered the sheriff "to

execute the sentence and order of the court."

The sheriff did so. Defendant served the time imposed upon him and paid the fine and costs assessed.

Then, by his motion of June 10, 1987, defendant purports to be outraged that, as set out in the motion, "To date of May 8, 1987, there has been a period of time lapsed of 1 year, 3 months and 29 days without proper execution of the sentence."

Without specifically addressing the convoluted reasoning in defendant's brief, we hold that the judgment in this case has become final. Except for the specific provisions set out in Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), a motion for postconviction relief cannot be used to secure review of issues which were known to defendant at the time of his trial, plea, sentencing, or commitment. There is no issue presented in this case which was not fully known to defendant and his counsel and which could not have been raised on a direct appeal from the order of commitment in the district court. The issue could then have been raised in a postconviction action under § 29-3001, because defendant was then in custody and had filed a motion setting out a claim of violation of various constitutional rights, although defendant does not present a constitutional claim in his appeal to this court.

Defendant was represented at all levels of the above-mentioned proceedings, and his present counsel represented defendant in 1984 when she was a member of the public defender's office. If the legal system is to work at all there must be finality of judgment at some point, and defendant has reached that point in this case.

Defendant has not brought himself within the ambit of § 29-3001 for two reasons: (1) He was not in custody at the time of the filing of the motion in this case, and (2) defendant's rights were not denied or infringed upon in any manner which would render the judgment against him void or voidable under the Constitution of the United States or the Constitution of Nebraska.

Even defendant's contention that this case should be remanded (apparently to be sent to the now county court for resentencing on a crime for which his sentence has been fully served) is without merit. Defendant's reliance on our holding in

State v. Daniels, 224 Neb. 264, 397 N.W.2d 631 (1986), is misplaced. *Daniels* held only that in cases where probation has been granted by a county court, that sentence of probation can only be revoked by the county court which granted probation in the first place, and not by the district court reviewing the case. This position should be no more startling than the fact that generally a county court in Douglas County will not revoke a probation granted in Scotts Bluff County. Instead, if there has been an offense committed in Douglas County, that court will assess appropriate punishment for that new offense.

We do not have that type of situation in the case at bar. Here, the district court merely performed the ministerial task of enforcing the order of the Supreme Court of this State.

The order of the district court denying defendant's motion to set aside his conviction is affirmed. Defendant's driver's license remains revoked.

AFFIRMED.

RONALD J. FEES, APPELLANT, V. RIVETT LUMBER COMPANY, APPELLEE.

423 N.W.2d 483

Filed May 20, 1988. No. 87-716.

1. **Workers' Compensation: Proof.** In a workers' compensation case, by a preponderance of evidence the plaintiff must prove that plaintiff's employment caused the claimed injury or disability and that the claimed disability was not the progression of the plaintiff's condition present before the employment-related incident alleged as the cause of the claimed disability.
2. _____: _____. Presence of a preexisting condition enhances the degree of a plaintiff's proof required to establish that the injury arose out of and in the course of employment.
3. _____: _____. An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability.
4. **Workers' Compensation: Expert Witnesses.** Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.
5. **Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

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

Lynn A. Melson and Walter E. Zink II of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

SHANAHAN, J.

Ronald J. Fees appeals from the dismissal of his petition on rehearing in the Nebraska Workers' Compensation Court.

In 1978, while employed by Southern Lumber & Coal Co., Fees hurt his back in a work-related accident when he fell on some ice. After 2 weeks' absence from work as a result of that injury, Fees returned to his employment at Southern.

In February 1981 Fees was treated by Dr. Kenneth Browne for Fees' pain in his low back and right leg. According to Dr. Browne, Fees had had "back trouble off and on for several years with catches and stiffness and muscle spasm in the low back." Dr. Browne performed a laminectomy and removed Fees' herniated fourth lumbar disk. After that surgery, Fees continued working without any further back pain.

Fees went to work for Rivett Lumber Company in 1983. Although he was hired as a salesman, Fees "worked in general duties in the office and the yard . . . selling over the counter and helping out in the yard, making deliveries, whatever." On April 29, 1985, Fees was helping a customer carry a 16-foot board to the customer's truck, when the customer dropped his end of the board, causing Fees to fall backward into a lumber pile. Fees immediately experienced pain and told his supervisor about the fall, but continued to work in the lumberyard office for the remainder of that day. The following day, Fees "could hardly move" and went to his family physician, Dr. R.J. Dietz, who recommended bed rest and prescribed muscle relaxants and pain pills for Fees. Later, Dr. Dietz referred Fees to an orthopedic surgeon, Dr. Michael Morrison. On June 11, Dr. Morrison noted that Fees was suffering from "[a]cute lumbar strain." On June 21, after Fees failed to respond to treatment,

Dr. Morrison made the following observation: "No improvement. It's rather chronic pain involving his right leg with previous history of L4-L5 surgery." Dr. Morrison ordered a CAT scan for Fees, which disclosed a "herniated disk above [Fees'] previous surgery site." On August 29, Dr. Morrison diagnosed Fees' problem as "[l]umbar disk syndrome with right leg radiculopathy" and ordered a myelogram, which showed "disk herniation at L3-4." According to Dr. Morrison, Fees had sustained a herniated disk above the site of the 1981 surgery by Dr. Browne. Dr. Morrison recommended surgery at Fees' L3-4 area. Fees sought a second opinion from Dr. Robert Hacker, a neurologist. On November 4, 1985, Dr. Hacker noted:

> [Fees] has a history of lumbar surgery and now has recurrent low back and right lower extremity pain. A CT and myelogram suggested degenerative disk disease at the L3 and L4 disk level and since he is not improved with a conservative approach, I'm going to perform a selective L5 nerve block.

That same month, Dr. Hacker performed two "nerve blocks" on Fees, temporarily relieving the pain in Fees' back.

As part of a program in liquidation of the business, Rivett discharged Fees from employment in May 1986. On June 3, 1986, Dr. Hacker concluded that Fees had chronic low back pain and that surgical intervention was not warranted at that time. Dr. Hacker recommended physical therapy for Fees, muscle relaxants, and light work only.

On August 6, 1986, Dr. Joseph Gross, an orthopedic surgeon, examined Fees and noted:

> It is my opinion that the patient sustained a strain to the back as a result of the incident. I do not feel that his present complaints are a result of [the accident of April 29, 1985]; however, he does have degenerative changes in the lower portion of the back in the lowest disc which probably accounts for all of his present complaints.

Although Fees complained that he was unable to bend, twist, or stay on his feet for any prolonged period, the three-judge panel of the Workers' Compensation Court concluded that Fees "failed to submit sufficient medical evidence that the disability from which he suffers was caused by his accident . . .

and his petition must therefore be dismissed."

In his assignments of error, Fees contends that medical evidence established a causal relationship between the 1985 accident and his disability. Also, Fees complains that the Workers' Compensation Court attached too much weight to the evidence from Dr. Gross and disregarded various medical reports received in evidence. Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. Neb. Rev. Stat. § 48-185 (Reissue 1984); *Zaleski v. Farmland Foods*, 219 Neb. 157, 361 N.W.2d 523 (1985). In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Vredeveld v. Gelco Express*, 222 Neb. 363, 383 N.W.2d 780 (1986); *Knudsen v. Metropolitan Utilities Dist.*, 220 Neb. 902, 374 N.W.2d 56 (1985). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. *Vredeveld v. Gelco Express, supra*; *Gibson v. City of Lincoln*, 221 Neb. 304, 376 N.W.2d 785 (1985). As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony. *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See, also, *Norris v. Iowa Beef Processors*, 224 Neb. 867, 402 N.W.2d 658 (1987).

In a workers' compensation case, by a preponderance of evidence the plaintiff must prove that plaintiff's employment caused the claimed injury or disability and that the claimed disability was not the progression of the plaintiff's condition present before the employment-related incident alleged as the cause of the claimed disability. See *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987). Presence of a preexisting

condition enhances the degree of a plaintiff's proof required to establish that the injury arose out of and in the course of employment. *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987). An employee has the burden to show the cause-and-effect relationship involving employment, an industrial injury, and disability. *Mendoza v. Omaha Meat Processors, supra.* As expressed in *Mendoza, supra*:

> Unless the character of an injury is objective, that is, an injury's nature and effect are plainly apparent, an injury is a subjective condition, requiring an opinion by an expert to establish the causal relationship between an incident and the injury as well as any claimed disability consequent to such injury.

225 Neb. at 785, 408 N.W.2d at 289.

"Determination of causation is, ordinarily, a matter for the trier of fact." *Mendoza v. Omaha Meat Processors, supra* at 778, 408 N.W.2d at 285.

In view of the medical evidence from Drs. Morrison and Hacker, the Workers' Compensation Court may have concluded that Fees was suffering from a degenerative disk condition unrelated to the 1985 accident. Also, the Workers' Compensation Court undoubtedly accepted Dr. Gross' opinion: "I do not feel that [Fees'] present complaints are a result of [the alleged accident]; however, he does have degenerative changes in the lower portion of the back in the lowest disc which probably accounts for all of his present complaints." Was Fees' fall in April 1985 the cause of his claimed disability? The Workers' Compensation Court answered that question in the negative. Although medical evidence described Fees' condition before and after his fall in April 1985, Fees' evidence did not include a medical opinion that the 1985 fall in any way caused Fees' disability. Therefore, Fees failed to introduce medical evidence that the disability in his back was the result of an accident arising out of and in the course of his employment with Rivett Lumber Company. As this court observed in *Caradori v. Frontier Airlines*, 213 Neb. 513, 516-17, 329 N.W.2d 865, 867 (1983):

> None of the physicians, whether testifying for Frontier Airlines or Caradori, stated that, in their opinion,

> Caradori's disability *was* the result of an accident arising out of as well as in the course of employment.
>
> . . . .
>
> The claimant, Caradori, having only proved that the disability could have been caused by an accident arising out of and in the course of employment has not sustained her burden of proof.

(Emphasis in original.)

We have examined the exhibits which Fees contends the Workers' Compensation Court disregarded. While generally descriptive of Fees' condition, either before or after his fall in April 1985, none of the exhibits contain any specific information that the fall caused Fees' disability which is the subject of his claim against Rivett.

The findings of the Workers' Compensation Court are not clearly erroneous. Therefore, the judgment of the Workers' Compensation Court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. OLLIE J. DAVIS, APPELLANT.

423 N.W.2d 487

Filed May 20, 1988. No. 87-913.

1. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct appeal.
2. _____: _____. In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Ollie J. Davis, pro se.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In a postconviction proceeding, see Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1985), the district court for Douglas County, on examination of the motion of Ollie J. Davis and a review of the files and records in Davis' case, determined that Davis was not entitled to postconviction relief and denied an evidential hearing on Davis' motion for postconviction relief.

As reflected in Davis' direct appeal, *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987), he was represented at trial by counsel; a jury found Davis guilty of second degree forgery, see Neb. Rev. Stat. § 28-603(1) (Reissue 1985); and the district court sentenced Davis as a habitual criminal, see Neb. Rev. Stat. § 29-2221 (Reissue 1985). In his direct appeal, Davis was represented by the Douglas County public defender's office. In that appeal, Davis contended that the State's evidence was insufficient for imposition of the enhanced penalty (habitual criminal). See *State v. Davis, supra*.

In the postconviction proceeding involved in the present appeal, Davis, pro se, claims that his conviction is a denial of due process required by the 14th amendment to the U.S. Constitution.

The gist and substance of Davis' contention are an alleged insufficiency of evidence to sustain the verdict against him. In particular, Davis contends that a police officer's testimony was contradictory and that testimony from other witnesses for the State was either vague or inconclusive concerning the elements of second degree forgery, including identification of Davis as the individual who uttered the forged check involved in the prosecution of Davis.

> A motion for postconviction relief cannot be used to secure review of issues which have already been litigated on direct appeal, or which were known to the defendant and counsel at the time of trial and which were capable of being raised, but were not raised, in the defendant's direct

> appeal. *State v. Hurlburt*, 221 Neb. 364, 377 N.W.2d 108 (1985). In an appeal involving a proceeding for postconviction relief, the trial court's findings will be upheld unless such findings are clearly erroneous.

State v. Dillon, 224 Neb. 503, 507, 398 N.W.2d 718, 720-21 (1987).

Davis' contention relates to matters which were known to Davis and his counsel at the time of trial and which were capable of being raised, but were not raised, in Davis' direct appeal. See *State v. Davis, supra.*

The decision and judgment of the district court are correct.

AFFIRMED.

JANIE RAE BUCHE, APPELLANT AND CROSS-APPELLEE, V. JOHN JEFFREY BUCHE, APPELLEE AND CROSS-APPELLANT.

423 N.W.2d 488

Filed May 27, 1988. No. 86-350.

1. **Divorce: Appeal and Error.** The Supreme Court's review of a judgment dissolving a marriage is de novo on the record to determine whether there has been an abuse of discretion. When the evidence is in conflict, the Supreme 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.
2. **Property Division.** When awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.
3. **Alimony.** Alimony is an allowance for support and maintenance and is a substitute for marital support. In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. One consideration is the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children.
4. **Child Support.** In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must

be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account.

5. **Child Support: Appeal and Error.** The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial court, is reviewed de novo on the record in this court, and is affirmed absent an abuse of discretion.

Appeal from the District Court for Brown County: EDWARD E. HANNON, Judge. Affirmed as modified.

W. Gerald O'Kief, for appellant.

Forrest F. Peetz of Peetz and Peetz, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; divided the property and debts of the parties; awarded custody of the two minor children of the parties to the petitioner; awarded child support to the petitioner in the amount of $400 per month, which is reduced to $250 per month if only one child is entitled to support; awarded $2,000 alimony to be paid in two equal payments without interest; and awarded the petitioner $700 in attorney fees.

The petitioner has appealed and contends the trial court erred in dividing the property and the debts, in awarding inadequate child support and alimony, and in the amount of attorney fees allowed. The respondent has cross-appealed and contends the trial court erred in sustaining an objection to the testimony of an expert witness and by including 36 shares of G. F. Buche Company stock as marital property.

The Supreme Court's review of a judgment dissolving a marriage is de novo on the record to determine whether there has been an abuse of discretion. When the evidence is in conflict, the Supreme 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. *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987). See, also, *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988).

The record shows that the petitioner, Janie Rae Buche, and the respondent, John Jeffrey Buche, were married on January 3, 1975. They separated in February 1985.

At the time of the marriage, both parties were employed at the Buche Company's grocery store in Mitchell, South Dakota. The company was founded by the respondent's grandfather in 1905.

The principal assets of the parties are a residence in Ainsworth, Nebraska, purchased in 1984 for $22,700; 36 shares of stock in the Buche Company; an IRA; two automobiles; a camper; a golf cart; and furniture.

The indebtedness of the parties consists of the $6,297 mortgage on the residence; a $17,000 bank loan used in the purchase of the residence; $21,916.22 due the Buche Company for groceries and clothing charged by the parties; $1,000 due for marriage counseling; $150 due J.C. Penney Co.; and $202.18 due Sears.

The trial court assigned one-half of the value of the residence and one-half of the mortgage and bank debt to each of the parties; included 36 shares of the Buche Company stock in the marital estate; and valued the IRA at its current value. Although the value of the residence and the debt attributed to it were divided in half, the entire marital estate was assigned two-thirds to the respondent and one-third to the petitioner.

Each party received an automobile. The Buche Company stock, the IRA, the camper, and the golf cart were assigned to the respondent. The furniture was assigned to the petitioner.

The principal controversy concerns the Buche Company stock, which the trial court valued at $500 per share, and the valuation of the IRA.

Although 36 shares of the Buche Company stock were acquired by the respondent during the marriage, the record shows that they were actually a gift or bequest from his grandfather.

In 1970 or 1971, when the senior Buche died, his stock in the Buche Company was placed in a trust for his five grandsons, one of whom is the respondent. Under the grandfather's bequest, the respondent was allowed to purchase 51 shares of the company stock with funds supplied by the company. Once a

year for 10 years each recipient received a dividend which was used to buy the stock from the trust at $350 per share plus 4 percent interest. Any obligation of the respondent for the purchase of stock has been satisfied and certificates representing his 51 shares have been issued.

The respondent claims that the trial court erred by including 36 shares of Buche Company stock in the marital estate. The respondent relies upon *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986), and *Van Newkirk v. Van Newkirk*, 212 Neb. 730, 325 N.W.2d 832 (1982), where we held:

> While we have not heretofore said in exact words how property acquired by inheritance or gift during the marriage should be considered, an examination of our previous decisions discloses that when awarding property in a dissolution of marriage, property acquired by one of the parties through gift or inheritance ordinarily is set off to the individual receiving the inheritance or gift and is not considered a part of the marital estate. . . . An exception to the rule is where both of the spouses have contributed to the improvement or operation of the property which one of the parties owned prior to the marriage or received by way of gift or inheritance, or the spouse not owning the property prior to the marriage or not receiving the inheritance or gift has significantly cared for the property during the marriage.

212 Neb. at 733, 325 N.W.2d at 834.

Furthermore, in *Ross v. Ross*, 219 Neb. 528, 531, 364 N.W.2d 508, 509 (1985), we stated that "if the inheritance can be identified, it should be set off . . . and eliminated from the marital estate to be divided." However, we have also held that "[t]he *Van Newkirk* rule itself does not purport to be an ironclad, rigid rule for all circumstances," *Grace v. Grace*, 221 Neb. 695, 699, 380 N.W.2d 280, 284 (1986), and that " '[w]hile the source of funds brought into a marriage is a consideration in the division of property, it is not an absolute.' " *Id.* at 701, 380 N.W.2d at 285, citing *Ulmer v. Ulmer*, 205 Neb. 351, 287 N.W.2d 685 (1980).

The parties were married in 1975, 3 years after the respondent had begun acquiring the Buche Company stock.

Neither the respondent nor the petitioner contributed any of his or her own money to acquire the stock. There is no evidence that the petitioner "contributed to the improvement or operation of the property" or that she "significantly cared for the property during the marriage." Since the stock is readily identifiable and traceable to the respondent, and because the petitioner does not fall within the exception stated in *Van Newkirk*, we find that the Buche Company stock should not be included as part of the marital estate.

The controversy concerning the IRA relates to its valuation. The account amounts to $17,418.24, but if it was withdrawn at this time and divided between the parties, the proceeds would amount to only $11,418.24. The trial court refused to permit a certified public accountant, called by the respondent, to testify that both an income tax and a penalty would have to be paid if the respondent withdrew the account at this time. Since the account will not be withdrawn, the penalty may be disregarded, but the income tax will have to be paid eventually and is a proper consideration in determining the present value of the account. We find that the IRA should be valued at approximately $13,000 for inclusion in the marital estate.

The adjustments which we have made reduce the valuation of the marital estate to approximately $46,400, of which the petitioner receives $16,000 and the respondent $30,400.

To equalize the property division which the trial court made, the respondent was ordered to pay to the petitioner $6,325 over a period of months. This was in addition to the $2,000 alimony awarded the petitioner. We believe the trial court was correct in ordering the respondent to pay an additional sum to the petitioner, but that it should be considered to be in the nature of alimony rather than a division of property.

Alimony is an allowance for support and maintenance and is a substitute for marital support. *Ball v. Ball*, 183 Neb. 216, 159 N.W.2d 297 (1968). In determining whether alimony should be awarded, in what amount, and over what period of time, the ultimate criterion is one of reasonableness. *Pyke v. Pyke*, 212 Neb. 114, 321 N.W.2d 906 (1982). One consideration is the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children.

Brown v. Brown, 199 Neb. 394, 259 N.W.2d 24 (1977).

The respondent was first employed by the Buche Company in 1974, following graduation from high school.

In 1983 the Buche Company purchased a store in Ainsworth, Nebraska, which the respondent managed for 1½ years. The respondent's gross income for 1983 was $35,950, and $35,380 for 1984.

In April 1985, the respondent moved to O'Neill, Nebraska, and became manager of the advertising department for the Buche Company grocery stores. The respondent was compensated in the following manner: $300 per week salary; and $1,750 quarterly, $500 of which was to be applied to the parties' account at the various stores. Fringe benefits of his position include health insurance for the respondent and his family. In addition, the company has paid $240 per month for the respondent's apartment. The respondent testified there was some agreement that he would repay a portion of the money the company paid on his rent.

Throughout the marriage, the petitioner, who is 30 years of age and in good health, held various jobs, most of which paid minimum wages. The petitioner testified that she had acquired some skills through on-the-job training in the areas of laboratory and x-ray work, bookkeeping, and general office skills. At the time of trial the petitioner was employed by Midwest Appraisals to appraise homes and commercial buildings in Brown County at $3.50 for each parcel appraised.

Because of her inability to find full-time employment in Ainsworth, the petitioner testified that she would be willing to move with her children to Sioux Falls, South Dakota, in order to pursue the possibility of full-time employment and a college education.

We find that the respondent should be ordered to pay the petitioner alimony in the sum of $175 per month for 36 months to assist the petitioner in establishing a new home for herself and the children and for completing further training.

During the marriage the petitioner used her earnings for babysitting, clothing for herself and the children, entertainment, and at times for payments on the family home.

The petitioner contends that the award of child support in

the amount of $400 per month is inadequate, as it is "less than Respondent/Appellee's real ability to pay, and far less than Petitioner/Appellant's needs . . . to support the parties' minor children." In addition to the child support, the respondent was ordered to provide and maintain standard hospital and surgical insurance on both minor children.

"In determining the amount of child support to be awarded, the status, character, and situation of the parties and attendant circumstances must be considered. The financial position of the husband as well as the estimated costs of support of the children must be taken into account . . . ." *Brus v. Brus*, 203 Neb. 161, 164-65, 277 N.W.2d 683, 686 (1979).

"The amount of child support ordered in a dissolution of marriage action is initially left to the sound discretion of the trial court and is reviewed de novo on the record in this court and is affirmed absent an abuse of discretion." *Grace v. Grace*, 221 Neb. 695, 704, 380 N.W.2d 280, 287 (1986); *Lainson v. Lainson*, 219 Neb. 170, 362 N.W.2d 53 (1985).

The respondent testified that he probably could pay $500 per month child support, and the child support guidelines which have been adopted by this court, see, *Brandt v. Brandt*, 227 Neb. 325, 417 N.W.2d 339 (1988), and *Fooks v. Fooks*, 226 Neb. 525, 412 N.W.2d 469 (1987), indicate that the child support should be in excess of $400 per month. We find that the judgment should be modified to increase the child support to $500 per month.

The trial court assigned all of the indebtedness of the parties to the respondent except that relating to the residence property. We agree with that finding and find that in addition to the indebtedness listed in the judgment, the respondent should pay the amounts owed J.C. Penney Co. and Sears. We further find that any mortgage debt remaining after the sale of the parties' residence shall be paid by the respondent, and the petitioner shall not be liable to the respondent for any deficiency on the mortgage after the sale of the property.

We find no error in the allowance of attorney fees made in the district court.

The judgment as modified is affirmed. The appellant is allowed the sum of $750 for the services of her attorney in this

court. Each party shall pay his or her own costs on the appeal.

AFFIRMED AS MODIFIED.

IN RE APPLICATION OF KOCH SERVICE, INC.
KOCH SERVICE, INC., OF WICHITA, KANSAS, APPELLANT, V. WHEELER TRANSPORT SERVICE, INC., ET AL., APPELLEES.

423 N.W.2d 767

Filed May 27, 1988. No. 86-684.

1. **Public Service Commission: Appeal and Error.** In reviewing the record before the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
2. _____: _____. Whether the Supreme Court agrees or disagrees with the decision of the Public Service Commission is immaterial. It is not the province of this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it.
3. **Public Service Commission: Motor Carriers: Proof.** To obtain a contract carrier permit, an applicant must show that its proposed service is specialized and fits the needs of a proposed contracting shipper or shippers; that the applicant is fit, willing, and able to perform the service; and that the proposed operation will be consistent with the public interest.
4. _____: _____: _____. Where the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for a contract carrier is not established.
5. **Public Service Commission: Motor Carriers.** The Public Service Commission is required to weigh the special needs of the shipper desiring contract carrier service against the adequacy of existing common carrier service.
6. _____: _____. The effect on protesting carriers of a grant of an application for a contract carrier permit and the effect on shippers of a denial are factors to be weighed in determining if the grant of the application would be consistent with the public interest.

Appeal from the Nebraska Public Service Commission. Affirmed.

Lavern R. Holdeman of Peterson Nelson Johanns Morris & Holdeman, for appellant.

James E. Ryan, P.C., and Jack L. Shultz of Nelson & Harding, for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

FAHRNBRUCH, J.

Koch Service, Inc. (KSI), appeals the Nebraska Public Service Commission's denial of KSI's request for a permit to operate as a contract carrier to haul asphalt and related products for its sister corporation. We affirm.

As originally filed, KSI's application was for a common carrier permit. At the hearing, KSI orally requested only a contract carrier permit, and the hearing proceeded upon that basis.

KSI alleges six separate assignments of error. They may be summarized as follows: (1) that the denial of the application was arbitrary, unreasonable, and unsupported by the evidence; and (2) that the commission's finding that the granting of a permit is not consistent with the public interest was based upon improper criteria, contrary to law.

Although denying the permit, the commission found that KSI was fit, willing, and able to properly perform the services proposed and to conform with the statutes and rules of the commission. The denial was based upon a finding that a grant of the application is not consistent with the public interest as provided in Neb. Rev. Stat. § 75-311 (Reissue 1986).

KSI seeks to transport asphalt, asphalt cements, cutback asphalt, and emulsified asphalt for Koch Asphalt Company (KAC). Both KSI and KAC are owned by Koch Industries, Inc.

In reviewing the record before the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary. *In re Application of Silvey Refrig. Carr.*, 226 Neb. 668, 414 N.W.2d 248 (1987); *In re Application of Amsberry, Inc.*, 220 Neb. 353, 370 N.W.2d 109 (1985).

> " ' " 'Whether we agree or disagree with the decision of the commission . . . is immaterial. It is not the province of

> this court to weigh or resolve conflicts in the evidence, or the credibility of witnesses. The Supreme Court does not act as an appellate public service commission but will sustain the action of the commission if there is evidence in the record to support it. . . .' " ' "

In re Application of Silvey Refrig. Carr., supra at 676, 414 N.W.2d at 254; *In re Application of McCarty*, 218 Neb. 637, 358 N.W.2d 203 (1984).

Section 75-311 provides in part that a permit shall be issued to a qualified applicant if (1) the applicant is fit, willing, and able to properly perform the service of a contract carrier and to conform to statutory and lawful requirements, rules, and regulations of the commission and (2) the proposed operation will be consistent with the public interest by providing the services designed to meet the distinct needs of each customer or class of customers.

If KSI's contract carrier permit was granted, it would only involve one shipper, KAC. Therefore, only that shipper's requirements need to be considered here.

The controlling issue raised before this court is whether the commission acted unreasonably or arbitrarily in denying KSI's application on the basis that to grant it would be inconsistent with the public interest.

Under *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 188 Neb. 584, 198 N.W.2d 195 (1972), to obtain a permit, KSI must show that its proposed service is specialized and fits the needs of a proposed contracting shipper or shippers; that the applicant is fit, willing, and able to perform the service; and that the proposed operation will be consistent with the public interest. See, also, *In re Application of Silvey Refrig. Carr., supra*; *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968).

However, "[w]here the transportation of specified commodities can be performed as well by common carriers as by contract carriers, a need for contract carriers is not established." *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp., supra* at 587, 198 N.W.2d at 198; *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp., supra.*

Therefore, the commission is required to weigh the special needs of the shipper desiring contract carrier service against the adequacy of existing common carrier service. *Wells Fargo, supra.*

The effect on protesting carriers of a grant of the application and the effect on shippers of a denial are also factors to be weighed in determining if the grant of the application would be consistent with the public interest. *Wells Fargo, supra*; *Hagen Truck Lines, Inc. v. Ross*, 174 Neb. 646, 119 N.W.2d 76 (1963).

In the present case, KSI proposes to meet KAC's special needs. They are: (1) transportation of asphalt and related products in insulated trailers, (2) immediate availability of trucking equipment, (3) tight peak-season truck schedules because of KAC's limited dock space, (4) peak-season storage of inventory in trailers, (5) jobsite delivery and report of any delivery problems on the site, (6) return of partial excess loads, (7) drivers who maintain business confidentiality, (8) inclusion of two-way radios, (9) special training and safety program for drivers, and (10) a KSI dispatcher located in KAC's facilities.

The evidence reflects that all of the common carrier protestants own and operate insulated trailers for transporting asphalt and its related products. This equipment, as a practical matter, has been dedicated only to the transportation of KAC's products. This is due to the extensive costs involved in cleaning the equipment for use in hauling other products. A witness from KAC testified that, within reason, the protestants' truck equipment has been immediately available to KAC. The equipment has been maintained in Nebraska exclusively for KAC because KAC has been the only substantial Nebraska shipper of asphalt using common carrier motor service.

With respect to KAC's special scheduling needs, neither KSI's witness nor the KAC witness testified to any problems which resulted in loss of sales. KAC's witness stated that existing carriers provide immediate availability and jobsite delivery of KAC's products. KSI's witness testified that the dispatcher's responsibility would be to make sure that delivery occurs on a timely basis. He stated there had been no service complaints or problems in this area.

The record reflects that KSI has a standard training program

for its drivers. There was no complaint as to the capabilities of the common carrier drivers.

It appears that mobile radio unit usage by KAC would be limited by the unit's range. Once out of range, the drivers would contact KAC by telephone. The telephone procedure is presently available to the common carriers.

The KAC witness had no complaint that the protestants refused to store KAC's inventory in the protestants' trailers for later delivery. The evidence reflects that all the protestants' drivers could report delivery site problems to KAC. The KAC witness was unaware of any problems regarding the protestants' ability to return partial loads of excess shipments.

Finally, the KAC witness admitted that, overall, existing common carriers do a "pretty good job" of being confidential. He could not cite an instance where confidentiality was broken. KSI and KAC asserted that confidentiality includes customer information and trade secrets. KAC's trade secrets were not explained at the hearing. The evidence was sufficient to rebut any alleged need to further protect unexplained trade secrets. See *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986), wherein the applicants refused to disclose "trade secrets."

As previously observed, to determine whether issuance of a contract carrier permit is consistent with the public interest, the commission must weigh the effect of granting the permit on both the shipper and protesting common carriers. Here, the evidence shows that KAC will continue to receive the satisfactory service it has received from the protestants if KSI is denied a permit. KAC did not meet its burden of showing how a denial of KSI's application would have an adverse effect upon KAC.

The record reflects that a grant of KSI's application would have an adverse financial impact on the protestants and, consequently, on the public. Protestants collectively have invested in 124 asphalt trailers, primarily to serve KAC. The commission found that

> [i]t is not in the public interest for a shipper to encourage common carriers to augment their fleets to the optimum for the shipper, then have that shipper swich [sic] to a

> contract carrier and leave the common carriers saddled with thousands and thousands of dollars worth of special equipment.

It is clear that if KSI was granted a permit, traffic would be totally diverted from the existing certified motor common carriers. KAC did not claim it would retain any of its current common carriers if KSI's permit was granted. There is competent evidence to support the commission's finding that the denial of the permit is consistent with the public interest.

The record is clear that the commission acted within the scope of its authority, that its findings are supported by the evidence, and that its order was reasonable and not arbitrary. We have reviewed all of the appellant's assignments of error and find none of them have merit. The commission's denial of KSI's application for a contract carrier permit is affirmed.

AFFIRMED.

DENNIS ROGGASCH AND ELEANOR ROGGASCH, HUSBAND AND WIFE, PARENTS, NATURAL GUARDIANS, AND NEXT FRIENDS OF RONALD ROGGASCH, A MINOR CHILD, APPELLANTS, V. REGION IV OFFICE OF DEVELOPMENTAL DISABILITIES, ALSO KNOWN AS MENTAL RETARDATION REGION IV, APPELLEE.
DENNIS ROGGASCH AND ELEANOR ROGGASCH, HUSBAND AND WIFE, APPELLANTS, V. REGION IV OFFICE OF DEVELOPMENTAL DISABILITIES, ALSO KNOWN AS MENTAL RETARDATION REGION IV, APPELLEE.

423 N.W.2d 771

Filed May 27, 1988. Nos. 86-712, 86-713.

Tort Claims Act: Words and Phrases. An entity consisting of specifically named counties, created by the Legislature to carry out a state policy of providing services to the mentally retarded, governed by a board consisting of members of the county boards of supervisors or commissioners, supported by funds from the state or participating counties, and lacking the requisites of a political subdivision, is a state agency within the meaning of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987).

Appeal from the District Court for Wayne County: MERRITT C. WARREN, Judge. Affirmed.

David A. Domina of Domina, Gerrard & Copple, P.C., for appellants.

Jewell, Gatz, Collins & Dreier, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

In these two cases, the parents of Ronald Roggasch seek recovery on their own behalf as parents and on behalf of their minor son for his injuries allegedly caused by the negligence of employees of Region IV Office of Developmental Disabilities (Region IV), while he was under their care. The district court sustained demurrers of Region IV and dismissed the plaintiffs' amended petitions when they declined to plead further. The cases were consolidated for briefing and argument in this court. We affirm.

Plaintiffs' petitions alleged that the defendant was a mental health region created, pursuant to Neb. Rev. Stat. § 71-5002(6)(d) (Reissue 1981), to provide comprehensive community mental health services and facilities. They further alleged that defendant is governed by a governing body provided by contract. Summonses were served on a person stated by the plaintiffs to be the managing agent. Nowhere in the petitions and amended petitions do the plaintiffs allege compliance with either the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 et seq. (Reissue 1987), or the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983 & Cum. Supp. 1984). It was on this basis that the trial court sustained the demurrers.

As provided in Neb. Rev. Stat. § 25-806 (Reissue 1985), a defendant may demur to a petition when it appears on its face that the court has no jurisdiction of the subject of the action, there is a defect in parties, or the petition does not state facts sufficient to constitute a cause of action. Defendant's demurrers in these instances were based on the latter two reasons. Therefore, the central issue in these cases is whether

the petitions on their face show such defects.

In other words, is Region IV a private entity or, instead, is it a state agency or a political subdivision, and does such information appear on the face of the petitions? The only facts in our possession are found in an exhibit attached to each of the amended petitions.

According to that exhibit, Region IV was established by written agreement dated June 10, 1974, and signed by Dakota, Dixon, Wayne, and Madison Counties. We know from the Interlocal Cooperation Act, Neb. Rev. Stat. §§ 23-2201 et seq. (Reissue 1983), that the purpose of the act was to

> permit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

§ 23-2201. In § 23-2203, the term "public agency" is defined to mean any "county, city, village . . . or any other municipal corporation or political subdivision of this state . . . ."

Neb. Rev. Stat. § 83-1,141 (Reissue 1987) provides, among other things:

> (1) It is hereby declared to be the public policy of the State of Nebraska that a pattern of facilities, programs, and services should be available to meet the needs of each person with mental retardation so that a person with mental retardation may have access to facilities, programs, and services best suited to such person throughout his or her life.

Neb. Rev. Stat. § 83-1,142 (Reissue 1987) provides:

> (1) To carry out the policies and purposes of section 83-1,141, the director of the office of mental retardation shall provide a comprehensive and integrated statewide plan for facilities, programs, and services for persons with mental retardation . . . .
>
> . . . .
>
> (3) Any public agency defined by section 23-2203 may

enter into agreements and compacts to form cooperative undertakings or separate legal entities under the Interlocal Cooperation Act for the purpose of entering into agreements on a regional basis with the director for providing facilities, programs, and services for persons with mental retardation. Each public agency having taxing authority may levy and collect taxes within its geographical unit in an amount not to exceed one and seven-tenths cents on each one hundred dollars on the actual valuation of all taxable property except intangible property for the purpose of funding programs within sections 83-1,141 to 83-1,146.

Additional money needed for the funding of such programs may be obtained from taxes levied and collected under the general fund levy of any public agency having taxing authority.

It is provided by Neb. Rev. Stat. § 83-1,143.01 (Reissue 1981) that each region shall prepare a proposed budget which shall be reviewed by the Department of Public Institutions and sent to the Director of Administrative Services, with the final budget for each mental retardation region to be set by the Legislature.

The office of mental retardation shall provide funds on a matching basis for community-based programs on the basis of $3 for each dollar available in the community. Neb. Rev. Stat. § 83-1,143.03 (Reissue 1987).

Finally, the Legislature has created six mental retardation regions in the state, with Region IV to consist of the counties of Cherry, Keya Paha, Boyd, Brown, Rock, Holt, Knox, Cedar, Dixon, Antelope, Pierce, Wayne, Dakota, Thurston, Madison, Stanton, Cuming, Burt, Boone, Platte, Colfax, and Nance. Neb. Rev. Stat. § 83-1,143.06 (Reissue 1987).

Although neither the statutes relating to mental retardation nor the Interlocal Cooperation Act seem to provide for the method of governing Region IV, the organizational agreement which is attached to and incorporated into the amended petitions as exhibit 1 appears to track the provisions of Neb. Rev. Stat. § 71-5004 (Reissue 1986), which provides in part that "[a]ny combination of counties operating under the provisions

of the Interlocal Cooperation Act [with regard to mental health and alcoholism services] shall appoint a governing board which shall govern and supervise the operation of the comprehensive community mental health services program . . . ." Exhibit 1, the formal "Agreement for the Formation of the Region IV Office of Developmental Disabilities under the Interlocal Cooperation Act," provides that "REGION IV shall be operated and maintained by the COUNTIES named herein" and that "the government of REGION IV shall be vested in the COUNTIES and their board of commissioners or supervisors appointed to serve on the Governing Board of REGION IV."

Based on the foregoing facts and inferences to be drawn from the applicable statutes, it is necessary for us to determine whether Region IV was performing its services as a part of private or state action. The fact of substantial funding by the state is not necessarily determinative of the issue. The important consideration is the rather obvious fact that Region IV acted as an arm of the counties involved, which are creatures of the state. It was organized under authority granted by state statute for the purpose of carrying out, in part, the responsibilities of the office of mental retardation of the Department of Public Institutions.

McVarish v. Mid-Nebraska Com. Mental Health Center, 696 F.2d 69 (8th Cir. 1982), involved the question of whether the action of a community mental health center established under the Nebraska Comprehensive Community Mental Health Services Act and the Interlocal Cooperation Act constituted state action. The court stated:

> We have here, then, a governing board appointed by governmental units specifically for the purpose of allowing the participating governments to supervise and allocate resources efficiently. Moreover, the statute requires that the governing board consist of "one member from each of the county board of supervisors or county commissioners as represented by the Interlocal Cooperation Act." . . . Where the government is so closely involved in supervising a given activity, state action exists.

696 F.2d at 71. We believe this to be a well-reasoned statement of the law and adopt it as the deciding factor in determining this

case.

Having determined that the defendant in this case is a public agency, it becomes apparent that Region IV must be either a political subdivision or a state agency. In either event, compliance with the Political Subdivisions Tort Claims Act or the State Tort Claims Act is necessary in order for the plaintiffs to state a cause of action. Section 23-2401 (Reissue 1983) provides in part that "no suit shall be maintained against such political subdivision on any tort claim except to the extent, and only to the extent, provided by this act." Similarly, § 81-8,209 states in part that "no suit shall be maintained against the state or any state agency on any tort claim except to the extent, and only to the extent, provided by this act." See, *Catania v. The University of Nebraska,* 204 Neb. 304, 282 N.W.2d 27 (1979), *overruled on other grounds Blitzkie v. State, ante* p. 409, 422 N.W.2d 773 (1988); *Parriott v. Drainage Dist. No. 6 of Peru,* 226 Neb. 123, 410 N.W.2d 97 (1987).

While Region IV has many of the characteristics found in political subdivisions such as those declared in *Catania* and *Parriott*, e.g., clearly defined geographical boundaries, a statement of general purpose or benefit, and the lack of a contractual relationship with other political subdivisions, it is also lacking essential attributes which call into question its existence as a political subdivision. Unlike political subdivisions, Region IV has no independent authority to levy taxes. It instead must rely on the counties' contributions, as well as funds from other sources, and is funded for the most part by matching statewide funds.

Region IV also lacks public elections. Tied in with this is Region IV's lack of autonomous operation. Although endowed with a governing board, this board is actually a panel of participating county representatives. Moreover, Region IV is under the direction of the office of mental retardation and, at least in budgeting matters, the state Legislature. Region IV, therefore, cannot be considered a political subdivision to the extent that compliance with the Political Subdivisions Tort Claims Act is necessary to maintain a suit against the region.

Region IV clearly operates as an arm of the counties and as a facilitator to carry out the public policy of the State of

Nebraska to provide programs and services for the mentally retarded, which primary responsibility rests with the state Department of Public Institutions. As such, it is a state agency, and the plaintiffs must comply with the terms of the State Tort Claims Act. *Catania, supra.*

The judgments of the district court in sustaining the demurrers and dismissing the petitions were correct and are affirmed.

AFFIRMED.

CONTROL SPECIALISTS COMPANY, INC., APPELLEE, V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, APPELLANT.

423 N.W.2d 775

Filed May 27, 1988. No. 86-725.

1. **Insurance: Subrogation.** Generally, no right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty.
2. **Insurance: Motor Vehicles.** Where two motor vehicles covered by the same insurance carrier collide, the nonnegligent driver may recover for damage to his vehicle under the negligent driver's liability insurance and again under the property damage clause of his own insurance policy unless the nonnegligent driver's policy limits such recovery.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Wayne J. Mark of Fraser, Stryker, Veach, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellant.

John J. Respeliers and Thomas K. Harmon of Respeliers and DiMari, for appellee.

HASTINGS, C.J., SHANAHAN, and FAHRNBRUCH, JJ., and RILEY and OTTE, D. JJ.

FAHRNBRUCH, J.

A vehicle owned by the plaintiff, Control Specialists

Company, Inc., was involved in a two-vehicle collision while both drivers were covered by insurance policies issued by the defendant, State Farm Mutual Automobile Insurance Company.

The defendant paid Control Specialists for the damage to its vehicle under the other driver's liability coverage. State Farm refused to pay the plaintiff for the damage to its car under the property damage clause of Control Specialists' State Farm insurance policy. The Douglas County District Court entered judgment for Control Specialists and State Farm appealed. We affirm.

The defendant claims the trial court erred (1) when it allowed the plaintiff to recover under its policy based upon *Stetina v. State Farm Mut. Auto. Ins. Co.*, 196 Neb. 441, 243 N.W.2d 341 (1976), when it should have denied a recovery based upon the clear policy language and the rules of interpretation announced in *Charley v. Farmers Mut. Ins. Co.*, 219 Neb. 765, 366 N.W.2d 417 (1985), and *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985); and (2) in failing to find that the coverages involved in this case are contracts of indemnity which only obligate State Farm to pay for unreimbursed losses and do not operate to permit a plaintiff to recover for more than its actual loss or damage.

The district court's judgment is consistent with *Stetina v. State Farm Mut. Auto. Ins. Co., supra*. In *Stetina*, two vehicles were involved in an accident. Diana Stetina, a passenger in one of the vehicles, and her father, the plaintiff in *Stetina*, were paid $50,000 under the personal injury liability portion of the other vehicle driver's State Farm policy. Stetina then made a claim for medical payment coverage under those provisions of his own State Farm policies. State Farm denied his claim.

In *Stetina*, the trial court entered a summary judgment in favor of State Farm. Stetina appealed. This court reversed and remanded the cause for further proceedings.

State Farm's position in *Stetina* was that Stetina jeopardized its subrogation rights by releasing the tort-feasor. This court disagreed:

> "No right of subrogation can arise in favor of an insurer against its own insured since, by definition,

> subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty. . . .
>
> " '. . . it is axiomatic that [an insurance company] has no subrogation rights against the negligence of its own insured.' (Bracket material paraphrased.)
>
> "To allow subrogation under such circumstances would permit an insurer, in effect, to pass the incidence of the loss, either partially or totally, from itself to its own insured and thus avoid the coverage which its insured purchased. . . ."

(Citations omitted.) *Stetina, supra* at 451, 243 N.W.2d at 346. Cited with approval in *Reeder v. Reeder*, 217 Neb. 120, 348 N.W.2d 832 (1984).

This court, in *Stetina*, held that in the present type of situation, two rights exist: " 'one in tort as the result of . . . negligence, one in contract as the result of the contract of insurance. Payment of one did not discharge the other. . . .' " *Stetina, supra* at 449, 243 N.W.2d at 345.

State Farm, thereby, was given notice of the rule this court has elected to follow with respect to policy language such as used by State Farm. The defendant could have amended its policy to eliminate double recovery by its insured. Under the principles laid down in *Stetina*, we hold that where two motor vehicles covered by the same insurance carrier collide, the nonnegligent driver may recover for damage to his vehicle under the negligent driver's liability insurance and again under the property damage clause of his own insurance policy unless the nonnegligent driver's policy limits such recovery.

Charley v. Farmers Mut. Ins. Co., supra, and *Kracl v. Aetna Cas. & Surety Co., supra*, which the defendant mentions in its first assignment of error, are not applicable here. The issue we need to address in this case is subrogation, not aggregation, or "stacking," of multiple uninsured motorists coverages as addressed in *Charley* and *Kracl*. The defendant's argument that recovery should be denied under the rules announced in *Charley* and *Kracl* has no merit.

The defendant's second assignment of error is essentially that the insurance policy in this case is a contract of indemnity

covering only unreimbursed losses. The problem with that position is that while defendant now claims that the policies "were not intended" to provide more than reimbursement to the extent of actual loss, there is no language in the plaintiff's policy to that effect. The policy describes the risks and losses which are covered and those which are not. Nowhere in the policy is there a limitation on the coverage for plaintiff's type of claim. Such limitation could have been written into the policy. It was not. Therefore, defendant's second assignment of error with respect to indemnity has no merit.

Neb. Rev. Stat. § 44-359 (Cum. Supp. 1986) provides that in a successful action to enforce a policy of insurance by the insured, the court shall tax attorney fees against the insurance carrier. Pursuant to § 44-359, the plaintiff is awarded attorney fees in the amount of $2,000 plus costs.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DAN REED, APPELLANT.

423 N.W.2d 777

Filed May 27, 1988. No. 87-268.

1. **Circumstantial Evidence: Convictions.** Circumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt.
2. **Intent: Words and Phrases.** The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident.
3. **Convictions: Appeal and Error.** It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction.
4. **Criminal Law: Trial: Appeal and Error.** Where a jury has been waived and the judge is the trier of the facts in a criminal case, the factual findings will not be disturbed on appeal unless they are clearly wrong.
5. **Criminal Law: Trial: Theft.** In a theft case where a jury trial has been waived, the value of the property is one of the facts and elements of the crime to be determined by the trial judge, and Neb. Rev. Stat. § 29-2026.01 (Reissue 1985) is not applicable.

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

Charles F. Fitzke, Scotts Bluff County Public Defender, for appellant.

Dan Reed, pro se.

Robert M. Spire, Attorney General, and Lisa D. Martin-Price, for appellee.

BOSLAUGH, CAPORALE, and SHANAHAN, JJ., and ROWLANDS, D.J., and COLWELL, D.J., Retired.

COLWELL, D.J., Retired.

Defendant, Dan Reed, appeals his conviction of the crime of felony theft, Neb. Rev. Stat. § 28-511(1) (Reissue 1985), and his sentence of 2 to 4 years' confinement. A jury was waived. We affirm.

The five errors assigned are that the trial court erred in (1) finding the defendant guilty on insufficient evidence, (2) overruling the defendant's motion for directed verdict or dismissal, (3) not making a finding concerning the amount of the theft, (4) allowing the admission of exhibits 1 and 2 at trial, and (5) sentencing the defendant to serve a term of 2 to 4 years, because the sentence is excessive and constitutes an abuse of discretion.

Dan Reed was a short-term resident of Scottsbluff, Nebraska, where he represented himself as engaged in the sale and installation of siding on houses. He did not have a permanent residence address, a vehicle registered in the county, a business location, nor an inventory of siding materials. In May 1984, Reed stopped at the home of James Marshall in Gering, having noticed that the Marshall house needed repairs. Reed left some siding samples with Marshall. Within a few days, Reed returned and measured the Marshall house. On May 17, 1984, Reed had a discussion with Marshall regarding siding for Marshall's house, culminating in the execution of a written agreement, signed by Marshall and Reed, to put siding on the Marshall house for $2,550. Marshall gave Reed his bank check for $1,750 payable to Reed Home Improvement-Dan Reed.

Reed told Marshall that he needed the money since he was going to Omaha to get the siding materials so that he could start on the job the following Monday. The agreement had no performance deadline. Marshall offered to give Reed a cashier's check, but Reed said that it was not necessary and that if needed, he could get one. The next day, Reed endorsed and cashed the check, and Marshall's bank account was debited $1,750.

About 10 days later, Reed contacted Marshall and requested an additional $200 for labor. Marshall refused. On about June 8 or 9, 1984, Reed contacted Mrs. Marshall by telephone and said that he understood that Mr. Marshall had suffered a stroke. Reed offered to return the $1,750, but Mrs. Marshall declined the offer and told Reed to put on the siding.

The siding was neither delivered nor installed, and no part of the $1,750 was returned to Marshall. Marshall endeavored to find Reed, since he had become suspicious of Reed's behavior. However, Reed could not be located in the Scottsbluff area. Marshall filed a report with the sheriff's office. A criminal complaint was filed against Reed on June 26, 1984. He was later located and arrested in Denver, Colorado, in the fall of 1985. At the trial, defendant offered no evidence on his behalf. During all of these proceedings defendant was represented by legal counsel. On appeal, defendant filed an additional brief, pro se.

At the conclusion of the State's case in chief, defendant moved for dismissal for failure of proof, which was denied.

Where a jury has been waived and the judge is the trier of the facts in a criminal case, the factual findings will not be disturbed on appeal unless they are clearly wrong. *State v. Laue*, 225 Neb. 57, 402 N.W.2d 313 (1987).

The first two assignments are discussed together.

The information charged that defendant, "on or about May 17, 1984 . . . did unlawfully and feloniously then and there take or exercise control over movable property of James Marshall, with the intent to deprive him thereof, to wit: cash in an amount of $1,750.00 . . . ."

Section 28-511(1) provides: "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." A conviction under § 28-511(1) is a Class III felony when the

value of the property is over $1,000; the value of the property is an element of the crime to be proven by the State; and the jury must make a finding of fact as to that issue. See *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987).

In theft cases, it is necessary to consider the application of Neb. Rev. Stat. § 28-510 (Reissue 1985):

> Consolidation of theft offenses. Conduct denominated theft in sections 28-509 to 28-518 constitutes a single offense embracing the separated offenses heretofore known as larceny, embezzlement, false pretense, extortion, blackmail, fraudulent conversion, receiving stolen property, and the like. *An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under sections 28-509 to 28-518, notwithstanding the specification of a different manner in the indictment or information*, subject only to the power of the court to insure fair trial by granting a continuance or other appropriate relief where the conduct of the defense would be prejudiced by lack of fair notice or by surprise.

(Emphasis supplied.)

From the evidence, attention is directed to Neb. Rev. Stat. § 28-512 (Reissue 1985):

> Theft by deception. A person commits theft if he obtains property of another by deception. A person deceives if he intentionally:
>
> (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind; but deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise . . .
>
> . . . .
>
> The word deceive does not include falsity as to matters having no pecuniary significance, or statements unlikely to deceive ordinary persons in the group addressed.

The following statutory definitions found in Neb. Rev. Stat. § 28-509 (Reissue 1985) are relevant:

> (1) Deprive shall mean:

(a) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or

(b) To dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was when the actor obtained it;

. . . .

(3) Movable property shall mean property the location of which can be changed . . . and documents although the rights represented thereby may have no physical location. Immovable property shall mean all other property;

(4) Obtain shall mean:

(a) In relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another . . .

. . . .

(5) Property shall mean anything of value, including real estate, tangible and intangible personal property, contract rights, credit cards, charge plates, or any other instrument which purports to evidence an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer, choses in action and other interests in or claims to wealth . . .

(6) Property of another shall mean property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property . . . .

From the charges in the information, the evidence, and the applicable statutes, the State had the burden to prove beyond a reasonable doubt these elements: (1) Reed took and exercised control over property of another (Marshall); (2) Reed intended to and did obtain the property of another (Marshall) by deception, in that he created or reinforced a false impression of his (Reed's) intention or state of mind; (3) Reed intended to deprive Marshall of the property; and (4) the value of the property was in excess of $1,000.

Much of the proof of those foregoing elements must be found in the circumstantial evidence.

"[C]ircumstantial evidence is sufficient to support a conviction if such evidence and reasonable inferences that may be drawn from the evidence establish defendant's guilt beyond a reasonable doubt." *State v. Hunt*, 224 Neb. 594, 596, 399 N.W.2d 806, 807 (1987). The State is not required to disprove every hypothesis but that of guilt. *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984).

"The intent with which an act is committed is a mental process and may be inferred from the words and acts of the defendant and from the circumstances surrounding the incident." *State v. Thielen*, 216 Neb. 119, 125, 342 N.W.2d 186, 191 (1983); *State v. Schott*, 222 Neb. 456, 384 N.W.2d 620 (1986).

It is the province of the Supreme Court, on appeal from a conviction, to refrain from resolving conflicts in the evidence and to sustain the judgment of conviction if, taking the view most favorable to the State, there is sufficient evidence to support the conviction. *State v. Zellner, ante* p. 272, 422 N.W.2d 96 (1988).

The following evidence and circumstances and their inferences support the proof of the charges in the information and defendant's guilt. Reed told Marshall that he needed $1,750 to purchase siding materials in Omaha so that he could start work the next Monday. There is no evidence that Reed either bought siding materials or delivered any to the Marshall residence. No siding work was performed, and no part of the $1,750 was returned to Marshall. Thereafter, Marshall became concerned about the siding job, his money, and his inability to locate Reed. Marshall reported the facts to the Scotts Bluff County sheriff's office. The sheriff's investigator, Alex Moreno, testified that he could find neither a residence nor a business address in Scottsbluff for Reed. No vehicle was registered in the county for Reed. Reed could not be located. Even his wife, Kim, denied knowing his whereabouts. After a criminal complaint was filed and warrant issued for Reed's arrest, he was not located until the fall of 1985, when he was arrested in Denver, Colorado.

After giving due regard to the caveat in § 28-512(1) that failure to perform a promise, standing alone, shall not be an

inference of intent to deceive, we conclude that the trial judge could find beyond a reasonable doubt that Reed took and exercised control over a $1,750 bank check which was converted into cash, the property of Marshall; that Reed obtained the confidence of Marshall, and he (Reed) created the continuing false impression that he intended to use the $1,750 to buy siding for the Marshall job; that Reed intended to and did obtain that property of Marshall's by deception; that Reed intended to deprive Marshall of such property; that the value of the property was in excess of $1,000; and that Reed was guilty of the felony offense charged in the information. Further, defendant's motion to dismiss made at the close of the State's evidence was properly denied. See *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302 (1987).

In his third assignment, defendant claims reversible error because the trial judge did not make a finding of the value of the property taken as required in Neb. Rev. Stat. § 29-2026.01 (Reissue 1985): "When the indictment charges an offense against the property of another by larceny, embezzlement or obtaining under false pretenses, the *jury*, on conviction, shall ascertain and declare in its *verdict* the value of the property stolen, embezzled, or falsely obtained." (Emphasis supplied.) As further authority, he cites *State v. Scott*, 225 Neb. 146, 403 N.W.2d 351 (1987), holding that the value of the thing must be established by the jury and included in its verdict. This has long been the law in this State. See *Fisher v. State*, 52 Neb. 531, 72 N.W. 954 (1897).

The problem with defendant's claim is that the authorities that he cites apply to cases tried to a jury and where the value is to be included in the jury's verdict; whereas here, defendant waived a jury trial and the trial judge was the trier of the facts. This difference is readily apparent when the purposes of § 29-2026.01 are understood, as they were known to the judge. By statute, crimes are classified between serious and minor offenses, all distinguished by the possible penalties that may be imposed. Neb. Rev. Stat. § 28-105(1) (Reissue 1985) describes six classes of felonies; Neb. Rev. Stat. § 28-106(1) (Reissue 1985) describes seven classes of misdemeanors. Neb. Rev. Stat. § 28-518 (Reissue 1985) grades theft offenses into four different

classes dependent upon the value of the thing (property) involved. For example, theft of property valued at over $1,000 is a Class III felony and theft of property valued at $100 or less is a Class II misdemeanor. In the event of a defendant's conviction in theft cases, the sentencing judge must know the value of the property as a guide to the possible maximum and minimum sentences. In jury trials, the jury must find the value of the property taken and convey that fact to the judge in its verdict. § 29-2026.01. In a theft case where a jury trial has been waived, the value of the property is one of the facts and elements of the crime to be determined by the trial judge, and § 29-2026.01 is not applicable. That is not to say that we discourage trial judges from making such special findings of value.

A recital in a journal entry appearing in the transcript is presumptively true unless it is overcome by an affirmative showing to the contrary in the bill of exceptions. See *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986).

The transcript here shows the judgment, "It is therefore ordered, adjudged and decreed that the defendant is found guilty of the offense contained in the Information." This is more than a general finding of guilt. It made reference to the information, which alleged that the property was $1,750 in cash. By inference, it included a finding that the value of the property was over $1,000, and the State had proved all of the elements of the crime charged. Defendant does not dispute the value of the property. The failure of the trial judge to make a special finding of the value of the property was not error.

The fourth assignment concerns exhibits 1 and 2, which are photocopies of (1) the siding agreement and (2) the $1,750 check; both were identified by witness James Marshall as true and accurate copies of the originals, pursuant to Neb. Rev. Stat. § 27-901 (Reissue 1985). Defendant's objection for insufficient foundation, Neb. Rev. Stat. § 27-1004 (Reissue 1985), was sustained. Thereafter, the originals of both exhibits were made available for defendant's examination and inspection. There was no error in the reception of the exhibits in the absence of a renewed objection and a genuine challenge of the authenticity of the originals. See Neb. Rev. Stat. § 27-1003

(Reissue 1985).

Finally, defendant contends that his sentence was excessive and that it constituted an abuse of discretion on the part of the trial judge. The possible penalties for a Class III felony are a sentence of from 1 to 20 years of confinement, up to a $25,000 fine, or both. There is neither error nor abuse of discretion here, since the sentence, as reduced by 40 days' jail time, was well within the statutory limits. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

The findings, judgment of conviction, and the sentence imposed were a proper performance of the trial judge's duties and functions.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL D. DAIL, APPELLANT.
424 N.W.2d 99

Filed May 27, 1988. No. 87-758.

1. **Indictments and Informations: Motions to Suppress: Courts: Double Jeopardy.** The State may dismiss a charge filed against a defendant in a county court and refile the same charge in the district court after an order of the county court has sustained a motion to suppress evidence, if the defendant has not been placed in jeopardy at the time of the dismissal. Neb. Rev. Stat. § 29-827 (Reissue 1985).
2. **Criminal Law: Police Officers and Sheriffs: Investigative Stops: Probable Cause.** A police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.
3. **Criminal Law: Investigative Stops: Probable Cause.** An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity.
4. **Motions to Suppress: Appeal and Error.** The findings of fact made by a trial court on a motion to suppress will not be overturned on appeal unless clearly wrong.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Barbara Thielen of Taylor, Fabian, Thielen & Thielen, for appellant.

Robert M. Spire, Attorney General, and Yvonne E. Gates, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

After a trial to the court, the defendant was convicted of second offense driving under the influence of alcoholic liquor and was placed on probation for 18 months. Pursuant to Neb. Rev. Stat. § 39-669.07 (Cum. Supp. 1986), he was fined $100, given credit for 1 day's jail time, and sentenced to an additional 1 day in jail, and his driver's license was suspended for 6 months.

The defendant has appealed, and his 14 assignments of error can be consolidated into 8. He alleges that the district court erred in (1) failing to sustain the plea in abatement, quash the direct information, and dismiss the case, and allowing the State to refile the charge, for the reason that a prior valid suppression order had been issued by a county court judge in a court of competent jurisdiction on the identical charge; (2) failing to find that the procedure used pursuant to Neb. Rev. Stat. § 29-827 (Reissue 1985) violated his constitutional right to due process of law; (3) failing to find that the proper remedy for the State was by way of an appeal to the district court for error on the record; (4) admitting the results of the preliminary breath test at the motion to suppress; (5) overruling the motion to suppress; (6) admitting the results of the Intoxilyzer test and the opinion testimony of the arresting officer, because of improper and insufficient foundation; (7) finding there was sufficient evidence to support a finding of guilt; and (8) denying his motion for a new trial. As to the last assigned error, since there is no separate discussion of this error in the appellant's brief, it will not be considered on appeal. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986).

After the complaint had been filed in the county court, the

defendant filed a motion to suppress on the grounds that the arresting officer did not have probable cause to stop the defendant's vehicle or to arrest him and that any evidence obtained subsequent to the illegal stop was tainted and should be excluded at trial. After a hearing on the motion on April 14, 1987, the county court sustained the motion to suppress.

The State then moved for dismissal, pursuant to § 29-827, which provides:

> Where motions to suppress and for the return of seized property are made in courts inferior to the district court in cases involving violations of state laws, the county attorney may give notice to such court that the property in question will be further required as evidence, may then dismiss the action in such court and refile the complaint in the district court. In its order of dismissal the court shall order transfer of the property to the jurisdiction of the district court.

The county court ordered that the complaint be dismissed without prejudice and that any property in evidence be transferred to the district court.

The first issue concerns the effect of the prior suppression order on the State's right to file the charge in the district court and the district court's jurisdiction to consider a new suppression motion without regard to the findings made by the county court. In *State v. Chamley*, 223 Neb. 614, 617, 391 N.W.2d 99, 101 (1986), we held that

> the terms of § 29-827 permit the State to dismiss a charge filed against a defendant in a county court and to refile the same charge in the district court after an order of the county court has sustained a defendant's motion to suppress evidence, provided that defendant has not been placed in jeopardy at the time of the dismissal.

Under Neb. Const. art. I, § 12, jeopardy attaches when a judge, hearing a case without a jury, begins to hear evidence as to the guilt of the defendant. *State v. Chamley, supra.* In this case, as in *Chamley*, the county court had not yet begun to hear evidence as to guilt, but had merely disposed of a pretrial procedural motion. Since jeopardy had not attached when the State dismissed and refiled, the State's actions under § 29-827

were entirely proper. The district court was correct in refusing to sustain the plea in abatement, quash the direct information, and dismiss the case, and was correct in allowing the State to refile.

The defendant next contends that the procedure for refiling a case in district court under § 29-827 violates his constitutional right to due process. He first argues that it is a violation of due process to require a criminal defendant who once establishes a fourth amendment violation to have to repeat the procedure if a case is refiled. He cites *State v. Pope*, 192 Neb. 755, 224 N.W.2d 521 (1974), which held that where the legality of a search or seizure is established at a pretrial motion to suppress, the State is not obligated to relitigate the issue and again prove its legality at trial. In that case this court noted that the purpose of requiring the parties to file motions to suppress before trial is to free the trial court from determining the collateral issue of the legality of the searches during trial, and that purpose would be defeated if the State were again required to prove legality after a favorable ruling at the suppression hearing. The defendant argues that a similar rule should apply when a defendant is successful in establishing the illegality of a police procedure. While this may be true, it has nothing to do with the facts in this case.

The defendant was not required to relitigate the legality of the stop and arrest at trial. The complaint which had been filed in the county court was dismissed and refiled as a direct information in the district court. *Pope, supra*, is inapplicable.

The defendant further argues that his due process rights were violated because the procedure under § 29-827 amounts to "judge-shopping." Brief for Appellant at 32. No authority is cited for this proposition. It has been held that repetitious dismissing and refiling of charges which is designed to harass a defendant and bypass unfavorable evidentiary rulings by trying the case in front of a different judge may rise to the level of a due process violation. See, *People v Vargo*, 139 Mich. App. 573, 362 N.W.2d 840 (1984); *People v Walls*, 117 Mich. App. 691, 324 N.W.2d 136 (1982); *Stockwell v. State*, 98 Idaho 797, 573 P.2d 116 (1977). This case does not fall into that category.

The statutory procedure which the State followed in this case

is merely the method by which the State can obtain an interlocutory review of a ruling on a motion to suppress made in the county court.

Next, the defendant contends that the State's remedy for the unfavorable ruling at the county court suppression hearing is an appeal to the district court, where it must be reviewed for error on the record. The statute does not otherwise provide for an interlocutory appeal to the district court by the State from a suppression order of the county court. Section 29-827 must be read in conjunction with Neb. Rev. Stat. § 29-824 (Reissue 1985), which provides:

> In addition to any other right to appeal, the state shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence in the manner herein provided. Where such motion has been granted in district court, the Attorney General, or the county attorney or prosecuting officer with the consent of the Attorney General, may file his or her application with the Clerk of the Supreme Court asking for a summary review of the order granting the motion.
> . . .

The statute authorizes an interlocutory appeal by the State from the sustaining of a motion to suppress only when the motion is sustained in district court. The only statute regarding an interlocutory review of a motion to suppress in county court is § 29-827.

The defendant, however, relies on two other statutes for his contention that the State does have a right of appeal. Neb. Rev. Stat. § 24-541.01 (Cum. Supp. 1986) provides in part:

> (1) Any party in a civil case and any defendant in a criminal case may appeal from the final judgment or final order of the county court to the district court of the county where the county court is located, except in cases of appeals from proceedings for the termination of parental rights in the county court sitting as a juvenile court. The same right of appeal exists in those cases in which a final judgment or final order was entered by a municipal court prior to July 1, 1985. *In a criminal case, a prosecuting attorney may obtain review by exception proceedings*

pursuant to sections 29-2317 to 29- 2319.
(Emphasis supplied.)

Neb. Rev. Stat. § 29-2317 (Reissue 1985) provides in part:

> (1) A prosecuting attorney, including any county attorney, city attorney, or designated assistant, may take exception to any ruling or decision of the county court made during the prosecution of a cause by presenting to the court a notice of intent to take an appeal to the district court with reference to the rulings or decisions of which complaint is made.

An appeal under these statutes from a suppression order in the county court would not be interlocutory and would be available in many cases only after jeopardy had attached. The State is not restricted to an appeal under § 24-541.01, but may proceed under §§ 29-827 and 29-824.

The defendant contends the district court erred in failing to sustain his motion to suppress because the arresting officer observed no violations of law prior to stopping his vehicle, and the stop was an unreasonable seizure under the fourth amendment.

In *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987), we considered the constitutionality of an officer's stopping a vehicle without probable cause to make an arrest. Therein, we stated, " '[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest.' " 226 Neb. at 662, 413 N.W.2d at 918-19, quoting from *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An investigatory stop must be justified by an objective manifestation, based upon the totality of the circumstances, that the person stopped has been, is, or is about to be engaged in criminal activity. *State v. Ege*, 227 Neb. 824, 420 N.W.2d 305 (1988); *State v. Thomte, supra*. In *Thomte* we held that "a vehicle weaving in its own lane of traffic provides an articulable basis or reasonable suspicion for stopping a vehicle for investigation regarding the driver's condition in operating the weaving vehicle." 226 Neb. at 663, 413 N.W.2d at 919.

In this case the arresting officer was on routine patrol,

driving his cruiser east on Harlan Drive in Bellevue, Nebraska. At approximately 4:20 a.m. the officer observed a vehicle two or three car lengths in front of him which was also driving east. At this location Harlan Drive is a four-lane street, with a raised cement island separating the two eastbound lanes from the two westbound lanes. The two traffic lanes on either side of the cement island are separated by white painted lines. Both the officer and the vehicle he was observing were traveling in the inside lane closest to the cement island. The officer observed the vehicle move to the left toward the cement island, almost touching the center island with its driver's-side tires. The vehicle then moved to the right toward the painted lane line and drove on top of the lane line with its passenger's-side tires. The vehicle moved back to the left, again almost coming in contact with the cement island, then moved to the right, again driving on top of the white painted lines. At no time did the vehicle come in contact with the center island, and it at no time crossed the lane line into the other eastbound lane. The officer testified that the vehicle did not move from left to right rapidly, but rather it was a gradual drift from side to side. He continued to follow the vehicle for approximately 1 mile, during which time it made a proper lane change to the outside eastbound lane and then turned south onto Galvin Road. While traveling south on Galvin Road, he observed the vehicle to weave slightly within its own traffic lane. Based on these observations, the officer stopped the vehicle. This evidence was sufficient to support a finding that the investigatory stop was justified.

After stopping the vehicle, the officer observed that the defendant's eyes were bloodshot and watery, and smelled an odor of alcohol. After receiving a negative response from the defendant as to whether he suffered from any physical disabilities or impairments, the officer had the defendant perform a series of standardized field sobriety tests. Apparently, the defendant failed at least four of the tests. The officer then administered a preliminary breath test, which the defendant failed. The defendant was arrested and taken to the Bellevue Police Station, where the implied consent advisement was read to him and which he acknowledged by his signature. The defendant then submitted to a breath test on the Intoxilyzer

Model 4011AS machine, which indicated a blood alcohol content of .195 percent.

The defendant contends that the district court erred in admitting into evidence the results of the preliminary breath test during the suppression hearing for the reason that insufficient foundation had been established. Before the results of a preliminary breath test may be received, foundation evidence must establish that the requirements of Neb. Rev. Stat. § 39-669.11 (Reissue 1984) have been met, including the requirements that the method of performing the preliminary test has been approved by the Nebraska Department of Health and that the testing officer possesses a valid permit issued by the Department of Health for such purpose. *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984); *State v. Gerber*, 206 Neb. 75, 291 N.W.2d 403 (1980). Neb. Admin. Code tit. 177, ch. 1, § 008.05 (1986), requires that the operator perform all tests according to the checklist technique as found in attachment 4 or attachment 14.

Prior to administering the preliminary breath test, the operator is required to verify that maintenance, repair, and calibration have been performed for the testing device by reviewing the maintenance record.

The actual checklist used by the arresting officer is not contained in the record. However, the officer testified that he complied with the instructions contained in that checklist prior to administering the preliminary breath test. The officer holds a Class B permit, which permits him to administer such a test.

The findings of fact made by a trial court on a motion to suppress will not be overturned on appeal unless clearly wrong. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987), *cert. denied* ____ U.S. ____, 108 S. Ct. 180, 98 L. Ed. 2d 133 (1987); *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

The district court did not err in failing to sustain the motion to suppress.

The sixth assignment of error is that the district court erred in admitting into evidence the results of the Intoxilyzer test and the opinion testimony of the officer because of improper and insufficient foundation.

There are four foundational requirements that must be met

before the State may offer into evidence the results of a breath test for the purpose of establishing that a defendant was operating a motor vehicle while having ten-hundredths of 1 percent or more by weight of alcohol in his or her body fluid. The State must prove:

> (1) That the testing device or equipment was in proper working order at the time of conducting the test; (2) That the person giving and interpreting the test was properly qualified and held a valid permit issued by the Nebraska Department of Health at the time of conducting the test; (3) That the test was properly conducted in accordance with a method currently approved by the Nebraska Department of Health; and (4) That there was compliance with all statutory requirements.

State v. Dush, 214 Neb. 51, 53, 332 N.W.2d 679, 681-82 (1983); *State v. Bullock*, 223 Neb. 182, 388 N.W.2d 505 (1986); *State v. Gerber, supra.*

Although it is not specifically stated in his brief, the defendant apparently is alleging that the third foundational requirement was not met. Specifically, he argues that the State failed to prove that the testing device was checked within 190 days prior to the analysis and that the State failed to establish that the officer verified that the maintenance and calibration had been performed, as required by the checklist prior to the administration of each test.

Neb. Admin. Code tit. 177, ch. 1 (1986) adopted by the Nebraska Department of Health, provides at § 007.04A3 that an appropriate method for testing the breath with an Intoxilyzer Model 4011AS is found in attachment 3. This checklist form was used by the officer in administering the test and was introduced into evidence. The checklist provides that, as a preliminary step, the officer must verify that maintenance, repair, and calibration have been performed for the Intoxilyzer Model 4011AS as prescribed in § 007.06 by reviewing the maintenance record. Contrary to the defendant's assertion, the record shows that the officer performed the preliminary step and verified that maintenance and calibration had been performed. The officer testified that he checked the maintenance log and that he indicated his compliance with that

preliminary requirement by checking the appropriate box. The checklist was received in evidence and shows that box was checked.

In addition, the maintenance log itself was also received. The log establishes that the 40-day check required under § 007.06F1 was conducted on November 18, 1986, and that the 190-day check, as required under § 007.06B, was conducted on August 6, 1986. Intoxilyzer maintenance officer Raymond D. Milroy testified that he is one of the persons responsible for conducting both the 40-day test and the 190-day test, and described each of these tests. He further testified that he personally conducted the tests required by title 177, which are outlined in the maintenance log, and that the results of the tests he performed indicated that everything was operating properly. There was, therefore, sufficient foundation evidence to show that the test was conducted in accordance with a method currently approved by the Nebraska Department of Health, and the results of the Intoxilyzer test were properly admitted.

The defendant's contention that there was insufficient foundation for the arresting officer's opinion testimony that the defendant was under the influence of alcohol is without merit. The officer stated this conclusion after testifying that he had observed the defendant's car to be weaving, the defendant's eyes were bloodshot and watery, the defendant's speech was slurred, he smelled an odor of alcohol, and the defendant failed most of the standardized field sobriety tests. Further, it had been shown that the officer had been employed by the Bellevue Police Department for over 6 years, that he had received training on the apprehension and detection of intoxicated drivers, that he had made approximately 100 to 150 DWI stops, and that he has had occasion to observe the effects of alcohol on friends, relatives, and neighbors. Based on these facts, there was sufficient foundation for the officer to testify that he believed the appellant to be intoxicated.

Finally, the appellant contends that there was insufficient evidence to support a finding of guilt. As the foregoing facts show, this contention is without merit. It is not the province of this court to pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such

matters are for the finder of fact, and the finding of guilty must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Hook, ante* p. 138, 421 N.W.2d 456 (1988). The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE C. ROWE, APPELLANT.
423 N.W.2d 782

Filed May 27, 1988. No. 87-777.

1. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.
2. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the challenges related to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to defendant because of their shared race.
3. _____: _____: _____: _____. By asking the State to articulate its reason for questioned strikes, a trial court implicitly finds a criminal defendant has met her or his burden of proving a prima facie case of discrimination in the selection of a jury.
4. **Trial: Juries: Discrimination: Appeal and Error.** The trial court's findings that there was no discrimination in the selection of a jury are not to be reversed on appeal unless clearly erroneous.
5. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Nebraska Supreme Court will uphold a trial court's findings of fact unless those findings are clearly wrong.
6. **Miranda Rights: Waiver.** The test for determining whether a defendant acted

intelligently regarding any *Miranda* right is whether, at the time of the waiver, the defendant possessed the capacity to understand and act in response to the warnings given by an interrogating officer.

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

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley, for appellant.

Robert M. Spire, Attorney General, and Laura L. Freppel, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant-appellant, Willie C. Rowe, a black man, was charged in one case with second degree murder in violation of Neb. Rev. Stat. § 28-304 (Reissue 1985), and with the use of a knife to commit that felony in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1985). As a result of the same incident, but in a separate case, Rowe was charged with robbery in violation of Neb. Rev. Stat. § 28-324 (Reissue 1985), and with the use of a knife to commit that felony. The two cases were consolidated and thereafter tried to a jury, which found Rowe guilty of all four charges. He was so adjudged and thereafter sentenced on each conviction. In this appeal, Rowe asserts the trial court erred in failing to (1) find the State impermissibly exercised its peremptory challenges so as to exclude members of his race from the jury and (2) suppress certain statements he made to the police. Finding no merit in either assignment, we affirm.

At approximately 4:15 a.m. on September 10, 1986, Omaha Police Officer Timothy Cavanaugh responded to a police call in the area of 25th Avenue and Leavenworth Street in Omaha, where he found a large white man, later identified as John Bevins, lying on the ground in a parking lot. The victim was still alive, but he was "saturated with blood," and one of his eyes was bulging out of its socket. He later died as a result of the blood lost from the 66 knife wounds inflicted upon him.

Shortly thereafter, Omaha Police Officer Michael Piernicky responded to a radio broadcast which provided the description

of a possible suspect. As the officer reached the area of 25th Avenue and Marcy Street, he was flagged down by a man who identified himself as Jon Duin and as the one who had placed the emergency call regarding a stabbing in the area. Duin then volunteered the information that the person who might have done the stabbing was known to him as "Willie" and that Willie might live at apartment 8 of a South 24th Street address. Omaha Police Officer Lori Glover then proceeded to the apartment address given by Duin, where she was met by two other officers. Because the building was the site of frequent disturbances, a tenant had previously given Glover a key to the outside security door. The three officers entered the building and proceeded to knock on the door of apartment 8. The door was answered by Bertha Thomas. When first asked if Willie was there, Thomas responded she did not know a Willie. All three officers testified that they could hear noises coming from inside the apartment. Thomas then stated she had a son named Willie but that he was in California. Some further conversation took place between Thomas and the officers, all amounting to a denial by Thomas that Willie was inside. Finally, another noise came from inside the apartment, Thomas looked nervously over her shoulder into the apartment, and then "stepped back." The officers thereupon entered the apartment, where they found Rowe, who first misidentified himself, lying on the floor. He was bloody and was wearing a bloody T-shirt. A search uncovered a bloody gold wristwatch with a broken band still wet with blood, $37 in bloody cash, a bloody knife, some bloody traveler's checks, and other papers belonging to the victim. At the time of Cavanaugh's search at the scene, he saw no watch on the victim but found a check stub and some traveler's check receipts in the victim's pockets.

At trial, Duin testified that on the evening of the killing, he had been drinking at a bar on 24th and Leavenworth Streets, along with his roommate, John Klahn, and the victim. Also at the bar were Rowe and his girlfriend, a prostitute known as Lukmilla or Vanessa Brown. Both Rowe and Brown were acquaintances of Duin's. At 1 a.m., the five proceeded to Duin's house, which was nearby, at 25th and Marcy. They sat on the porch, drank beer which had been purchased at the bar, and

smoked marijuana.

At approximately 3:30 a.m., the conversation between Rowe, Brown, and the victim turned to sex, and a deal was struck whereunder Brown would perform a sexual act with the victim for a $20 consideration. Duin, Brown, the victim, and Rowe then began to walk toward Leavenworth Street. At some point, Brown and the victim left the others and walked toward a secluded area. Rowe and Duin kept traveling toward Leavenworth Street. Shortly thereafter, screams from a "hysterical" Brown were heard coming from the secluded area. Although the evidence of the sequence of events which followed is unclear, it appears Rowe then chased the victim toward Leavenworth Street.

After assuring himself that Brown was not injured, Duin walked toward 25th and Leavenworth. Duin testified that Rowe came around a corner, where he observed that Rowe was covered with blood and was holding a knife. Rowe grabbed Duin, started running, and said, "We got to get out of here" and, later, "I had to waste him." Because Duin had a wooden leg and could not keep up with Rowe, they split up, whereupon Duin placed the call which brought the police to the scene.

After being arrested and given the *Miranda* warnings, Rowe was taken to the police station. At the station Rowe was again given the *Miranda* warnings. While Glover was completing reports and before formal questioning began, Rowe said to Glover that a homosexual had started a fight with him after the homosexual tried to get his (Rowe's) girl. Rowe further said the homosexual had pulled a knife on him and that he took it away to defend his girl.

Defendant was later taken to a room for questioning by Omaha Police Officer James Wilson. Using an Omaha police rights advisory form, Wilson again advised Rowe of his *Miranda* rights, asking whether Rowe understood each right. In response to whether he, knowing his rights in the matter, was willing to make a statement, Rowe replied, "Yes." Rowe then related that he was in the area of 22d and Jones Streets, heard his girlfriend screaming, came around a corner, and was confronted by an unknown individual with a knife, whom Rowe disarmed and stabbed. Upon being told by Wilson that

his version of the occurrence differed from that of others, Rowe responded, "[Y]ou got me, I'll tell you the truth." This time, Rowe related the events of drinking at the bar and at Duin's house; leaving Duin's house with Duin, Brown, and the victim; the prostitution deal; and of hearing Brown's screams. Rowe also stated that upon chasing and catching the victim, the victim hit Rowe in the head with his fist, so, because Rowe thought the victim was too strong, Rowe repeatedly stabbed the victim. The victim fell to the ground, and Rowe took his wallet because he did not think the victim had paid Brown. Rowe gave a taped statement to the police reflecting the last-mentioned version of the killing.

At trial, Rowe testified that he chased the victim to the area where the victim was found, and because the victim hit him in the head, he stabbed the victim to defend himself. Rowe took the wallet to confuse the police as to the identity of the victim, but denied taking the victim's watch.

Rowe's first assignment of error rests on the overruling of his motion asking that the trial court order a mistrial or, in the alternative, require that the State withdraw its peremptory challenges to certain of the black venirepersons. Rowe points out the difference in the races of the defendant and victim; that of the 36 venirepersons passed for cause, 6 were black; and that the prosecutor peremptorily struck 5 of those 6.

Although a criminal defendant has no right to a petit jury composed in whole or in part of persons of her or his own race, *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1879), the equal protection clause of U.S. Const. amend. XIV bars a prosecutor from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). In so holding, *Batson* overturned the evidentiary standard contained in *Swain v. Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), which required a showing of systematic exclusion of black jurors over time, and established a new multistep standard of proof for showing discrimination in the jury selection process. In order to make a prima facie case of

discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the challenges related to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to defendant because of their shared race. *Batson v. Kentucky, supra*; *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987); *State v. Threet*, 225 Neb. 682, 407 N.W.2d 766 (1987).

In the case before us, the prosecutor explained that he wanted to remove women jurors because prostitution was involved. He was of the opinion that women are more sensitive to the problem of prostitution than men and would therefore be distracted from the murder issue. Of the 12 venirepersons stricken by the State, 9 were women. Of the black venirepersons stricken, three were women. The prosecutor further explained that gender alone accounted for his peremptory challenge of the first black woman he struck from the venire. The second black woman was stricken not only because of her sex but also because she knew one of the police officers endorsed as a witness in the case. The third was stricken not only because she is a woman but also because, as a Job Service employee, she was engaged in a form of social work. It was the prosecutor's belief that social workers tend to blame everyone but a defendant for whatever deficiencies a defendant's conduct may display. Moreover, he detected that this woman responded mildly to his questions but "cheerfully and very favorably" to those of defense counsel.

Of the two black men peremptorily challenged, one was stricken because, although he said he could keep an open mind

and decide the defendant's guilt or innocence based on the evidence presented at trial, he had nonetheless heard of the incident through "street talk," and because he was vague in discussing the sources of his knowledge. The second black man was stricken because he was single and worked at the Omaha Playboy Club. It was the prosecutor's impression that irrespective of race, people working in such environments do not make desirable jurors from the State's point of view. In addition, the prosecutor pointed out that he also struck another young, single venireperson because he felt young, single persons do not have much at stake in the community.

Rowe urges the district court erred by not analyzing the prosecutor's voir dire examination to determine whether it was such as to raise an inference of a discriminatory purpose, and to determine whether the prosecutor in fact discriminated against black venirepersons in the jury selection process.

The first argument relates to whether Rowe made the requisite prima facie showing of a discriminatory intent. It is, however, unnecessary to specifically determine whether Rowe met his prima facie burden, for in *State v. Walton, supra*, we held that if the trial court does not state on the record that the defendant met her or his burden of proving a prima facie case, it does so implicitly by asking the State to articulate its reason for the questioned strikes. Thus, we must treat this matter as if the trial court concluded that Rowe established a prima facie case of discrimination in the jury selection process. The question thus becomes whether the record supports the trial court's finding that the State provided adequate neutral explanations for its actions. In this connection Rowe in effect argues that the neutral reasons given by the prosecutor are not worthy of belief. He contends the facts that the prosecutor asked no individual questions during voir dire of three of the black venirepersons he struck, that he struck another who swore he could decide the case on the evidence notwithstanding the fact he had heard "street talk," and that he struck still another who was asked only general questions establish the pretextual nature of the stated reasons.

In conducting our review of this phase of the matter, we must bear in mind that the trial court's determination as to whether a

defendant has established purposeful discrimination in the selection of a jury is a finding of fact entitled to appropriate deference from a reviewing court. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Indeed, we have held that such findings are not to be reversed on appeal unless clearly erroneous. *State v. Walton*, 227 Neb. 559, 418 N.W.2d 589 (1988); *State v. Alvarado*, 226 Neb. 195, 410 N.W.2d 118 (1987). While we agree with defendant's contention that in making the determination the entire voir dire should be considered, we cannot agree with his suggestion that only the information elicited as a result of the prosecutor's inquiries is important. It matters not from what source the prosecutor obtains the information on which she or he acts; the prosecutor may rely on the questions asked by the court or defendant, as well as on the prosecutor's own inquiries. The question is whether the total record supports a finding that the jury selection process was not discriminatory.

The language of a California intermediate appellate court is helpful in providing an understanding as to why such deference to the trial court is particularly appropriate in the context of evaluating the bases of a peremptory challenge:

> Jury selection is, in itself, an inexact science, based as often on hunches and inferences about human behavior as on hard facts. By their very nature, peremptory challenges particularly lend themselves to the application of popular psychology, the consideration of unarticulated values, and the varied experiences—both at trial and in life—of the attorneys who use them. As a result, a decision to exercise a peremptory challenge may be based on factors that an appellate court cannot see when reviewing a cold record.
>
> In practical terms, observing potential jurors may reveal as much about them as counsel may learn from listening to them. As if to underscore the importance of the visual aspect of jury selection, the legal term used to describe this process—"voir dire"—is itself a combination of two French verbs meaning "to see" and "to say." (See Cassell's French-English Dict. (1982) pp. 259-260, 757.) The importance of observation during voir dire extends to court and counsel alike. During voir dire, the trial judge

> has had an opportunity to observe counsel's behavior as well as the demeanor of prospective jurors.

People v. King, 195 Cal. App. 3d 923, 932, 241 Cal. Rptr. 189, 194 (1987).

In the most recent case of *State v. Walton, supra,* we affirmed the trial court's finding that the prosecutor's peremptory challenges were not racially motivated. The prosecutor explained that in using three of the State's six challenges to eliminate from the jury persons who shared the defendant's black race, he struck one because she was unemployed, single, lived at a particular address, and did not have community ties showing the stability sought by the State. He struck another because she was possibly related to an individual previously prosecuted by the prosecutor's office. He struck the third because he was married to a social services worker, in connection with whom the trial judge expressed the view that people working in that field have a tendency to place blame for one's wrongful conduct on others.

In *State v. Alvarado, supra,* we held that merely showing defendant had a Hispanic surname did not establish he was in fact a member of a cognizable racial group, and, thus, defendant failed to prove a prima facie case of discrimination in the jury selection process. We also observed that if the venireperson whose elimination was challenged shared the defendant's race, the prosecutor's explanations that she was stricken because she was young and he feared she might identify with some of the young defense witnesses expected to appear at trial, and because of the unavailability of a juror background questionnaire for her, were adequate to support the trial court's finding that she had not been eliminated for a racial reason.

In *State v. Threet,* 225 Neb. 682, 407 N.W.2d 766 (1987), we held the prosecutor's explanation that he struck the two black venirepersons because one knew about the case and her father had lived near the defendant and the other knew one of the potential witnesses adequately supported the trial court's finding that the strikes were not racially motivated.

We find nothing in this record which compels a conclusion that the prosecutor's neutral reasons were pretextual and, thus, that the trial court's finding he did not discriminate against

blacks in the jury selection process is clearly wrong. Accordingly, the first assignment of error is without merit.

In his second and last assignment of error, Rowe claims the trial court erred in not suppressing the statements he made to the police because the *Miranda* warnings he was given were inadequate.

As noted earlier, the record reveals that Rowe was given the *Miranda* warnings on three occasions. On the last occasion he was read the following six questions verbatim:

> I would like to advise you that I am a Police Officer. Do you understand that?
>
> You have a right to remain silent and not make any statements or answer any of my questions. Do you understand that?
>
> Anything that you may say can be and will be used against you in court. Do you understand that?
>
> You have the right to consult with a lawyer and have the lawyer with you during the questioning. Do you understand that?
>
> If you cannot afford a lawyer, the court will appoint one to represent you. Do you fully understand that?
>
> Knowing your rights in this matter, are you willing to make a statement to me now?

On that occasion Rowe answered each of the foregoing questions affirmatively, as he had to similar questions on the two earlier occasions.

Nonetheless, Rowe claims his understanding of his rights was deficient. While he asserts this in part was so because he was not told he could stop the questioning at any time, his argument focuses mainly on his allegedly incomplete understanding of his right to an attorney. In support of this claim Rowe offers the following colloquy between himself and his attorney at the suppression hearing:

> Q. All right. Another right says: "If you can't afford a lawyer, the Court will appoint one to represent you." Now, you knew you couldn't afford a lawyer; right?
>
> A. Yes.
>
> Q. Well, when they tell you that if you can't afford a lawyer and the Court will appoint one to represent you,

what does that mean?

A. Well, I thought it meant that if I couldn't afford a lawyer, well, I can't afford one, but the Court will appoint one to me. I thought I wouldn't get one until I went to court.

Q. Right. And that's what it says, isn't it?

A. Yes.

Q. When you go to court; true?

A. True.

Q. So what this meant to you was that if you don't have enough money, you have to wait until you get to court, and then the judge will say, "Okay, you can have a lawyer"; right?

A. Right.

Q. So did you feel you could have a lawyer with you down there at that time if you couldn't afford one?

A. No, I didn't.

Rowe argues that "the impression left in his mind is precisely that which is desired by the police interrogators, and that is to confuse the indigent defendant in such a way as to lead him to believe he will not get an attorney until he goes to court." Brief for Appellant at 11.

Before we go further in our analysis of this issue, it is well to remind ourselves that in determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly wrong. *State v. Gibson, ante* p. 455, 422 N.W.2d 570 (1988); *State v. Brown,* 225 Neb. 418, 405 N.W.2d 600 (1987). See, also, *State v. Nash, ante* p. 69, 421 N.W.2d 41 (1988).

In determining that the defendant's mistaken belief that a custodial oral statement would not be admissible in evidence did not render his waiver of the right to remain silent unintelligent, we observed that the test for determining whether a defendant acted intelligently regarding any *Miranda* right is whether, at the time of the waiver, the defendant possessed the capacity to understand and act in response to the warnings given by an interrogating officer. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986).

The evidence is more than ample to support the district

court's implicit findings that at the relevant time Rowe did indeed have the requisite capacity to understand and act in response to the warnings, and was not misled. As he was being transported to the police station, he threatened to sue the police for arresting the wrong person, stating that he would press charges against them if they had the "wrong guy." He tried to conceal the crime by removing the victim's wallet, and to exculpate himself by misstating his identity when first confronting the arresting officers. In addition, he gave three conflicting stories in an effort to fit what the police knew from others. Moreover, he had close association with the "street people" of his area, including his prostitute girlfriend. And he appeared coherent as he was being questioned. His coaxed trial testimony regarding his understanding does not overcome the circumstances surrounding his statements.

Rowe's heavy reliance on *State of South Dakota v. Long*, 465 F.2d 65 (8th Cir. 1972), in urging a contrary conclusion is misplaced. Therein, the interrogating officer had developed a mutual, trusting relationship with Long which continued through the interrogation. Although the sheriff advised Long he had the right to an attorney, Long was not told that if he could not afford an attorney, one would be appointed for him prior to questioning. Thus, the court concluded Long's statements were inadmissible.

However, the *Long* circumstances are not the circumstances in this case. Although Rowe was not told he could stop talking at any time, he was informed of his right to a court-appointed attorney not once but three times. Rowe's second and last assignment of error is as devoid of merit as was his first.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

G. RONALD AMES AND CHERIE A. AMES, HUSBAND AND WIFE, APPELLEES, V. GEORGE VICTOR CORPORATION, A NEBRASKA CORPORATION, APPELLANT.

424 N.W.2d 106

Filed June 3, 1988. No. 85-874.

1. **Equity: Appeal and Error.** On review of an equity action, this court reaches its conclusion independent of the trial court, subject to the rule that we will consider, and may give weight to the fact that the trial court observed the witnesses and accepted one factual version over another.
2. **Leases: Contracts.** Where neither an executed lease nor the facts and circumstances surrounding the lease are in dispute, construction of the lease contract is a question of law.
3. **Appeal and Error.** With regard to a question of law, this court has an obligation to reach its conclusion independent of the trial court's action.
4. **Leases: Contracts.** The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed as modified.

Otto H. Wellensiek of Wellensiek, Rehmeier & Kelch, for appellant.

E. Dean Hascall of Hascall, Jungers & Garvey, for appellees.

BOSLAUGH, CAPORALE, and GRANT, JJ., and RIST and CLARK, D. JJ.

GRANT, J.

Defendant, George Victor Corporation, a Nebraska corporation, appeals from a declaratory judgment of the district court for Sarpy County. In the district court, plaintiff G. Ronald Ames filed a declaratory judgment action requesting the court to construe a written lease between the parties and to define the rights and obligations of the parties under the lease. Defendant filed a cross-petition requesting the court to reform the lease to reflect defendant's interpretation of the lease. The court reformed the lease in three aspects, as set out below, and construed the lease. In this appeal defendant objects to the court's failure to reform the lease as defendant requested and objects to the trial court's construction of the lease payment escalation clause. We affirm as modified.

The record shows the following. On February 18, 1974, defendant leased the real estate which is the subject of this action to Hawaiian Village Partnership, which thereafter became Hawaiian Village, Inc., also a Nebraska corporation. Hawaiian Village, Inc., subsequently subdivided and developed this land into a lakefront residential community named Hawaiian Village, located in Sarpy County. On July 28, 1978, one of the plaintiffs, Ronald Ames, and his wife at that time, Susan L. Ames, executed a lot lease with Hawaiian Village, Inc., for Lot 2 in the Hawaiian Village development. The initial term of this lease was 60 years and 6 months, with an option to extend for an additional 35 years. After executing the lease agreement, Ronald Ames and Susan Ames built a home on Lot 2. The marriage between Ronald Ames and Susan Ames was dissolved, and Ronald Ames was awarded the Lot 2 lease. On September 7, 1982, Susan Ames conveyed her interest in Lot 2 by quitclaim deed to Ronald Ames. Ronald Ames later remarried, and on March 18, 1983, conveyed Lot 2 by quitclaim deed to himself and his wife Cherie A. Ames.

The lease agreement executed between Hawaiian Village, Inc., lessor, and Ronald Ames and Susan Ames, lessees, provided for an initial yearly rent of $500. The transaction was closed on July 28, 1978, and the annual rental was prorated for 338 days in the amount of $463. This amount covered the period up to July 1, 1979.

On May 22, 1984, Hawaiian Village, Inc., assigned all of its leasehold interest in the entire Hawaiian Village subdivision back to the owner, defendant George Victor Corporation.

At issue in this case is the following paragraph from the lot lease agreement, particularly that part which sets forth the amount and timing of the lease payment adjustments. The district court reformed the paragraph by deleting two words (shown in the following paragraph with a line through the deleted words) and substituting two other words (shown in brackets), and by adding the phrase "all-items" before "average of the Consumer Price Index." These changes are not at issue in this appeal. The paragraph in question provides:

> In consideration of the leasing of said lot, or lots, Lessee hereby covenants to pay the sum of $7,500.00, plus all

special assessments levied against the captioned lot and a yearly annual lot rent lease ~~prior~~ [price] of $500.00 per year, per lot, to be made on or before the 1st day of July, in each year during the term of this lease, for the succeeding year in advance, said payment to be made to Lessor or its assigns, as may be designated from time to time by the Lessor. It is further agreed that after any extension thereof ~~the~~ [or] expiration of a period of five (5) years and after each five-year period thereafter, during the term of this lease, the yearly lease payment set forth above shall be increased or decreased in an amount directly proportionate to the increase or decrease of the [all-items] *average* of the Consumer Price Index published by the Bureau of Labor Statistics of the United States over the five-year period *using the base for the first year of each five-year period*. The base for December, 1973, being 138.5. In further consideration of said leasing, Lessee agrees to abide by the terms of this Agreement hereinafter set out.

(Emphasis supplied.)

The trial court determined: "The word 'average' [emphasized above] . . . modifies 'Consumer Price Index . . .' and not '. . . over the five year period . . .' The word 'average' means 'all items average'. The language should read '. . . of the 'all- items average' of the Consumer Price Index. . . ."

In its ruling, the district court reformed the above paragraph as set out above. The court also held that after these changes, the clause provided that "the amount of lease payment be adjusted each five years during the term of the lease."

The trial court further found that the lease between plaintiff and Hawaiian Village, Inc., commenced July 1, 1978; that the December 1978 Consumer Price Index (CPI) was 202.9; that the December 1978 CPI is the base-year CPI, since it is the first year of the 5-year period; that "[t]he fifth year of Plaintiff's lease expired during 1983"; and that the December 1983 CPI was 303.5. This, the court found, resulted in the computation for the amount of the annual base payment for the 5 years commencing July 1, 1984, being $500 times (303.5 divided by 202.9) equals $747.91. This calculation increases the lease

payment, as required in the lease agreement, "in an amount directly proportionate to the increase or decrease of . . . the Consumer Price Index."

Consistent with its first calculation, the court further found that "[i]n 1989 the adjustment will be computed as follows: $500.00 × (1988 all items C.P.I. ÷ 303.5)."

Hawaiian Village, Inc., pursuant to its interpretation of the lot lease agreement, and prior to its assignment of the lease to defendant George Victor Corporation, increased plaintiff's lease payment beginning July 1, 1979, to $730. This increase was based on the belief of Hawaiian Village that plaintiff's base year for purposes of lease payment increases began July 1, 1974 (with a December 1973 CPI base of 138.5), making the 5-year anniversary July 1, 1979. Approximately 5 years later, as what defendant believed was the second 5-year anniversary approached, defendant notified plaintiffs that their lease payments would be increased from $730 to $1,093, effective July 1, 1984. Plaintiffs tendered payment of $500 as lot rental to defendant. This tender was refused. Subsequently, plaintiff filed this action and deposited $500 with the court. Plaintiff later deposited an additional $500 for the lease year beginning July 1, 1985.

On appeal to this court, defendant assigns as error: (1) The trial court erred in finding there was no party plaintiff defect; (2) the court erred in refusing the admission of parol evidence to reform the lease; (3) the court erred in finding the first 5-year period commenced on the date of the lease between plaintiff and Hawaiian Village, Inc., rather than July 1, 1974; (4) the court erred in computation of the rental for the reason it is not in conformity with its findings; (5) the court erred in not reforming the lease to the agreement made by the parties prior to execution of the lease; and (6) the court erred in charging the excess payments made to Hawaiian Village, Inc., to the appellant herein.

From plaintiffs' point of view, this is a declaratory judgment action seeking the construction of a lease, and defendant has presented an action to reform a lease. The scope of our review in this case is de novo on the record. With regard to the construction of the lease where neither the executed lease nor

the facts and circumstances surrounding the lease are in dispute, construction of the lease contract is a question of law. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986); *Lueder Constr. Co. v. Lincoln Electric Sys., post* p. 707, 424 N.W.2d 126 (1988). With regard to a question of law, this court has an obligation to reach its conclusion independent of the trial court's action. *Boisen v. Petersen Flying Serv., supra.*

Reformation of a contract is an equity action. *Parry v. State Farm Mut. Auto. Ins. Co.*, 191 Neb. 628, 216 N.W.2d 875 (1974). On review of an equity action, this court reaches its conclusion independent of the trial court, subject to the rule that we will consider, and may give weight to, the fact that the trial court observed the witnesses and accepted one factual version over another. *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988). In this case, the dispute in the evidence revolved primarily around defendant's efforts to reform the lease.

Defendant's first assignment of error alleges that there was a party plaintiff defect because Cherie Ames, Ronald Ames' wife at the time of filing the petition herein, was a joint tenant and was not made a party to the action for declaratory judgment. This contention is without merit. The record shows that after defendant's motion to dismiss plaintiff Ronald Ames' petition for the alleged party plaintiff defect, there was discussion among the trial court and counsel for both parties. After this discussion, the parties stipulated that Cherie Ames be made a party insofar as her spousal interest was concerned. This stipulation was accepted by the trial court. Cherie Ames was properly made a party to this action. We hold the trial court did not err in determining there was no defect in parties plaintiff.

Defendant's second assignment of error sets out that the trial court erred in refusing the admission of parol evidence to reform the lease. We first note that the trial court did admit parol evidence in the court's reformation of the lease agreement in the three respects set out above. Both parties agreed that this reformation was proper. The changes make the sentences read so they are intelligible.

With respect to the other reformation requested by

defendant, the defendant sought to change the second sentence of the fourth paragraph of the lease, as set out above, to read:

> IT is further agreed that after the expiration of a period of five years after July 1, 1974, and after each five year period thereafter during the term of this lease, the yearly lease payments set forth above shall be increased or decreased in an amount directly proportionate to the increase or decrease of the average Consumer Price Index
> . . . .

We have held:

> The right of reformation presupposes that the instrument does not express the true intent of the parties and the purpose of reformation is to make an erroneous instrument express the real agreement. If the parties have not come to a complete mutual understanding of all the essential terms of the bargain, there is no standard to which the writing can be conformed.

Waite v. Salestrom, 201 Neb. 224, 229, 266 N.W.2d 908, 912 (1978).

Reforming the contract in the manner suggested by defendant might well reflect what defendant wishes the lease stated, but the suggested language does not reflect the terms of the lease plaintiff signed. No mistake on the part of plaintiff was made. The lease, as reformed, clearly states that plaintiff is to pay an annual lot lease rent for 5 years and that after the "expiration of a period of five (5) years . . . the yearly lease payment set forth above shall be increased or decreased . . . ." The trial court properly held parol evidence was not admissible to permit a change in the agreed-upon lot lease agreement in the respects sought by defendant.

The third, fourth, and fifth assignments of error all involve the trial court's construction of the lease agreement and will be discussed together.

Both parties agree that the lease provides for a lease payment adjustment every 5 years. The parties disagree, however, as to when the adjustment is to be made. The crux of this appeal is the determination of the date on which the first 5-year period began. Defendant argues that the first 5-year period must be determined to begin July 1, 1974.

Plaintiffs argue, as held by the trial court, that the first 5-year period began July 1, 1978. A purchase agreement to lease the lot was signed by plaintiff on July 4, 1978. This lot lease was signed by plaintiff on July 28, 1978. The changes which the trial court made, as set out above, do not control this issue. Changing of the word "the" to "or" simply clarifies the point that the lease payment is to be adjusted every 5 years. Neither party disputes this.

After supplying the words necessary to reform the contract to reflect the changes the parties have agreed to, the court determined no further reformation was necessary and construed the lease agreement as written. We agree with the trial court and hold that the lease agreement expressly defines the initial date and CPI to be used when the lease provides that the calculation is to be made by "using the base for the first year of each five-year period." In the lot lease in question, we hold the first year of the first 5-year period runs from July 1, 1978, to June 30, 1979, and that the first year of the second 5-year period runs from July 1, 1983, to June 30, 1984.

Defendant's sixth assignment of error asserts that the trial court erred in charging the excess payments made by plaintiff to Hawaiian Village, Inc., to defendant. In support of this contention, defendant suggests the rule which states that an assignment of contract does not create a contractual obligation between assignee and the other party to the contract, citing *Industrial Loan & Inv. Co. v. Lowe*, 173 Neb. 624, 114 N.W.2d 393 (1962). Defendant further claims that the assignment of the lot lease by Hawaiian Village did not create a contractual obligation between itself and plaintiffs and that, therefore, if there was an overpayment of rent to Hawaiian Village, it cannot be offset against amounts due defendant.

This rule is applicable only where assignee has not assumed the liabilities of the assignor by the assignee. *Industrial Loan & Inv. Co. v. Lowe, supra.* Paragraph 2 of the "Assignment of Lease" from Hawaiian Village, Inc., to defendant George Victor Corporation provides in part: "[George Victor Corporation] agrees to assume all the obligations of [Hawaiian Village] in said subleases and shall be entitled to all rentals under said subleases due and payable on July 1, 1984 and

thereafter." In light of defendant's express assumption of Hawaiian Village's obligations, we hold, as did the trial court, that the funds overpaid by plaintiff to Hawaiian Village should be offset against the additional rent owed by plaintiffs to defendant.

We note an improper approach made in the trial court's journal entry in calculating the annual rental. In its entry, the trial court held: "On July 1, 1984 the computation for the amount of the annual base payment for the five years commencing July 1, 1984 is: $500.00 × (303.5 ÷ 202.9) = 747.91 annual lease payment [i.e., original lease payment times (December 1983 CPI divided by December 1978 CPI) equals new lease payment]." This is a correct method of calculation. However, the trial court next held: "In 1989 the adjustment will be computed as follows: $500.00 × (1988 all items C.P.I. ÷ 303.5)." This is incorrect. The trial court's formula uses the original 1978 lease payment ($500), but applies a multiplier which only takes into account the change in CPI from December 1983 to December 1988. These CPIs may be used, but only if the 1983 lease payment ($747.91) is used as the base payment. To yield a correct method of calculation, either one of two adjustments should be made: (1) use the 1983 lease payment ($747.91 times (December 1988 CPI divided by 303.5)), or (2) use the 1978 lease payment ($500), but also use the December 1978 CPI as the denominator ($500 times (December 1988 CPI divided by 202.9)). Although both of these reach the same mathematical result, the lease agreement defines and uses the first method, when it states "using the base for the first year of each five-year period."

In addition, we also note that incorrect dates were used to define the first 5-year period. In its journal entry, the trial court found that the lease commenced on July 1, 1978. This would make the 5-year anniversary July 1, 1983. Using the December 1977 CPI and the December 1982 CPI, the lease payment amount beginning July 1, 1983, is $500 times (292.4 divided by 186.1) equals $785.60. The second 5-year anniversary is July 1, 1988, thus the lease payment amount for that date is $785.60 times (December 1987 CPI divided by 292.4) equals July 1, 1988, lease payment.

In order to reconcile payments between the parties in light of the foregoing corrections, the amount paid by plaintiffs for each year must be compared to the amount owed by plaintiffs. On July 1, 1978, when plaintiff's lease began, the annual rental was $500. Plaintiff paid a correct adjusted rental of $463. On July 1, 1979, and on July 1 of the succeeding 3 years, plaintiff paid $730 when he owed $500. As of June 30, 1983, plaintiff had overpaid defendant $920. Beginning July 1, 1983, and for each year until July 1, 1988, the correct rent amount was $785.60. On July 1, 1983, plaintiffs paid $730 when they owed $785.60. For the payment due July 1, 1984, and again for the payment due July 1, 1985, plaintiffs paid $500 when they owed $785.60. This resulted in an underpayment by plaintiffs for the lease years 1983-84, 1984-85, and 1985-86 of $626.80. The net total of these differences in overpayments and underpayments is $293.20 overpaid by plaintiffs. To be current up through June 30, 1986, defendant should refund to plaintiffs the amount of $293.20. This result is based on the assumption that the two $500 payments deposited by plaintiffs with the court have been paid to defendant. On July 1, 1986, and on July 1, 1987, a lease payment of $785.60 is due. On July 1, 1988, a new lease payment amount should be calculated as set forth in the preceding paragraphs.

An additional point is raised by defendant. As set out above, Hawaiian Village, Inc., prematurely raised the lease payments from $500 to $730, beginning on July 1, 1979. Defendant contends that the making of four payments at the increased level shows that plaintiff construed the contract as defendant did. In *Bishop Buffets, Inc. v. Westroads, Inc.*, 202 Neb. 171, 175, 274 N.W.2d 530, 533 (1979), we held: "The practical construction put upon a lease contract cannot control the express, unambiguous provisions of the instrument itself." The lease language was not ambiguous with regard to the appropriate base-year issue. The trial court correctly determined that issue, and we so find. The judgment of the trial court is correct, as modified herein.

AFFIRMED AS MODIFIED.

MIKE L. KEIM, APPELLANT, V. JANIS KAY KEIM, APPELLEE.
424 N.W.2d 112

Filed June 3, 1988. No. 86-230.

1. **Divorce: Appeal and Error.** The review of a judgment relating to the dissolution of a marriage is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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.
2. **Property Division: Appeal and Error.** The division of marital property is a matter which is initially entrusted to the discretion of the trial court and will not be disturbed on appeal unless the record establishes that the trial court abused its discretion.
3. **Property Division: Alimony.** A division of property and the awarding of alimony are not subject to a precise mathematical formula. Rather, an appropriate division of marital property and amount of alimony must turn on reasonableness and the circumstances of each particular case in the light of the factors set forth in Neb. Rev. Stat. § 42-365 (Reissue 1984).
4. **Alimony.** The actual earning capacity of a spouse is frequently more important than the profitability of that spouse's business in determining the propriety of an award of alimony.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed as modified.

Joseph Polack and Charles O. Forrest of Polack & Woolley, P.C., for appellant.

Steven J. Riekes and Harold M. Zabin of Richards, Riekes, Brown & Zabin, P.C., for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

BLUE, D.J.

The appellant, Mike L. Keim, filed a petition for dissolution of marriage with the appellee, Janis Kay Keim, on January 14, 1985. A trial was held and a decree was entered which dissolved the marriage, awarded the custody of the two minor children to the respondent, and ordered the petitioner to pay child support in the sum of $300 per month per child. The decree also awarded the respondent alimony of $500 per month for a period of 96 months, to terminate on the death of the petitioner

or death or remarriage of the respondent, and divided the marital assets and liabilities as follows:

To the petitioner:

1. petitioner's interest in the Tabor, Iowa, property, which the court found to have a value of $4,125;

2. petitioner's IRA and Keogh account in the approximate amount of $61,941;

3. petitioner's 1985 tax refund in the approximate amount of $8,000;

4. the stained-glass window, which the court found to have a value of $250;

5. the 1985 Cutlass automobile, which the court found to have a value of $8,000;

6. petitioner's bank balance in the approximate amount of $2,250;

7. the note receivable from Corn Belt Bancorporation in the amount of $66,171;

8. all right, title, and ownership of petitioner's interests in the following: Keim Land & Cattle, Corn Belt Bancorporation, Thurman State Corporation, Sidney Investment Corporation, Sidney Investment Partnership, and Regency Financial Corporation. The court found these six interests to have an aggregate value of $350,000. Petitioner was ordered to assume all liabilities on these interests and to hold the respondent harmless therefor; and

9. all the personal property in the petitioner's possession.

Petitioner was required to pay the debt of $16,400 to Norwest Bank Nebraska and to hold respondent harmless thereon.

To the respondent:

1. the 1983 Ford Escort and 1974 Fiat automobiles, which the court found to have an aggregate value of $4,500;

2. the family residence at 9691 Meadow Drive, subject to the first mortgage only. The court found the residence to have a net value of $67,224. Respondent was to hold the petitioner harmless on the debt creating the first mortgage. Petitioner was to hold the respondent harmless on the debt secured, in part, by the second mortgage and to discharge the debt creating said second mortgage within 60 months;

3. the rental property at 3515 Maplewood Boulevard, subject to the mortgage thereon. Respondent was to hold petitioner harmless on the debt secured by said mortgage. The court found this property to have a net value of $25,529;

4. all household goods and other personal property in respondent's possession, which the court found to have a value of $3,360;

5. respondent's IRA in the approximate amount of $5,260;

6. respondent's bank balance in the approximate amount of $500;

7. respondent's retirement plan with the Omaha Public Schools in the approximate amount of $368; and

8. an additional property settlement in the amount of $115,000, payable in installments of $14,375 per year for a period of 8 years, with the first payment due on December 1, 1986, and subsequent payments due on the first of December of succeeding years. Interest was to accrue commencing on December 1, 1986, on the unpaid principal balance at the rate as provided by Neb. Rev. Stat. § 45-103 (Reissue 1984). This obligation was not to terminate on the death of petitioner or on the death or remarriage of respondent.

The trial court further ordered that the petitioner pay $10,000 toward attorney fees for the use and benefit of respondent's attorney and the sum of $7,000 toward respondent's expended cost.

The trial court further ordered that the petitioner maintain life insurance, with the minor children named as his irrevocable beneficiaries, in an amount sufficient to fund his child support obligations under the decree, and that he maintain health and accident insurance on the minor children. The petitioner and respondent were ordered to share equally any necessary and extraordinary medical, dental, or orthodontic expense of the minor children which was not covered by insurance. Petitioner was found to be liable for, and ordered to hold respondent harmless on, any state or federal income tax deficiencies from 1985 and preceding years, and each party was ordered to be responsible for his or her own debts incurred after January 14, 1985, unless otherwise provided in the decree.

The parties were married on June 2, 1969. Neither of the

parties brought into the marriage any assets of significant value.

The respondent graduated from the University of Nebraska at Omaha in 1969. She taught school in Omaha following her graduation until 1975. She resumed her teaching career in 1985, for which she receives an annual income of $18,032.

The petitioner graduated from the University of Nebraska at Omaha in 1970, receiving a bachelor of science degree in business administration. After graduation, he was employed by the First National Bank of Omaha. He then accepted a position with Fred Horn, who was involved in owning banks and bank holding companies. The petitioner, at the time of the trial, was employed by one bank holding company, for which he was paid $4,000 a month, and by one bank in a management capacity, where he received $1,667 a month.

Both parties prepared and offered into evidence statements of financial condition as of January 20, 1986. The petitioner's statement claims a negative net worth for the parties of $2,699. The respondent's statement claims a net worth for the parties of $373,820. The only real discrepancy between the two statements is the value of the petitioner's interests in Corn Belt Bancorporation (CBB) and Thurman State Corporation (TSC), two closely held corporations. The valuation of these corporations is a crucial issue in this case. The petitioner testified that the value of his minority interest in TSC was $62,000, based upon a formula of 1.1 times book value. He also testified that it was his opinion that the value of his minority interest in CBB was a negative $31,000, based upon book value. The petitioner called as an expert witness the chief executive officer of the First National Bank of Council Bluffs, who testified that the fair market value of the petitioner's interest in CBB was a negative $29,820 and in TSC was $62,448, before discount for being minority shares. A second vice president of Norwest Bank Des Moines testified that the value of petitioner's interest in CBB was minus $24,263 and in TSC was $38,430.

Respondent called Jerome Swords, who has had an extensive background in banking and in valuing banks. Swords testified that, in his opinion, at the time of trial the value of the petitioner's interest in CBB was $292,000 and in TSC was

$120,000, for a total of $412,000.

The trial court valued the petitioner's interest in CBB, TSC, Sidney Investment Corporation, Sidney Investment Partnership, Regency Financial Corporation, and Keim Land & Cattle (cattle herd) at $350,000.

The parties, in their statements of financial conditions, had agreed that the interest in Sidney Investment Corporation had a value of zero, that Sidney Investment Partnership had a value of negative $3,019, that Regency Financial Corporation had a value of $7,352, and that Keim Land & Cattle had a value of $141,900. In arriving at a value of all these assets of $350,000, the trial court must have determined the value of CBB and TSC to be $203,767.

We have held that a trial court's valuation of a closely held corporation is reasonable if it has an acceptable basis in fact and principle. *Bryan v. Bryan*, 222 Neb. 180, 382 N.W.2d 603 (1986). In our de novo review of this matter we find that this determination of value does not have an acceptable basis, and the proper valuation of CBB and TSC is $412,000.

The petitioner claims that the testimony of Swords as to the value of petitioner's interests in CBB and TSC should not have been received. Swords has extensive training and experience in valuing banks and was described by the former director of the Nebraska Department of Banking as "probably the foremost expert on bank valuation in the country." Apparently, petitioner's objection is that Swords did not personally inspect each bank and examine things like the local crop, physical facilities, and so forth.

Firsthand knowledge such as the above is not a requirement for the receipt of an expert opinion. "Rule 703, Nebraska Evidence Rules, clearly contemplates admission of an expert's opinion based on hearsay supplying facts or data for that opinion, rather than a requirement of firsthand knowledge as the only source of information for an expert's opinion." *Gibson v. City of Lincoln*, 221 Neb. 304, 311, 376 N.W.2d 785, 790 (1985). The court went on to point out that this matter goes to the weight to be given to the opinion by the trier of fact and not to its admissibility, preference, or priority. "Generally, an expert witness' firsthand knowledge is a factor which may affect such

witness' credibility and weight given to the testimony from that expert, but presence or absence of firsthand knowledge does not, by itself, necessarily establish preference or priority in evidentiary value." *Id.* at 313, 376 N.W.2d at 791.

The rule is that a trial court's ruling in receiving expert testimony will be reversed only when there has been an abuse of discretion. *State v. Miner*, 216 Neb. 309, 343 N.W.2d 899 (1984); *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980). The trial court did not abuse its discretion in receiving the testimony of Swords.

The petitioner's chief complaint seems to be that the trial court did not deduct from the marital assets indebtedness in the amount of $418,029.

In its decree the trial court found that the petitioner's interests in Keim Land & Cattle, TSC, CBB, Sidney Investment Corporation, Sidney Investment Partnership, and Regency Financial Corporation had an aggregate value of $350,000. The trial court further found that petitioner should assume all liabilities on the interests set out above and should hold the respondent harmless from that indebtedness, which petitioner claims must be deducted. The indebtedness associated with those assets is as follows:

1. Keim Land & Cattle	$228,726
2. CBB	
(a) note payable to First Interstate Bank of Des Moines	62,588
(b) note payable to Nelson	81,250
3. TSC note payable to Grotenhuis	20,190
4. Sidney Investment Corporation	0
5. Sidney Investment Partnership	0
6. Regency Financial Corporation	13,500
7. accrued interst payable on notes	11,775
Total	$418,029

In dividing the marital property the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate. *Black v. Black*, 221 Neb. 533, 378 N.W.2d 849 (1985).

It is important to note that the parties offered into evidence exhibits which show identical amounts of liabilities. It is

apparent that the trial court did not give full consideration to these debts that were agreed upon by the parties.

In appeals concerning dissolution of marriage, the Supreme Court is required to try the case de novo on the record and reach independent conclusions on the issues presented by appeal without reference to the conclusions or judgment of the district court. *Gleason v. Gleason*, 218 Neb. 629, 357 N.W.2d 465 (1984). We have also stated that the division of property and the awarding of attorney fees in marriage dissolution cases are matters initially entrusted to the sound discretion of the trial judge, which matters, on appeal, will be reviewed de novo on the record and affirmed in the absence of an abuse of the trial judge's discretion; however, where the evidence is in conflict, this court may give weight to the fact that the trial judge observed and heard the witnesses and accepted one version of the facts rather than another. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984); *Hamm v. Hamm, ante* p. 294, 422 N.W.2d 336 (1988).

With the above rules in mind, the decree of the district court is modified as follows:

The petitioner is awarded all right, title, and ownership of petitioner's interests in the following:

1. Keim Land & Cattle;
2. CBB;
3. TSC;
4. Sidney Investment Corporation;
5. Sidney Investment Partnership; and
6. Regency Financial Corporation.

The court finds these interests have an aggregate value of $558,233. Petitioner is to assume all liabilities on the interests set out above and to hold respondent harmless therefor. These liabilities are in the sum of $418,029.

Under the division of the assets as provided in the decree, this would result in an award for the petitioner of $708,970. Since petitioner was required to also pay the debt to Norwest Bank Nebraska in the sum of $16,400, his liabilities would amount to $434,429. Deducting this figure from his aggregate assets gives him $274,541. For the respondent the award would be $165,888 less liabilities of $64,516, for a figure of $101,372.

Awards of property to the spouse generally vary from one-third to one-half of the value of the property involved, depending upon the facts and circumstances of the particular case. *Martin v. Martin*, 215 Neb. 508, 339 N.W.2d 754 (1983). However, there is no mathematical formula for dividing property when a marriage is dissolved. Such awards are determined by the facts of each case, the ultimate test being one of reasonableness. *Reuter v. Reuter*, 218 Neb. 732, 359 N.W.2d 78 (1984). We believe that under consideration of the facts of this case, the division of assets should approximate one-half to each party. To accomplish this, the decree of the trial court is modified to provide for an additional property settlement award of $80,000, rather than $115,000, said amount to be paid in eight equal annual installments commencing December 1, 1986, together with interest on the unpaid principal balance to accrue commencing on December 1, 1986, at the rate as provided by § 45-103. The remainder of the provision of the decree as it relates to this property is to remain in effect.

The petitioner claims that it was error to award the respondent alimony of $500 for 96 months, or until the death of either party or the remarriage of respondent.

As in the division of property, there is no mathematical formula for the awarding of alimony. The ultimate test for the division of property and award of alimony is reasonableness as determined by the facts of each case. *Sonntag v. Sonntag*, 219 Neb. 583, 365 N.W.2d 411 (1985); Neb. Rev. Stat. § 42-365 (Reissue 1984). Under § 42-365, this court, in deciding what is reasonable, should consider

> the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

A review of the record convinces us that the trial court did not abuse its discretion in awarding alimony. The petitioner has an annual income of approximately $72,000 and in the past has

had an even greater income. It is reasonable to assume that he will have a relatively high earning capacity in the future. It is proper to consider this in setting alimony. *Burhoop v. Burhoop*, 221 Neb. 657, 380 N.W.2d 254 (1986).

While the petitioner, in an exhibit, shows expenses greater than income, a careful appraisal of his asserted expenses shows a somewhat different picture. For instance, he will no longer have payments on the house mortgage. Also, the trial court reasonably scrutinized the $200 for miscellaneous business expenses which petitioner said were "just a guesstimate," and also the $1,000 a month to a person whom he identified as "the girl I live with" and as his "assistant."

We do not believe the trial court abused its discretion in the amount of alimony awarded.

The decree of dissolution entered by the district court is affirmed but modified as to the amount awarded as a part of the property division.

AFFIRMED AS MODIFIED.

E. JAMES KULA, APPELLEE AND CROSS-APPELLANT, V. KENNETH M. PROSOSKI ET AL., APPELLEES AND CROSS-APPELLEES, COUNTY OF NANCE, APPELLANT AND CROSS-APPELLEE.

424 N.W.2d 117

Filed June 3, 1988. No. 86-305.

1. **Equity: Appeal and Error.** In an appeal of an equity action, the Nebraska Supreme Court must try factual questions de novo on the record and reach a conclusion independent of the findings of the trial court. However, where credible evidence is in conflict on a material issue of fact, we consider, 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.
2. **Constitutional Law: Property: Damages.** Where land, no part of which is taken, temporarily suffers damage compensable under Neb. Const. art. I, § 21, the measure of compensation is not the market value but the value of the use for the period damaged.
3. **Property: Damages: Crops.** If the land temporarily damaged is cropland, the

best test of the value of its use is the value of the crops which could and would have been grown upon the land.

4. _____: _____: _____. Where a growing crop is either totally destroyed or partially damaged, the measure of damages is the value at the time of destruction or injury, less the necessary cost of harvesting and transporting it to market. However, where it is apparent that the cost of harvesting a grain crop which was damaged would be the same as harvesting a full crop, no deduction need be made for harvest and marketing costs in arriving at the net loss.
5. **Property: Damages.** Where the land damaged can be returned to its prior condition by treatment, grading, or otherwise, the damage is temporary and the landowner is entitled to such expenses as part of his or her damages.

Appeal from the District Court for Nance County: JOHN C. WHITEHEAD, Judge. Affirmed as modified.

John Morgan, Nance County Attorney, for appellant.

Steven M. Curry of Sampson, Curry & Hummel, for appellee Kula.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is the second appearance of this case; our former opinion in *Kula v. Prososki* is reported at 219 Neb. 626, 365 N.W.2d 441 (1985) (*Kula I*). This was a suit for injunctive relief and damages arising out of the acts of the County of Nance (County) and others in impeding the flow of surface waters off the land of the plaintiff. The trial court enjoined the defendants Prososki from restricting the flow of water in certain depressions, and ordered the defendant County of Nance to construct a culvert under a county road sufficient in capacity to drain the farmlands of the plaintiff. The court found the defendants Prososki not responsible for any damages to the plaintiff, from which no appeal was taken. Kula did appeal from a denial of damages against the County of Nance, which denial was based on the trial court's determination that there had been no compliance with the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). We reversed and remanded for further proceedings to consider the issue of damages under Neb. Const. art. I, § 21, which provides that "[t]he property of no person shall be taken or

damaged for public use without just compensation therefor." An award of $14,454.92 was then entered by the district court, from which the County appealed and the plaintiff cross-appealed.

The County assigns as error the trial court's finding that Kula was entitled to damages, because the proof on that issue, i.e., the evidence offered in that regard, did not address the proper measure of damages. In his cross-appeal, Kula complains that the amount of damages awarded by the court was inadequate, based upon the evidence presented at trial.

In an appeal of an equity action, we must try factual questions de novo on the record and reach a conclusion independent of the findings of the trial court. However, where credible evidence is in conflict on a material issue of fact, we consider, 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. *Johnson v. NM Farms Bartlett,* 226 Neb. 680, 414 N.W.2d 256 (1987). In *Johnson*, the plaintiffs sought damages and injunctive relief. NM Farms had not appealed the injunction entered against it, but the proceedings were still reviewed as an equitable action.

Nothing appearing in the record to the contrary, we assume in deciding this case that the order relating to the installation of the culvert eliminated future damages. Therefore, we are dealing with a situation involving temporary damage. Accordingly, the County's reliance on the rule relating to the measure of damages as being the difference in the market value of the land before and after the damage, where there has been no taking, cited in *Beach v. City of Fairbury*, 207 Neb. 836, 301 N.W.2d 584 (1981), refers to permanent damage and is inapplicable in this situation.

Where land, no part of which is taken, temporarily suffers damage compensable under Neb. Const. art. I, § 21, " 'the measure of compensation is not the market value but the value of the use for the period damaged.' " *Pierce v. Platte Valley Public Power and Irrigation District*, 143 Neb. 898, 902, 11 N.W.2d 813, 816 (1943), quoting *Gledhill v. State*, 123 Neb. 726, 243 N.W. 909 (1932). If the land is cropland, the best test of the value of its use is the value of the crops which could and

would have been grown upon the land. *Pierce, supra.*

Plaintiff seems to urge that, having remanded this cause to the district court for the consideration of the issue of damages, that decision becomes the law of the case and damages must be awarded, citing *Barker v. The Wardens & Vestrymen of St. Barnabas Church*, 176 Neb. 327, 126 N.W.2d 170 (1964). That case contains a correct statement of the law. However, in our earlier opinion in *Kula I*, we did not conclude that the plaintiff was entitled to damages, only that the failure to comply with the Nebraska Political Subdivisions Tort Claims Act did not preclude consideration of *possible* damages.

In *State v. Dillon*, 175 Neb. 350, 121 N.W.2d 798 (1963), we appeared to indicate that there were two different rules for measuring crop damage: one where the crops were totally destroyed, and one where there has been damage but not destruction. We said:

> "The measure of damages to growing crops destroyed by the wrongful act or omission of another is the value at the time of destruction. * * *
>
> "The measure where a crop is injured but not rendered entirely worthless as a result of the acts or omissions of another is the difference between the value at maturity of the probable crop if there had been no injury and the value of the actual crop at the time injured less the expense of fitting for market that portion of the probable crop which was prevented from maturing."

Id. at 361, 121 N.W.2d at 804-05. That might suggest that the cost of harvesting and marketing would not be considered in the case of complete destruction of a crop.

However, *Dillon* relies on *Gable v. Pathfinder Irr. Dist.*, 159 Neb. 778, 68 N.W.2d 500 (1955), which in turn cited *Pulliam v. Miller*, 108 Neb. 442, 187 N.W. 925 (1922). *Pulliam* seems to suggest that whether the crop is damaged or destroyed, "the value is usually proved by showing the market value, less the necessary cost of harvesting, threshing, and transporting to market." *Id.* at 447, 187 N.W. at 927. We see no reason why, in the case of a crop which is totally destroyed, the owner should not, in establishing his loss, prove not only the market value of the crop, but also the cost of harvesting and bringing the crop to

market.

Miller v. Drainage District, 112 Neb. 206, 199 N.W. 28 (1924), permitted the plaintiffs, who were the owners of the crops and tenants of the land, to testify as to crop values. " 'In an action for damages on account of an injury to chattels, the owner of such chattels is qualified by reason of that relationship to give his estimate of their value.' " *Id.* at 209, 199 N.W. at 29.

The cost of harvesting and marketing was found to be relevant in establishing the value of destroyed annual crops in *Miller v. Sabinske*, 322 S.W.2d 941 (Mo. App. 1959), where the court found it necessary

> First, to estimate the probable yield had the crop not been destroyed; second, calculate the value of that yield in the market; and third, deduct the value and amount of labor and expense which subsequent to the destruction, and but for it, would have been required to mature, care for and market the crop.

Id. at 948. Similarly, in *Casey v. Nampa and Meridian Irrigation District*, 85 Idaho 299, 379 P.2d 409 (1963), that court stated:

> "It would seem, then, that the value of a growing crop of wheat at the time of its destruction must be determined from evidence of the probable yield and the market value of the crop at maturity, less the probable cost of placing the growing crop in a marketable condition."

Id. at 304, 379 P.2d at 412.

An exception to this rule appears in *Thompson v. Mattuschek*, 134 Mont. 500, 333 P.2d 1022 (1959). There, the court found that where defendant's cattle trespassed on plaintiff's land and destroyed part of a barley crop, in arriving at the value of the crops damaged the defendant was not entitled to credit for the estimated cost of harvesting the grain which was damaged, because the cost of harvesting the grain in its damaged condition was the same as it would have been had the cattle not trampled and consumed a part thereof.

Finally, we need to discuss the rule relating to additional expenses incurred by reason of the action of the County. This had to do with replanting expenses and treatment of the land to eliminate the chemical problems and salt caused by the ponding

of water. Although this court has never passed directly on the particular situation presented here, we do have some cases that are of help in reaching a conclusion.

In *Applegate v. Platte Valley Public Power and Irrigation District*, 136 Neb. 280, 285 N.W. 585 (1939), the court said:

> The measure of damages for the injury to the land is the difference in value before and after the dam was erected, taking into consideration the uses to which the land was put and for which it was reasonably suitable. To determine any such loss, the present condition of the soil proximately caused by the damming of the water and all effects up to the present time would be relevant to determine its value.

Id. at 288, 285 N.W. at 590.

Collateral expenses were allowed in *Armbruster v. Stanton-Pilger Drainage Dist.*, 169 Neb. 594, 100 N.W.2d 781 (1960), for land taken by erosion caused by a waterfall created by the defendant in channel reconstruction of the Elkhorn River.

> [E]xpenses for additional fencing, repairs, removal, and rebuilding thereof; the expenses of removal and repair of plaintiffs' private roads and bridge, together with inconvenience and disadvantage caused thereby; the expenses of repair and the threatened peril and damages to one of plaintiffs' two valuable irrigation wells, irrigation and sewer systems, and to their buildings; and the expenses incurred attempting, in good faith, to stop the erosion and damages [were allowed].

Id. at 610, 100 N.W.2d at 792.

Other jurisdictions have dealt with this problem. In *Wilcox Oil Company v. Lawson*, 341 P.2d 591 (Okla. 1959), the costs of reseeding a perennial crop were permitted, together with the value of any matured crop destroyed. The alfalfa was readily restored by reseeding, yet both sums were to be warranted once proper evidence was adduced. The reasonable cost of reseeding bluegrass and the reasonable rental value of the area destroyed were judged proper in *Miller v. Sabinske, supra*, as damages resulting from total crop destruction.

It is our belief, and we so hold, that where the land damaged can be returned to its prior condition by treatment, grading, or

otherwise, the damage is temporary and the landowner is entitled to such expenses as part of his or her damages.

The defendant County does not in fact challenge the specific elements of damages claimed by the plaintiff or the proof thereof; it insists only that the wrong measure of damages was employed, which we have earlier discussed, and that the damage was not caused by the County.

There was some evidence of flooding on plaintiff's land prior to the road construction, offered through the testimony of neighboring farmers that water had been ponding on this property for 50 years, or at least before the 1970s. Plaintiff, on the other hand, introduced testimony from the county assessor that water did not earlier pond in any appreciable amount on the farm. Kevin Prior, an engineer, testified to relatively level elevations on the Kula farm, and characterized the whole area as being generally flat. From our examination of the entire record, we conclude that the flooding up until 1983, the time of the trial, and of which complaint has been made, was due to the action of the County in raising the grade of the road without providing for an adequate culvert.

We now turn to the specific elements of damages proved by a preponderance of the evidence to have occurred due to the action of the County. Plaintiff alleged a loss of 30 acres in crop production for the year 1979, the reasonable rental value of which was $3,000. Unfortunately for the plaintiff, the record does not support such a claim, and furthermore, plaintiff seems to have abandoned this claim in his brief on appeal.

Plaintiff's expert witness, Ray Starostka, a farmer and consultant in fertilizer, seeds, and agricultural research, with particular training in irrigation and drainage of agricultural lands and who holds a Ph.D. in agriculture, testified as to six observations made by him of plaintiff's land in 1982 and 12 similar examinations in 1983. He testified that for the year 1982, for 110 acres of plaintiff's land affected by ponding waters, a normal yield would have been 90 bushels per acre, or a total of 9,900 bushels of corn. However, because of the excess water, the production for that year was actually 6,500 bushels, or a loss of 3,400 bushels. He predicted approximately the same loss for 1983.

The testimony of the plaintiff himself, as well as that of certain farmers who were familiar with plaintiff's farm and had done custom cultivation and harvesting of that land, more than supported the conclusions of Dr. Starostka.

There seems no dispute but that the market price of corn in 1982 was $2.65 per bushel, and for 1983, $2.70. Multiplying these prices by the loss of yield for each year results in gross losses of $9,010 and $9,180 respectively, or a total for the two years of $18,190.

The loss referred to was a gross loss and did not take into consideration the costs of planting, cultivating, harvesting, and marketing. However, we are not talking about a total loss, but a reduction in yield. In *Thompson v. Mattuschek*, 134 Mont. 500, 333 P.2d 1022 (1959), that court held that because the loss was due to a short crop, not a total destruction, no allowance for marketing costs was necessary.

> Defendant also argues that the award of compensatory damages is speculative because he should have been credited with the cost of harvesting and marketing the barley and charged with compensatory damages only in the amount of plaintiff's net loss. We agree with plaintiff's position that because plaintiff did harvest his barley and his loss is claimed not in destruction of crop but in reduction of yield, the reduction itself is his net loss.

Id. at 509, 333 P.2d at 1027. We have no problem adopting that rule.

There was some evidence of replanting costs for the year 1982, totalling $5,705.22. This is found in a handwritten memorandum furnished by the plaintiff without explanation. We are not convinced that such a loss was either reasonable or necessary.

Finally, the witness Dr. Starostka testified that in order to return the soil on the 110-acre tract to its normal condition before the water damage, it would be necessary to eliminate the accumulation of soluble salts and bicarbonates caused by the ponding. He estimated the costs to run in the vicinity of $4 to $6 per acre for the next 4 years. Taking the more conservative figure, that amounts to a total for treatment of $1,760.

In conclusion, from a de novo review of the record, we are

convinced that plaintiff's total damages, proved by a preponderance of the evidence to have resulted from the public improvement made on the road by the County of Nance, total $19,950. The judgment of the district court is modified accordingly, and as modified, it is affirmed.

AFFIRMED AS MODIFIED.

JEANNE M. LINE, APPELLEE AND CROSS-APPELLANT, V. WILLIAM G. LINE, APPELLANT AND CROSS-APPELLEE.

423 N.W.2d 790

Filed June 3, 1988. No. 86-340.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

John F. Kerrigan of Kerrigan, Line & Martin, for appellant.

Jerome J. Ortman, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

PER CURIAM.

This is an appeal from a decree of dissolution entered by the district court for Douglas County, Nebraska. Husband appeals, alleging that the district court abused its discretion in dividing the parties' marital property, in awarding temporary support for the wife, in awarding a temporary attorney fee for the wife's lawyer, and in failing to find Neb. Rev. Stat. § 42-367 (Reissue 1984) unconstitutional. In her cross-appeal, the wife claims that the district court abused its discretion in the property division between the parties, and also erred in not awarding alimony to the wife and in awarding an inadequate attorney fee for the wife's lawyer.

Husband contends that § 42-367 is unconstitutional in that the statute "requires the husband to pay temporary allowances and makes no like provision for the wife to pay temporary

allowances to the husband." Brief for Appellant at 29. The husband has failed to file a written notice with the Clerk of the Supreme Court regarding any constitutional question concerning § 42-367. The records of this court do not indicate that the husband served on the Attorney General of Nebraska a copy of his brief assigning unconstitutionality of § 42-367. See Neb. Ct. R. of Prac. 16A (rev. 1986). See, also, *Zoimen v. Landsman*, 192 Neb. 561, 223 N.W.2d 49 (1974). In view of the husband's failure to comply with the rules of this court, we will not consider husband's question concerning the constitutionality of § 42-367.

> " 'In an appeal involving actions for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme 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.' "

Zavitka v. Zavitka, ante p. 267, 421 N.W.2d 798 (1988) (quoting *Gerber v. Gerber*, 225 Neb. 611, 407 N.W.2d 497 (1987)).

From our review de novo on the record of these proceedings, we find no abuse of discretion by the district court regarding the matters raised by the husband's appeal and the wife's cross-appeal. Therefore, the judgment of the district court is affirmed. An attorney fee of $1,500 is awarded for the wife's attorney in this appeal.

AFFIRMED.

JoAnn S. Kimball, appellant and cross-appellee, v. Curtis D. Kimball, appellee and cross-appellant.

424 N.W.2d 122

Filed June 3, 1988. No. 86-409.

1. **Property Division.** A provision in a judgment in a marriage dissolution proceeding reserving the property rights of the parties for review at a later date upon the application of one of the parties is invalid and unenforceable.
2. _____. All property rights of the parties in a marriage dissolution proceeding should be resolved and determined at the time of the dissolution.

Appeal from the District Court for Lancaster County: Dale E. Fahrnbruch, Judge. Affirmed.

C. Russell Mattson of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Richard A. Vestecka of Vestecka, Tegtmeier & Buethe, for appellee.

Boslaugh, White, and Shanahan, JJ., and Gitnick and Garden, D. JJ.

Per Curiam.

The parties were married in 1948, and the marriage was dissolved on December 1, 1975. The parties had four children, one of whom was 16 years of age at the time of the decree. The decree awarded custody of the minor child to the petitioner, JoAnn S. Kimball, with child support in the amount of $200 per month until majority. The decree also awarded alimony to the petitioner in the amount of $100 per month for 14 months, and then $500 per month until death or remarriage of the petitioner. Additional alimony at the rate of $200 per month was awarded until May 30, 1980, provided one of the sons of the parties continued his college education. The alimony was subject to the further order of the court and subject to review at the end of 15 years or at the time either party made application for adjustment of property rights.

The parties entered into a property settlement agreement which provided for the distribution of the then-existing property of the parties, and which was referred to as a "current property settlement." The agreement also contained the

following provision:

> It is understood and agreed by the parties that the Court may take a reservation of the property rights of the parties for review by the Court at a later date upon application by the Petitioner in the event the financial condition of Respondent materially changes for the better.

The property settlement agreement was approved by the trial court and was incorporated in the decree by reference and by attachment of a copy of the agreement to the decree. Paragraph (e) of the decree also provided that "the Court hereby takes a reservation of the property rights of the parties for review by the Court at a later date upon the application of the Petitioner in the event the financial condition of Respondent materially changes for the better . . . ."

The evidence shows that the petitioner inherited more than $400,000 during the marriage and that a part of her inheritance was spent on the family home and for the support of the family. At the time of the decree the respondent, Curtis D. Kimball, had a negative net worth.

In 1982 the respondent's father died, and he inherited in excess of $500,000.

On June 5, 1985, the petitioner filed an amended application for review of property rights, reciting the agreed-upon reservation of property rights provision and alleging that since the date of the decree, the financial condition of the respondent had materially changed for the better due to an inheritance from the respondent's deceased father in an amount in excess of $500,000. A responsive pleading filed by the respondent, consisting of 29 paragraphs, included a general denial of the allegations contained in the amended application. The respondent also filed a cross-petition, which alleged that he had provided direct support and education expenses for a son and daughter in excess of that which was required by the divorce decree, and which requested that the court find, by reason of these expenditures, he had discharged any obligation he may have had for child support and additional alimony under the terms of the decree.

The trial court dismissed both the petitioner's application for review and the respondent's cross-petition. The trial court

found that the decree of dissolution dated December 1, 1975, was a final order, was not appealed, and was binding upon the parties; that due to the fact the petitioner had expended substantial sums from her inheritance during the marriage and there were insufficient funds to reimburse her for those sums, the parties had agreed that the court should reserve the right to review the property rights of the parties upon the application of the petitioner, and that the court did in fact reserve that right; that having entered into such an agreement, neither party was in a position to challenge that reservation of power and was estopped from doing so, and that each party had accepted the December 1, 1975, decree and could no longer attack its terms; that it was inherent in the court's approval of the property settlement agreement that the court had found the property settlement fair and reasonable and not unconscionable; that the respondent's financial condition had materially changed, due to an inheritance received from his father, but there was no evidence that at the time of the property settlement the parties contemplated that an inheritance would be considered a material change in the respondent's financial condition and that, generally, inheritances, if they can be identified, are set off to the party receiving them and cannot be considered as marital property; that the cross-petition was totally without merit; that the issue of alimony was not an issue before the court; and that nothing in the order should be construed as denying the petitioner the right to seek increased alimony if the circumstances should warrant it.

The petitioner has appealed. The six errors which have been assigned can be consolidated into whether the district court erred in refusing to find that she was entitled to share in the respondent's inheritance pursuant to the terms of the reservation in the property rights agreement and decree.

We review the trial court's judgment de novo on the record to determine whether there was an abuse of discretion by the trial court, whose judgment will be upheld in the absence of an abuse of discretion. *Frost v. Frost*, 227 Neb. 414, 418 N.W.2d 220 (1988).

The petitioner relies upon *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962), in which this court said:

> A divorce decree is ordinarily considered a final adjudication of the property rights of the parties, and may not be modified after 6 months from its rendition except when it lacks the attributes of a final judgment, *where reservations are contained in it which lay the foundation for a modification*, or where changed circumstances can be shown.

(Emphasis supplied.) (Syllabus of the court.)

The respondent relies upon *Humphrey v. Humphrey*, 215 Neb. 664, 340 N.W.2d 381 (1983), and *Gerber v. Gerber*, 218 Neb. 228, 353 N.W.2d 4 (1984).

The practice of leaving matters of alimony, child support, and property distribution unresolved after a decree of divorce was discussed in *Humphrey v. Humphrey, supra.*

In *Humphrey*, the petitioner filed for dissolution in December 1980. The case was tried in May and June 1981, at the conclusion of which the court found the marriage irretrievably broken and dissolved the marriage, but took the issues of property division, alimony, fees, etc., under advisement. In July 1982, the court made a property division between the parties. At a hearing on a motion for new trial in August 1982, the court amended the property division. On September 14, 1982, the court signed a decree dissolving the marriage and disposing of the property of the parties.

In the *Humphrey* case we said at 666-67, 340 N.W.2d at 383:

> [T]he practice of bifurcating a dissolution of marriage case in any manner, and with any timelag, is expressly disapproved by this court. . . . It serves no interest of any party to dissolve the marriage itself without simultaneously determining all property rights of the married parties. . . .
>
> . . . Whatever personal convenience a court may confer on parties by granting an immediate dissolution while retaining property jurisdiction cannot be worth the difficulties and problems to which the trial court is exposing the litigants. The litigants deserve better.

In *Gerber v. Gerber, supra*, we not only reaffirmed the disapproval of bifurcated trials, but held that if any substantial rights of the parties remain undetermined and the cause is

retained for further action, the order, including the dissolution of the marriage, is interlocutory and not final.

In *Gerber*, the trial on the petition for dissolution was held in November 1982. At that time the trial court orally stated that the marriage was irretrievably broken and was dissolved and that the temporary orders concerning child custody, visitation, support, and an injunction prohibiting the parties from disposing of any property were to continue in effect. In September 1983, the trial court made a determination of property rights, but did not dispose of the issues of custody and support. On September 23, 1983, the respondent filed a notice of appeal from the decision on August 29, 1983, denying the motion for change of custody and contempt citation, and from the order of September 6, 1983, ordering property division and child support.

On appeal we ordered the trial court to "determine all issues between these parties and to make findings and orders as to *all* issues between these litigants," and dismissed the appeal. (Emphasis in original.) 218 Neb. at 231, 353 N.W.2d at 6. *Gerber* held that all issues incident to the dissolution must be determined at the time of the dissolution, and a failure to do so prevents the decree of dissolution from becoming a final order.

The effect of the decisions in the *Humphrey* and *Gerber* cases was to require that all issues between the parties be determined at the time of the dissolution and to invalidate any attempt to retain jurisdiction to modify the division of property at a future date. Accordingly, the "reservation of the property rights of the parties for review by the Court at a later date" was of no effect, and the petitioner could not obtain an additional award of property from the respondent by the application filed in 1985.

It is unnecessary to consider any of the other issues raised by the parties.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., concurs in the result.

LUEDER CONSTRUCTION COMPANY, A DELAWARE CORPORATION, APPELLEE, V. LINCOLN ELECTRIC SYSTEM, CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT. ACTION ELECTRIC COMPANY, A NEBRASKA CORPORATION, APPELLEE, V. LINCOLN ELECTRIC SYSTEM, CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT. GEORGE H. WENTZ, INC., A NEBRASKA CORPORATION, DOING BUSINESS AS WENTZ PLUMBING & HEATING COMPANY, APPELLEE, V. LINCOLN ELECTRIC SYSTEM, CITY OF LINCOLN, NEBRASKA, A MUNICIPAL CORPORATION, APPELLANT.

424 N.W.2d 126

Filed June 3, 1988. Nos. 86-517, 86-518, 86-519.

1. **Summary Judgment.** Summary judgment is proper only when the record discloses that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from material facts, and when the moving party is entitled to judgment as a matter of law.
2. **Contracts: Summary Judgment.** When it is established that a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact; in such a situation summary judgment is improper.
3. **Contracts.** Whether a contract is ambiguous and thus in need of construction is a question of law; there can be no ambiguity unless and until application of the pertinent rules of interpretation leaves uncertain which of two or more possible meanings represents the true intention of the parties.
4. _____. The determination as to whether an ambiguity exists in a contract is to be made on an objective basis, not by the subjective contention of the parties; thus, the fact that the parties urge opposing interpretations does not necessarily indicate a document is ambiguous.
5. **Contracts: Intent.** A written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from the contents of the document alone.
6. **Contracts.** The meaning of an unambiguous contract presents questions of law.
7. _____. A contract must be read as a whole, and, if possible, effect must be given to every part thereof.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Mary C. Wickenkamp of Erickson & Sederstrom, P.C., for appellant.

W.C. Nelson, Jr., of Nelson, Morrow, Waldron & Kivett, for appellee Lueder Construction Company.

Richard W. Smith of Woods, Aitken, Smith, Greer, Overcash & Spangler, for appellees George H. Wentz, Inc., and Action Electric Co.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

CAPORALE, J.

These appeals arise out of separate suits filed by three construction contractors, appellees Lueder Construction Company (case No. 86-517), Action Electric Company (case No. 86-518), and George H. Wentz, Inc. (case No. 86-519), against the owner, appellant Lincoln Electric System. The contractors aver they suffered damages as the result of delays which they, predictably, claim were caused through the fault of the owner. The owner in turn filed a counterclaim in each case, asserting that it suffered damages as a result of the delays which it, equally predictably, declares were the fault of the respective contractor. The district court determined that the time extensions granted by the owner entitled the contractors to the summary judgments they requested, and therefore dismissed the owner's counterclaims. In this court the owner, in substance, claims the district court erred in determining that each contractor is entitled to a dismissal of the counterclaim against it as a matter of law. We affirm the decisions of the district court.

The owner's contract with Lueder requires the latter to complete specified "General Construction Work" on the owner's service center, then to be erected at 27th and Fairfield Streets in Lincoln, within "Four Hundred Fifty (450) calendar days" from August 7, 1978, that is to say, according to the parties, by October 31, 1979. The contract with Action requires that it complete certain "Electrical Construction Work" at the center within "Four Hundred Fifty (450) calendar days" from August 7, 1978, "which is the Contract time established" in the contract with Lueder. In like language the contract with Wentz requires that it complete designated "Mechanical Construction

Work" at the center within the same 450-day period.

Each contract provides for extension of the time allotted to reach substantial completion, i.e., the date when construction is sufficiently complete for the owner to occupy or utilize the work, as follows:

> 8.3.1 If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner or the Architect, or by any employee of either, or by any separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in transportation, adverse weather conditions not reasonably anticipatable, unavoidable casualties, or any causes beyond the Contractor's control, or by delay authorized by the Owner pending arbitration, or by any other cause which the Architect determines may justify the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

A change order is defined by paragraph 12.1.1 of each contract as

> a written order to the Contractor signed by the Owner and the Architect, issued after execution of the Contract, authorizing . . . an adjustment in . . . the Contract Time. The . . . Contract Time may be changed only by Change Order. A Change Order signed by the Contractor indicates his agreement therewith, including the adjustment in . . . the Contract Time.

The contractors each requested extensions of the time within which to reach substantial completion because of the delays encountered. The owner investigated the requests and ultimately issued change orders to each contractor. The orders issued to Lueder extended the latter's contract time by 177 days, thereby changing its substantial completion date from October 31, 1979, to April 25, 1980. Although during the course of considering and negotiating the requests for the change orders, the owner suggested both a mutual waiver of damages and a reservation of its own rights, the change orders as issued to Lueder and the other contractors contained no such provisions. The owner, through its architect, has certified that each

contract was substantially completed on April 25, 1980.

The owner correctly points out that summary judgment is proper only when the record discloses that there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from material facts, and when the moving party is entitled to judgment as a matter of law. *Lowry v. State Farm Mut. Auto. Ins. Co., ante* p. 171, 421 N.W.2d 775 (1988); *Schriner v. Meginnis Ford Co., ante* p. 85, 421 N.W.2d 755 (1988). It then argues that it cannot be said the contractors are entitled to judgments as a matter of law because determining both the cause of the delays and whether the contract was modified so as to extend the contract time depends upon the resolution of factual questions. On the other hand, the contractors contend, among other things, that ascertaining the meaning of the contracts under the circumstances of these cases is a matter of law.

We first direct our attention to the Lueder contract and begin by recognizing the correctness of the owner's position that when it is established a contract is ambiguous, the meaning of its terms is a matter of fact to be determined in the same manner as other questions of fact; in such a situation summary judgment is improper. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). The owner overlooks, however, that whether a contract is ambiguous and thus in need of construction is a question of law, and there can be no ambiguity unless and until application of the pertinent rules of interpretation leaves uncertain which of two or more possible meanings represents the true intention of the parties. *Luschen Bldg. Assn. v. Fleming Cos., supra.* The determination as to whether an ambiguity exists is to be made on an objective basis, not by the subjective contention of the parties; thus, the fact that the parties urge opposing interpretations does not necessarily indicate a document is ambiguous. *Luschen Bldg. Assn. v. Fleming Cos., supra.* Finally, a written contract which is expressed in clear and unambiguous language is not subject to interpretation or construction, and the intention of the parties must be determined from the contents of the document alone. *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987); *Washington Heights Co. v. Frazier*, 226 Neb. 127, 409

N.W.2d 612 (1987). In short, the meaning of an unambiguous contract presents questions of law. *Washington Heights Co. v. Frazier, supra.* See, also, *Ames v. George Victor Corp., ante* p. 675, 424 N.W.2d 106 (1988).

Paragraph 8.3.1 of the contract in question provides a procedure whereunder the contractor may obtain an extension of the contract time, and further provides that the contract time shall be extended by a change order which is defined in paragraph 12.1.1. Lueder followed the specified procedure, and the owner issued the defined change orders altering the contract time. The consequence of those acts under the unambiguous language of the contract is that the contract was modified such that completion of Lueder's performance was required by April 25, 1980, rather than by the earlier date specified when the contract was executed. Since Lueder substantially completed its performance within the extended contract time, it did not breach the contract through delay and therefore cannot be responsible for delay damages whatever may have caused the need to extend the contract time.

Although not directly in point because there was no issue as to whether contract provisions such as those at issue in the Lueder contract were ambiguous and thus in need of interpretation, *Wiebe Constr. Co. v. School Dist. of Millard*, 198 Neb. 730, 255 N.W.2d 413 (1977), nonetheless recognizes that the time for performing a construction contract may be modified by change orders issued pursuant to the terms of the contract.

The owner's contention that paragraph 8.3.4, which reads that the existence of paragraph 8.3 (of which paragraph 8.3.1 above is a part) "does not exclude the recovery of damages for delay by either party under other provisions of the Contract Documents," renders the contractual scheme for change orders based on delay ambiguous and thus subject to interpretation is unavailing. To so read paragraph 8.3.4 would negate the provisions of paragraphs 8.3.1 and 12.1.1 and render unqualified change orders extending the contract time meaningless. A contract must be read as a whole, and, if possible, effect must be given to every part thereof. See, *T.V. Transmission v. City of Lincoln*, 220 Neb. 887, 374 N.W.2d 49

(1985); *Clemens Mobile Homes, Inc. v. Anderson*, 206 Neb. 58, 291 N.W.2d 238 (1980). So read, paragraph 8.3.4 applies not to change orders modifying the contract time issued in accordance with the provisions of paragraphs 8.3.1 and 12.1.1, but to claims for delay arising under other contract provisions such as, for example, delays encountered by virtue of the owner's failure to make timely payments under the provisions of paragraph 9.7 of the contract. Paragraph 9.7 reads, in part, that "[t]he Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shut-down, delay and start-up, which shall be effected by appropriate Change Order in accordance with Paragraph 12.3." (The last-mentioned paragraph deals with claims for additional cost.)

Thus, the record discloses that with respect to the owner's counterclaim against Lueder, there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from the material facts and that Lueder is entitled to judgment as a matter of law.

We therefore arrive at a consideration of the owner's counterclaims against Action and Wentz. The change orders issued by the owner to each of these contractors purported to extend their respective contract times to March 15, 1980. While Action accepted the change orders as issued, Wentz struck out the line which reads, "The Date of Substantial Completion as of the date of this Change Order therefore is March 15, 1980." Wentz' position is that under the contract language, it is entitled to the same contract time as is Lueder. The rules discussed above concerning the reading of contracts compel us to agree. Wentz' contract provides, as does Action's, that "[t]he Contract Time will be the time period in calendar days stipulated as such" by the contract with Lueder and, further, that Wentz and Action "shall complete their work within the Contract Time established by" the contract with Lueder.

The objective meaning of the language tying the completion date for Action and Wentz to that in the Lueder contract is that a modification of Lueder's completion date resulted in a modification of the contract time established in the owner's separate contracts with Action and Wentz. Consequently, with respect to the owner's counterclaim against Action and Wentz,

there is no genuine issue as to any material fact or as to the ultimate inferences to be drawn from the material facts; Action and Wentz are thus each entitled to summary judgment as a matter of law.

What effect Action's acceptance of change orders purporting to limit its contract time to March 15, 1980, may have on its own action for delay damages against Lueder is a question not involved in the matters now before us and is not considered.

AFFIRMED.

MILO M. HRUBY, APPELLANT, V. EDWARD KALINA, APPELLEE.

424 N.W.2d 130

Filed June 3, 1988. No. 86-523.

1. **Libel and Slander: Actions.** To make a submissible case of slander per se, the alleged defamatory statements must convey not only the expression of a wrong which is actionable, but also the nature of the particular wrong.
2. _____: _____. In determining whether a statement is actionable per se, the court is to construe the language in its ordinary and popular sense.
3. **Libel and Slander: Damages: Words and Phrases.** The word "crook" is a word of general abuse and, while derogatory and disparaging, does not constitute a basis for recovery of damages in the absence of a specific allegation of special damages.
4. **Libel and Slander: Criminal Law: Words and Phrases.** Imputation of a crime presents slander per se if the crime, in the place of publication, would be punishable by imprisonment or regarded by public opinion as involving moral turpitude.
5. _____: _____: _____. It is generally accepted that larceny and theft are crimes which involve moral turpitude.

Appeal from the District Court for Saline County: ORVILLE L. COADY, Judge. Reversed and remanded.

Robert R. Otte of Hecht, Sweet, Alesio, Morrow, Poppe & Otte, P.C., for appellant.

Matthew Hanson of Steinacher, Vosoba & Hanson, for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

GARDEN, D.J.

This is an appeal from the district court's grant of summary judgment against the plaintiff, Milo M. Hruby. Plaintiff's amended petition alleged in part that the defendant, Edward Kalina, "in the presence and hearing of other persons, falsely and maliciously did speak and publish the following false and defamatory words, that is to say: 'You crooked bastard you' (referring to plaintiff) and 'you're crooked . . . you stole the money' (all referring to this plaintiff)." Plaintiff further alleged that "said defamatory words [were] meant and intended by the defendant to impute the commission of a crime and subject the plaintiff to public ridicule, ignominy, disgrace, and tended to disinherit the plaintiff and were slanderous per se." Finally, plaintiff alleged that "plaintiff has been greatly injured in his good name all to his general damage." The amended petition contained no allegation of special damages. Defendant filed an answer in the nature of a general denial and moved for summary judgment. The trial court granted summary judgment and dismissed the plaintiff's amended petition, basing its decision upon the failure of the plaintiff to plead special damages, citing *Hudson v. Schmid*, 132 Neb. 583, 272 N.W. 406 (1937).

The issue presented here is whether the words "[y]ou crooked bastard you" and "you're crooked . . . you stole the money" were slanderous per se.

In *Hennis v. O'Connor*, 223 Neb. 112, 115, 388 N.W.2d 470, 473 (1986), we said:

> For a plaintiff to make a submissible case of slander *per se*, the alleged defamatory statements must convey not only "the expression of a wrong which is actionable, but also the nature of the particular wrong." . . . The language, by its nature and obvious meaning, must falsely charge a person with commission of a crime or subject him to public ridicule, ignominy, or disgrace.

We further said at 116, 388 N.W.2d at 474:

> In determining whether a statement is actionable per se, the court is to construe the language in its ordinary and popular sense. *Nelson v. Rosenberg, supra.* The court should neither strain to find innocent meanings for

statements which are prima facie defamatory nor place forced constructions on terms which may fairly be deemed harmless. See *Tennyson v. Werthman*, 167 Neb. 208, 92 N.W.2d 559 (1958).

The words "[y]ou crooked bastard you" and "you're crooked" are not actionable per se. This court has stated that the word "crook" is a word of general abuse and, while derogatory and disparaging, does not constitute a basis for recovery of damages in the absence of a specific allegation of special damages. See, *Nelson v. Rosenberg*, 135 Neb. 34, 280 N.W. 229 (1938); *Cummings v. Kirby*, 216 Neb. 314, 343 N.W.2d 747 (1984). The same is true concerning the word "bastard." "Oral words charging a person with being an illegitimate are not slanderous or actionable per se." 53 C.J.S. *Libel and Slander* § 27 at 70 (1987).

This leaves, for final consideration, the words "you stole the money." *Hennis v. O'Connor, supra*, discussed the issue as follows:

> The Restatement (Second) of Torts § 615(1) (1977) provides that it is for the court to determine "whether a crime . . . imputed by spoken language is of such a character as to make the slander actionable per se." Comment *a.* to this section explains that if the language clearly imputes commission of a criminal offense by the plaintiff, the court is to determine if the offense is one which satisfies the requirements of the Restatement, *supra* § 571(a) and (b). Under § 571, imputation of a crime presents slander per se if the crime, in the place of publication, would be "(a) punishable by imprisonment in a state or federal institution, or (b) regarded by public opinion as involving moral turpitude." Restatement, *supra* § 571(a) and (b).
>
> Prior to a determination that a statement amounts to slander per se, the court decides (1) whether a communication is susceptible of a particular meaning and (2) whether that meaning is defamatory. Restatement, *supra* § 614(1)(a) and (b). Then, according to the Restatement, it is for the jury to decide whether the statement, capable of a defamatory meaning, was so

> understood by its recipient. Restatement, *supra* § 614(2). Generally, Nebraska law is in accord with part of these procedural guidelines.

223 Neb. at 117, 388 N.W.2d at 474.

In the case at bar, the statement "you stole the money" clearly imputes to the plaintiff the crime of theft. Such a crime in Nebraska is punishable by imprisonment and would also be regarded by public opinion as a crime involving moral turpitude. "It is generally accepted that larceny . . . and theft are crimes which involve moral turpitude." 58 C.J.S. *Moral* at 1206 (1948). The words "you stole the money" were slander per se. This presents questions for the jury as to whether the defendant made the statement as alleged by the plaintiff; whether the statement, if made by the defendant, referred to the plaintiff; and the extent of any resulting damages. The trial court erred in dismissing the amended petition of the plaintiff for failure to plead special damages. If slander per se is properly alleged, special damages need not be pled. See, *Hudson v. Schmid, supra*; *Nelson v. Rosenberg, supra*.

The judgment of dismissal is therefore reversed, and this cause is remanded for trial.

REVERSED AND REMANDED.

JAMES J. BIERBOWER ET AL., APPELLANTS, V. MAYLON HANSON ET AL., APPELLEES.

424 N.W.2d 132

Filed June 3, 1988. No. 86-610.

1. **Waters.** The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainageways through which such waters were wont to flow in a state of nature.
2. _____. An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and which have no natural outlet or course of flow, by discharging the waters thereof by means of an

artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence.

Appeal from the District Court for Hamilton County: BRYCE BARTU, Judge. Affirmed.

Gary F. Wence of McGrath, North, O'Malley & Kratz, P.C., for appellants.

Larry G. Carstenson of Adams, Carstenson, Owens & Jones, for appellees.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

BOSLAUGH, J.

The plaintiffs, James J. and Ellen B. Bierbower, commenced this action to compel the defendants Maylon and Kathryne Elizabeth Hanson to restore the land owned by Maylon Hanson Farms, Ltd., partnership to its natural condition, and to recover damages. The action was dismissed as to Mrs. Hanson in this court, and she is no longer a party.

The plaintiffs own the northeast quarter of Section 28, Township 11 North, Range 6 West of the 6th P.M., in Hamilton County, Nebraska. The Hanson land lies immediately north of the plaintiffs' property and is legally described as the southeast quarter of Section 21, Township 11 North, Range 6 West of the 6th P.M., Hamilton County, Nebraska.

It is undisputed that a natural watercourse enters the Hanson land on its western edge, approximately halfway between the north and south boundaries of the land. Approximately 1,500 acres of farmland drain into this watercourse. Water which enters the watercourse flows generally in a south to southeasterly direction through the Hanson property, then through the plaintiffs' property, and ultimately into Lincoln Creek, a tributary of the Blue River.

There is a natural ridge running from the north to the south and southeast on the Hanson property which generally follows an irrigation lateral depicted in aerial photographs. This ridge

divides the natural drainage on the Hanson property so that surface and irrigation water on the west side of the ridge flows to the west, and water on the east side of the ridge flows to the east. Prior to 1983, water on the east side of the ridge flowed into a road ditch and borrow pit along the east side of the Hanson property, and just west of Highway 14, where it remained until it evaporated, percolated, or was pumped out.

In 1983, Hanson constructed a shallow drainage ditch running west from the road ditch to the watercourse. The purpose of the drainage ditch was to drain overflow water from the roadside ditch into the watercourse and then, by use of a 12-inch culvert, allow water from the watercourse to run east into a reuse pit located near the south line of the Hanson property. Exhibit 20, an engineering drawing, shows the reuse pit is situated along the eastern side of the watercourse and south of the drainage ditch. Kevin Lynn Prior, a consulting engineer, testified that a 12-inch culvert used as an inlet pipe to the reuse pit is "approximately 18-hundredths lower than a flow line of the channel itself." He further testified that water will flow into the reuse pit if it is empty, but a part of the water will continue to flow downstream, through the Bierbower property, and that the 12-inch culvert probably would not be fully effective in carrying off the increased flow from the drainage ditch. The purpose of diverting water into the reuse pit was to allow the defendant to repump the water into other areas of the farm, thus making it more efficient to irrigate.

According to Louis E. Roberts, Jr., a dirt contractor hired by Hanson, directing water into the reuse pit would allow Hanson to use only two pumps on his farm instead of three for irrigation purposes.

The plaintiffs alleged that the ditch reversed the natural drainage course of surface waters on the eastern side of the Hanson property, which caused an increase in the amount of water flowing through the natural watercourse on the plaintiffs' land.

At the close of the plaintiffs' evidence, the trial court dismissed the claim for damages. At the close of all of the evidence, the trial court found that the plaintiffs had failed to prove that the partnership had violated Neb. Rev. Stat. § 31-201 (Reissue 1984) in any way, and dismissed the petition.

The plaintiffs have appealed and contend that the trial court erred in finding that "the construction, operation and maintenance of Defendants' drainage ditch did not violate or exceed Neb. Rev. Stat. §31-201 (1943)."

Section 31-201 provides:

> Owners of land may drain the same in the general course of natural drainage by constructing an open ditch or tile drain, discharging the water therefrom into any natural watercourse or into any natural depression or draw, whereby such water may be carried into some natural watercourse; and when such drain or ditch is wholly on the owner's land, he shall not be liable in damages therefor to any person or corporation.

In *Jameson v. Nelson*, 211 Neb. 259, 263-64, 318 N.W.2d 259, 262-63 (1982), we stated:

> The owner of land is the owner of surface waters which fall, arise, or flow upon it, and he may retain them for his own use without liability. He may also change their course on his own land by ditch or embankment, but he may not divert them upon the lands of others except in depressions, draws, swales, or other drainways through which such waters were wont to flow in a state of nature. *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962). An owner of land has the right in the interest of good husbandry to drain ponds or basins thereon of a temporary character, and *which have no natural outlet or course of flow, by discharging the waters thereof by means of an artificial channel into a natural surface-water drain on his own property, and through such drain over the land of another proprietor in the general course of drainage in that locality, even though the flow in such natural drain is thereby increased over the lower estate, and provided that this is done in a reasonable and careful manner and without negligence. Pospisil v. Jessen*, 153 Neb. 346, 44 N.W.2d 600 (1950). While the flow of surface waters in a natural depression, draw, swale, or other natural drainway may be temporary and occasional, the course which they uniformly take is the controlling factor. *Nichol v. Yocum, supra.*

(Emphasis supplied.)

The plaintiffs' contention in this case is that Hanson had no right, under § 31-201, to construct the shallow drainage ditch across and through the ridge on Hanson's land, because that allowed water to enter the natural watercourse which runs through the land of the plaintiffs and Hanson which otherwise would never have reached that watercourse. A similar contention was considered and discussed in *Nickman v. Kirschner*, 202 Neb. 78, 273 N.W.2d 675 (1979).

In the *Nickman* case, the defendants had constructed a ditch to drain a lagoon on their property into a natural watercourse on their property. With respect to the plaintiffs' contention that the ditch must itself follow the natural course of drainage, we said at 83, 273 N.W.2d at 679:

> Plaintiffs argue that an artificial channel into which surface waters are drained must itself follow the natural course of drainage, and cannot vary therefrom. Plaintiffs assert this is what defendants have done.
>
> This is not a correct assessment of the law. The same argument was made in Bures v. Stephens, 122 Neb. 751, 241 N.W. 542, in which the court said: "The appellant contends that the ditch does not follow the general course of drainage; that without the ditch the water would never run there. That is undoubtedly true, for without it the basin would not drain. We are of the opinion that the ditch carries the water in the general course of drainage." The trial court in the instant case found the ditch upon defendants' land was consistent with the general course of drainage of the area involved. This is a sufficient compliance with the rule. It is also clear that the natural watercourse into which the ditch drains is the only one reasonably accessible to defendants.

The essential requirements of § 31-201 are that the ditch be located wholly on the owner's land and the water be discharged into *any* natural watercourse or natural depression or draw which also is located on the owner's land. The ditch constructed by Hanson in this case satisfies those requirements.

The judgment of the district court is affirmed.

AFFIRMED.

AMERICAN CHARTER FEDERAL SAVINGS AND LOAN ASSOCIATION, A U.S. CORPORATION, APPELLEE, V. LEONARD D. ZABEL ET AL., APPELLANTS.

423 N.W.2d 791

Filed June 3, 1988. No. 86-743.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Leonard D. Zabel, pro se.

David R. Wilson of Cline, Williams, Wright, Johnson & Oldfather, and Joseph F. Chilen, for appellee.

BOSLAUGH, WHITE, CAPORALE, GRANT, and FAHRNBRUCH, JJ., and ENDACOTT, D.J., and COLWELL, D.J., Retired.

PER CURIAM.

This was a suit to foreclose a mortgage on a residence property in Jefferson County, Nebraska. The trial court found that there was $39,947.47 due the plaintiff, American Charter Federal Savings and Loan Association, and that the plaintiff was entitled to foreclosure of the mortgage. The defendants, Leonard D. Zabel and Betty R. Zabel, have appealed.

By an order entered on March 15, 1988, on the motion of this court, the defendants were notified that the brief which they had filed failed to comply with the rules of the court in that it contained no assignments of error. The defendants were allowed 15 days in which to file an amendment to the brief stating assignments of error. On April 11, 1988, the defendants filed a pleading entitled "Amended Brief" in this court, in which they state that the error lies as stated in their original answer, "Allege that the mortgage is a void contract without legal force or effect; and that Plaintiff made no advancements under said mortgage . . . ."

We have carefully examined the record and there is nothing in the record to support the defendants' assignment of error. The mortgage was signed and acknowledged under oath by both defendants, and the proceeds of the loan were paid by the plaintiff in accordance with the mortgage settlement and order for payment of funds signed by the defendants.

The assignment of error is without merit, and the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SCOTT T. PROPST, APPELLANT.
424 N.W.2d 136

Filed June 3, 1988. No. 87-567.

1. **Postconviction: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and findings of the district court denying relief will not be disturbed on appeal unless they are clearly erroneous. Further, when a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required.
2. **Effectiveness of Counsel: Proof.** To assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different.

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

Scott T. Propst, pro se.

Robert M. Spire, Attorney General, and Lynne R. Fritz, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

The defendant, Scott T. Propst, appeals the dismissal of his postconviction relief motion by the Douglas County District Court. On appeal, the defendant assigns as error the district judge's failure to hold an evidentiary hearing before deciding Propst's motion. We affirm.

A defendant seeking postconviction relief has the burden of establishing a basis for such relief, and findings of the district

court denying relief will not be disturbed on appeal unless they are clearly erroneous. Further, when a motion for postconviction relief and the files and records show that a defendant is not entitled to relief, no evidentiary hearing is required. *State v. Scholl*, 227 Neb. 572, 419 N.W.2d 137 (1988); *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Galvin*, 222 Neb. 104, 382 N.W.2d 337 (1986).

In his postconviction relief motion, Propst claims a number of errors occurred at his arraignment. For convenience, they will be discussed in the following order:

1. Propst's trial counsel failed to spend sufficient time discussing the case with the defendant.

2. Propst was not served with a copy of the information setting forth the charges against him at least 24 hours prior to arraignment.

3. Propst's counsel was ineffective because: (a) He recommended that the defendant waive his constitutional rights; (b) he failed to assert as a defense that the weapons used in the crimes alleged were incapable of inflicting harm upon the alleged victims; (c) he failed to raise as a defense that due to drugs, the defendant was incapable of forming the required intent to commit the crimes charged; and (d) he failed to inform the trial judge that the defendant was suffering withdrawal from heavy drug use.

4. The trial judge impermissibly participated in Propst's plea agreement by informing the defendant that he would be given credit on his sentence for any time spent in custody prior to sentencing.

5. His court-appointed appellate counsel was ineffective because he failed to raise any of the foregoing claims before the Supreme Court on direct appeal.

Pursuant to a plea agreement, Propst appeared in the Douglas County District Court and entered a guilty plea to each of five counts of robbery. The pleas were accepted by the court after it found a factual basis existed for them. For the guilty pleas, the State agreed not to charge Propst with at least three other robberies, an attempted robbery, and the use of a weapon in the commission of a felony in each robbery. The State further agreed to dismiss charges of still another robbery, a burglary,

and escape, all of which were pending in Douglas County courts.

Ultimately, Propst was sentenced to an indeterminate prison term of not less than 16 nor more than 50 years on each of the first four robberies alleged in the information. Those sentences were ordered to be served concurrently. On the fifth robbery, Propst was sentenced to an indeterminate prison term of not less than 3 nor more than 10 years, with this sentence to be served consecutive to the others. The sentences were affirmed on direct appeal and are not at issue here.

At his arraignment, prior to being asked how he wished to plead to the five robbery charges, Propst was carefully interrogated by the trial judge. Propst told the judge that before appearing in court, he had discussed the robbery charges and his pleas with his court-appointed counsel. He said he was satisfied with his counsel. At no time before or during his arraignment did the defendant ask for additional time to discuss his case with his attorney.

When given the opportunity to ask questions of his own counsel, of the prosecutor, and of the judge, the defendant asked no questions. Initially, the judge explained to Propst the nature and effect of a preliminary hearing and that by pleading guilty to the charges Propst would be waiving his right to a preliminary hearing. The judge also advised Propst that he was entitled to have a copy of the information setting forth the robbery charges served upon him and of the further right to wait 24 hours thereafter before entering his pleas. The defendant specifically waived all of these rights. Propst was further told that by voluntarily entering pleas of guilty, he also waived every defense to the five charges filed against him, whether the defense was procedural, statutory, or constitutional. *State v. Rivers*, 226 Neb. 353, 411 N.W.2d 350 (1987); *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986); *State v. Paulson*, 211 Neb. 711, 320 N.W.2d 115 (1982). The trial judge found that the defendant knowingly, understandingly, intelligently, and voluntarily entered his guilty pleas. After reviewing the original bill of exceptions, we concur with the trial judge's findings. Propst has never claimed his pleas were involuntarily entered. The record affirmatively

negates both Propst's first and second claims of error.

Before asking the defendant how he wanted to plead, the judge also explained to Propst the charges against him, and the various types of pleas he could enter and the consequences of each. The judge explained to the defendant that upon guilty pleas the defendant could be sentenced to not less than 1 nor more than 50 years on each robbery and that the sentences could run consecutively. Propst was told that by pleading guilty, he would waive the right to a speedy trial by a jury of 12 people chosen at random; the right to have his attorney cross-examine the State's witnesses; Propst's right to testify or not as he desired; his right to remain silent; his right to present evidence and subpoena witnesses; the presumption of innocence; and the requirement that the State prove the defendant guilty beyond a reasonable doubt; and that, by pleading guilty, the defendant would be waiving his right to have a hearing outside of the presence of the jury to test the voluntariness of any statement the defendant had given to law enforcement officers, and to determine whether law enforcement officers had properly given the defendant his *Miranda* rights and whether the defendant had voluntarily and intelligently waived them. Propst said he understood that by pleading guilty, he was waiving all of the rights the judge explained to him.

In No. 3(a) of his claimed errors, the defendant states that his trial counsel was ineffective because he recommended that Propst waive his constitutional rights. The record is silent as to whether Propst's counsel did, in fact, make such a recommendation. But even if his counsel did advise Propst to waive his constitutional rights, it would not be grounds for postconviction relief under the circumstances of this case. The record does not reflect any undue influence upon or promises made to Propst to induce him to waive his constitutional rights. This was not the first time Propst had contact with his constitutional rights or with a court. He had previously been convicted of a felony and was out on work release when he committed the crimes charged. Propst was not ignorant. While in prison, he had earned his GED. Further, Propst did not have to follow his attorney's recommendation. It was Propst who told the judge that he understood his constitutional rights and

that he knew and understood what he was doing at his arraignment, and it was Propst who waived his constitutional rights, not his attorney. Propst was not required to follow the advice of his attorney. He cannot now complain that he made a bad choice in waiving his rights. Propst's claimed error No. 3(a) has no merit.

Propst claimed in error No. 3(b) that the weapons he used in committing the robberies were incapable of causing harm. For the crime of robbery, it matters not whether the weapon used is capable of inflicting harm upon a victim. Neb. Rev. Stat. § 28-324(1) (Reissue 1985) provides that "[a] person commits robbery if, with the intent to steal, he forcibly and by violence, *or by putting in fear*, takes from the person of another any money or personal property of any value whatever." (Emphasis supplied.) If the sight of a weapon, whether it is operative or not, instills fear in the victim, that is sufficient. In reciting the underlying facts of the crimes to the court, Propst said that in three of the robberies to which he pled guilty, he used a BB handgun, and in the other two he used a steak knife. In each instance he displayed the gun or knife and demanded money, which the victim gave him. It is implicit in those admitted facts that the victims were placed in fear. Moreover, it is common knowledge that a missile from a BB gun, if it hits a vital spot such as an eye or an eardrum, can inflict serious bodily injury. It is also common knowledge that a steak knife not only can be used to inflict serious bodily injury, but has been used to cause death.

Propst's articulation to the judge of how he committed the crimes charged refutes any validity to claimed error No. 3(c) that the defendant was incapable of forming the intent to steal. Before committing each robbery, Propst availed himself of a weapon, which he used in committing the crimes of robbery. He knew each time he displayed a weapon that it would strike fear in the victim and that the victim would give him the money he demanded. In each robbery, Propst demanded money to take with him, money which he knew was not his. The facts as recited by the defendant himself refute any idea that Propst did not have the capacity to form the intent to steal. Propst's intended purpose of the robberies was to steal money. Under the

facts of this case, as detailed by Propst, it would have been a useless gesture for Propst's trial counsel to claim that at the time the crimes were committed, his client was incapable of forming the intent to steal. Propst's claimed error No. 3(c) is without merit.

In regard to alleged error No. 3(d), the record affirmatively dispels any claim that Propst's trial counsel was ineffective in failing to inform the trial judge that his client was suffering drug withdrawal at the time of the defendant's arraignment. The record clearly shows that Propst knew what was going on at his arraignment, that he understood the rights the judge related to him, that he was coherent, and that he understood and answered questions unhesitatingly, knowingly, and intelligently. The record further affirmatively reflects that the defendant was not under the influence of drugs at the time of his arraignment. Propst, when asked, said he had consumed no drugs within the past 24 hours. Although he had the opportunity to do so, Propst, at the arraignment, did not claim he was under the influence of drugs or suffering from withdrawal. Propst said that he knew and understood what he was doing at his arraignment and that he was in full possession of his faculties. In accepting the defendant's pleas of guilty, the trial judge, who talked with and observed the defendant, found that Propst knowingly, understandingly, intelligently, and voluntarily entered his plea of guilty to each count of the information. There is no merit to Propst's alleged error No. 3(d).

In alleged error No. 4, Propst claims the trial judge impermissibly participated in the plea agreement between the parties by informing the defendant he would be given credit on his sentence for any time spent in custody prior to sentencing. The defendant has taken the judge's remarks out of context. The remark was made during the trial judge's explanation of the possible penalties in the event Propst was found guilty of the robbery charges. Under such circumstances, the remark could not be considered an inducement. Alleged error No. 4 has no merit.

A lawyer, other than his district court counsel, was appointed to represent Propst on his direct appeal. In alleged error No. 5, the defendant claims that his direct appeal counsel was

ineffective because he failed to raise the matters in alleged errors Nos. 1, 2, 3, and 4. We have found that there is no merit to any of the defendant's allegations of error at his arraignment. Since there is no merit to any of those claimed errors, defendant's direct appeal counsel could not be ineffective in failing to raise the matters contained in those alleged errors.

Whether it be a claim against a trial lawyer or a lawyer on direct appeal:

> To assert a successful claim of ineffective assistance of counsel, a defendant must prove (1) that his attorney failed to perform as well as an attorney with ordinary training and skill in the criminal law in the area; (2) that his interests were not conscientiously protected; and (3) that if his attorney had been effective, there is a reasonable probability that the results would have been different.

State v. Sowell, 227 Neb. 865, 868, 420 N.W.2d 704, 707 (1988); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988); *State v. Jackson*, 226 Neb. 857, 415 N.W.2d 465 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The defendant's district court counsel was successful in obtaining a very favorable plea agreement for Propst. At sentencing, defendant's counsel made a most eloquent plea for leniency. The judge noted that Propst had a felony for almost every year since his birth, 16 felonies in 19 years. The defendant began getting into serious trouble when he was 14 years old, and he was sent to the Youth Development Center-Kearney. Propst violated his parole at age 15, was sentenced to adult prison at age 17, and later escaped from there. After the robberies, the sentencing judge found that it was not safe for the people in the community to have Propst walking the streets. In this case, on the five felonies to which he pled guilty, Propst could have received up to 50 years' imprisonment on each robbery, and the sentences could have run consecutively. The sentences on four of the robberies were ordered to run concurrently. The sentence on the fifth robbery, although it is to be served consecutive to the other sentences, was substantially less than the sentences on the other four robberies.

The record discloses that both Propst's trial and appellate

counsel were effective; that they performed as well as any attorney with ordinary training and skill in the criminal law in the area; and that they conscientiously protected Propst's interests. Under all of the circumstances in this case, there is no probability that any other result could be achieved, regardless of what lawyer or lawyers represented the defendant.

It is clear from the record and files that Propst is not entitled to postconviction relief. The district judge was not required to hold an evidentiary hearing. Propst has failed to meet his burden of showing that the findings of the district court are clearly erroneous. The decision of the district court is affirmed.

AFFIRMED.

ROBIN POORKER, SURVIVING SPOUSE OF GEORGE POORKER, DECEASED, APPELLANT, V. HELLER'S CARBONIC, INC., ET AL., APPELLEES.

423 N.W.2d 792

Filed June 3, 1988. No. 87-626.

Workers' Compensation: Proof. In a workers' compensation case, when causation of the injury resulting in the damages claimed is not established by the evidence, the case must be dismissed.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

James E. Harris of Harris, Feldman Law Offices, for appellant.

William J. Dunn of Gross, Welch, Vinardi, Kauffman & Day, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from a decision of a three-judge panel of the Workers' Compensation Court affirming the judgment of a

single judge of that court. Plaintiff-appellant, Robin Poorker, is the surviving spouse of George Poorker. She filed an application in the compensation court seeking to modify an earlier award in that court in favor of her deceased husband against his employer, Heller's Carbonic, Inc., and the employer's insurance carrier, American Family Insurance Company.

The record shows that plaintiff's decedent, George Poorker, sustained a compensable injury on May 6, 1981, as a result of an accident arising out of, and in the course of, his employment with Heller's. An award in favor of decedent was entered in the Workers' Compensation Court on September 5, 1984.

Decedent was fatally injured in a one-vehicle accident on May 5, 1986. At the time of the accident, decedent was intoxicated. Plaintiff filed her application to modify the award of September 5, 1984. In her application, plaintiff alleged that as a result of the decedent's compensable injuries, decedent suffered constant and severe pain which drove decedent, in order to alleviate the pain, to drink alcohol excessively and to take large doses of pain medication. Plaintiff alleged that decedent did not voluntarily ingest alcohol and pain medication, but was forced to do so because of the nature of the pain and decedent's depressed mental state. Plaintiff further alleged that the vehicular accident and the fatal injuries "were directly and proximately caused by the decedent's extreme intoxication."

Plaintiff's application for modification of the earlier award was denied by a 2 to 1 majority of the panel on rehearing. Plaintiff timely appealed to this court, assigning five errors. We need discuss only one alleged error in affirming the panel's decision.

The theory of plaintiff's case is that decedent was injured in a compensable accident in 1981; that the accident caused decedent severe and unremitting pain; that the pain was such that decedent involuntarily was driven to excessive use of alcohol and pain medication; that in 1986, when the decedent was involuntarily intoxicated, he was fatally injured in a one-vehicle accident; and that the accident and the fatal injuries were directly and proximately caused by the decedent's extreme

intoxication.

With regard to the last step of plaintiff's required proof, the majority of the three-judge panel found:

> Although the plaintiff alleged that the accident and fatal injuries were directly and proximately caused by the extreme intoxication of George Poorker, such allegation of proximate causation was not admitted by the defendants, nor was it made an uncontested fact in the Pretrial Order. No evidence as to the actual cause of the fatal vehicle accident was adduced, the parties apparently assuming that the intoxication of George Poorker was the cause. Notwithstanding the absence of evidence on the vital question of proximate cause of the fatal accident, the Court proceeds to determine the cause on the issues joined as if the parties had stipulated that intoxication was the proximate cause of the vehicle accident.

We hold that it is not necessary to decide this case "as if the parties had stipulated that intoxication was the proximate cause of the vehicle accident," and we need not review the finding of the panel that "[t]he evidence as a whole fails to establish that the deceased's intoxication at the time of his fatal accident was directly and proximately caused by the compensable injury of 1981 and its consequence." As to that issue, we make no determination.

In our review of a workers' compensation case, the findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Currier v. Roman L. Hruska U.S. Meat Animal Res. Ctr., ante* p. 38, 421 N.W.2d 25 (1988). A finding with regard to causation of an injury is one for determination by the fact finder and will not be set aside unless clearly wrong. *Kingslan v. Jensen Tire Co.*, 227 Neb. 294, 417 N.W.2d 164 (1987); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983). In this case, the panel determined that no evidence was adduced as to the cause of the fatal vehicle accident. We agree. In a workers' compensation case, when causation of the injury resulting in the damages claimed is not established by the evidence, the case must be dismissed. Here, the cause of decedent's death was not established.

The record is virtually silent as to the fatal motor vehicle accident of May 5, 1986. A psychiatrist testified, in letter form, that decedent was aware of the danger associated with driving while intoxicated, but "[i]n spite of this, he frequently drove while intoxicated, and when confronted explained that he just didn't care what happened to him. As a consequence of this pattern, he died in a single car accident on 5/5/86 with a plasma ethanol level of .243." This same witness later wrote, "For a driver with a blood alcohol of .30, there is a 600 times increase [sic] probability of causing an accident." Such conclusions do not establish causation.

Included in the record are four photographs of the damaged pickup which decedent was driving at the time of his death and the police report of the fatal accident. No conclusion, factually supported or not, can be drawn from these items. There was no evidence before the panel to establish the proximate cause of the fatal crash. The possible causes are myriad: a blowout, a mechanical steering malfunction, defective road conditions, third-party involvement, or any number of additional factors. Plaintiff has not established that decedent's intoxication caused the fatal accident, and her case must fail. The panel specifically determined that no evidence as to the cause of the fatal accident was adduced. There was no need to go beyond that point. The judgment of dismissal is affirmed.

AFFIRMED.

CHRISTINA L. McKINSTRY, SPECIAL ADMINISTRATOR OF THE ESTATE OF EUGENE McKINSTRY, DECEASED, APPELLANT, V. COUNTY OF CASS ET AL., APPELLEES.

424 N.W.2d 322

Filed June 10, 1988. No. 86-250.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. _____: _____. In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a trial court.
4. **Negligence: Proof.** To prevail in an action based on negligence, a plaintiff must prove four essential elements: the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
5. **Negligence.** The general rule which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity is that such party is charged with the duty of taking due and suitable precautions to avoid injury or damage to such persons or property.
6. **Contractors and Subcontractors: Liability: Negligence.** A general contractor remains liable for the negligence of the subcontractor if the contractor retains control of the work—or if, by rule of law or statute, the duty to guard against the risk is made nondelegable.
7. **Master and Servant: Independent Contractor: Liability: Negligence.** A nondelegable duty means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from delegated duties negligently performed.
8. **Contractors and Subcontractors: Negligence.** A general contractor, in control of the premises where the work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance.
9. **Contractors and Subcontractors: Words and Phrases.** A contractor is one who enters into a contract with the owner of certain property to perform some type of work on that property. A subcontractor is one who independently contracts with the contractor to do part of the work which the contractor has previously agreed to perform.

Appeal from the District Court for Cass County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and

remanded for a new trial.

Frank L. Burbridge, Michael G. Connery, and Frank A. Taylor of Kutak Rock & Campbell, for appellant.

John R. Douglas of Cassem, Tierney, Adams, Gotch & Douglas, for appellee County of Cass.

Michael A. Fortune of Erickson & Sederstrom, P.C., for appellee WeWeldit & Repair, Inc.

J. Arthur Curtiss of Baylor, Evnen, Curtiss, Grimit & Witt, for appellee Husker Steel Corporation.

HASTINGS, C.J., WHITE, SHANAHAN, and FAHRNBRUCH, JJ., and BLUE, D.J.

SHANAHAN, J.

Eugene McKinstry died as the result of an accident during construction of a bridge for a Cass County road. Christina L. McKinstry, special administrator (personal representative) of the estate of Eugene McKinstry, appeals from the judgment of the district court for Cass County, denying recovery on the McKinstry claim in a wrongful death action against Husker Steel Corporation (Husker Steel), WeWeldit & Repair, Inc. (WeWeldit), and County of Cass (county). Cornhusker Casualty Company was joined as a defendant on account of its status and subrogation interest as the insurance company which provided workers' compensation coverage for WeWeldit, Eugene McKinstry's employer. See Neb. Rev. Stat. § 48-118 (Reissue 1984).

Plaintiff's action against the county was brought pursuant to the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983 & Cum. Supp. 1984). The action against the other defendants was based on common-law negligence. All actions were tried to the court.

STANDARD OF REVIEW

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. *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not

reweigh evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988); *Alliance Nat. Bank v. State Surety Co., supra.* Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent from the conclusion reached by a trial court. *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29, 60 A.L.R. 4th 953 (1986).

CONSTRUCTION AGREEMENTS

The county entered a written agreement with Husker Steel to construct a bridge for a road over Dee Creek. Husker Steel prepared blueprints for the bridge project, which included "all steel, concrete, erection [and] 1 shop coat of paint on [the] superstructure." In view of its past experience and in reference to its agreement with Husker Steel, the county requested that WeWeldit perform the actual construction in erecting the bridge. Husker Steel then contracted with WeWeldit to build the bridge according to Husker Steel's blueprints and agreed to pay WeWeldit for that work. The Husker Steel-county contract made no provision for trenching, excavating, and earthwork as a part of the bridge project. Keeping with its custom and apart from its agreement with Husker Steel, the county undertook all "responsibility for excavation" concerning the bridge project. In earthwork and excavating for projects such as the construction contracted with Husker Steel, the county used its own equipment and paid its employees who did such work.

CONSTRUCTION SITE AND ACCIDENT

To construct the bridge, WeWeldit erected a concrete "headwall" parallel with and on each side of the creek. Each headwall supplied the main support for the bridge and roadbed overhead. To support each headwall and prevent water from coursing between the headwall and the creek bank, a vertical "wingwall" was attached at each end of the headwall and ran obliquely into the creek's bank for a distance of 20 feet. Construction of a wingwall required a trench immediately adjacent to the wall for work at the base of and along that wall, such as securing the wingwall's attachment to the headwall. For

that excavation, Karl Neumeister, a county employee, appeared with the county's backhoe at the construction site to dig the wingwall trench. Inasmuch as Husker Steel had no active participatory role in erecting the bridge, no one from Husker Steel was present for the excavation by Neumeister. Although WeWeldit's foreman indicated the centerline, depth, and length of the proposed wingwall trench, the foreman did not direct or supervise Neumeister regarding the width of the trench or the slope from the bottom of the trench to the surface of the creek bank. Along the wingwall, Neumeister excavated a trench which was 13 feet deep, 19 feet long, and 5 feet wide at the top of the trench. Before WeWeldit's employees, including Eugene McKinstry, entered the trench to work on the wingwall, WeWeldit's foreman inspected and approved the trench excavated by Neumeister. While WeWeldit's employees were working in the trench along the wingwall, Neumeister noticed that McKinstry was digging in the creek bank, which formed a trench wall, trying to keep water from seeping into the trench. Approximately 3 hours after Neumeister had left the construction site, the trench collapsed, burying McKinstry, who died from asphyxiation.

PLEADINGS

In the wrongful death action, Christina McKinstry alleged that Husker Steel was the general or prime contractor for all aspects of construction in the bridge project; WeWeldit was Husker Steel's subcontractor to build the bridge; and the county, as owner of the construction site, supplied trenching, excavating, and earthwork for construction of the bridge. Christina McKinstry also alleged that each of the defendants had separately and negligently omitted certain measures which would have prevented the accident, such as each defendant's failure to "properly stabilize, shore, maintain and brace the Trench; . . . properly compact the walls of the Trench; [and] properly grade or slope the sides of the Trench."

In their answer, WeWeldit and Cornhusker Casualty generally denied liability, but admitted that Eugene McKinstry was an employee of WeWeldit and asserted their subrogation interest in any recovery on account of Eugene McKinstry's death.

The county answered and alleged that Eugene McKinstry was contributorily negligent in a degree which barred recovery and that Eugene McKinstry had "assumed the risk." Additionally, the county alleged that Eugene McKinstry's death was the result of the negligence of persons over whom the county had no control.

In its answer, Husker Steel raised the affirmative defenses of contributory negligence and assumption of the risk.

TRIAL

As a part of McKinstry's case, a soil engineer testified that the earth at the wingwall excavation was unable "to sustain the configuration of the trench that was excavated because of the relaxation and the deformation that's associated . . . [a]nd once that happens, the strength is reduced . . . [a]nd in this particular case, the wall of the trench was too steep to be maintained in that shape and collapse occurred." In the engineer's opinion, collapse of the trench could have been prevented by sloping the wall or bank of the trench at an angle of 45° or less, rather than the 70° angle existing after excavation, or by use of horizontal braces or shoring for the trench. The engineer also testified that WeWeldit's postexcavation activity in construction near the trench was "not significant relative to the stability of the trench." An expert in trenching testified that the "natural weight of the soil" caused the trench wall to collapse, because the "slope" was much too steep. A trench wall with a slope of 45° or supported by some type of "bracing system" would have prevented collapse of the wingwall trench.

Karl Neumeister, the county's backhoe operator, testified that he would have dug the trench wider or with a greater slope if WeWeldit's foreman would have requested such changes in place of the trench actually excavated. Neumeister acknowledged that WeWeldit's foreman gave no direction or instruction concerning the slope of the trench wall and admitted that he could have sloped the trench wall without WeWeldit's request. When asked whether the trench was sloped "far enough," Neumeister replied, "I guess not." In further questioning by McKinstry's lawyer, Neumeister responded:

> Q- Then couldn't you have continued to work on that ditch until you made it safe?

A- Well, I had a time limit on it. They wanted to get busy and get to working. Yes, I'll have to put it.

Q- Yes, you could have continued to work on it?

A- Yes.

Q- Your answer is yes?

A- Yes.

Q- And you could have dug out some more dirt; is that right?

A- Yes.

Q- And sloped it back properly?

A- Yes.

Over objection by the McKinstry lawyer, the county introduced as evidence the regulations promulgated under the federal Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651 et seq. (1982), pertaining to safe trenching and liability in trench excavation.

FINDINGS BY TRIAL COURT

The district court made specific findings of fact regarding each of the defendants.

The district court found that WeWeldit was Husker Steel's subcontractor in the bridge construction and that Husker Steel did not supervise or control WeWeldit's employees or have any contractual obligation concerning employees of WeWeldit or the county. Therefore, the district court concluded that Husker Steel was neither negligent by its own nonfeasance, as alleged, nor vicariously liable for any negligence of its subcontractor, WeWeldit.

Concerning WeWeldit, the district court found that, notwithstanding the county's furnishing labor and equipment for excavation of the trench wall, WeWeldit could have requested changes in the work done by the county but accepted the county's excavatory work without any requested change. The district court concluded that "the collapse of the wall could have been prevented either by shoring or by requiring a greater slope to the wall" and that Eugene McKinstry "did not voluntarily assume a known risk." The district court found that WeWeldit was negligent "in failing to take either of the steps [adequate shoring or slope of the trench wall] which would have prevented the collapse of the trench wall" and, because Eugene

McKinstry's "negligence, if any, was slight in comparison with the negligence" of WeWeldit, entered judgment against WeWeldit for $244,521.

In view of WeWeldit's involvement in the excavation of the trench, the district court found that the county was not negligent, especially since WeWeldit accepted the county's excavatory work and could have requested, but did not request, any change in the manner or nature of excavation by the county.

After the trial, WeWeldit and Cornhusker Casualty filed a joint motion for vacation of the judgment, based on the Nebraska Workers' Compensation Act. In response to that motion, the district court set aside its judgment against WeWeldit and Cornhusker Casualty. See *P.A.M. v. Quad L. Assocs.*, 221 Neb. 642, 380 N.W.2d 243 (1986) (Nebraska Workers' Compensation Act provides an exclusive remedy for an employee's injury arising out of and in the course of employment and precludes an employee's common-law action against the employer for negligence).

Christina McKinstry contends that the district court erred in its finding that the county was not liable in the collapse of the wingwall trench and in concluding that Husker Steel was not liable for the negligence of its subcontractor, WeWeldit, in excavation of the trench.

"To prevail in an action based on negligence, a plaintiff must prove four essential elements: the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages." *Zeller v. County of Howard*, 227 Neb. 667, 671, 419 N.W.2d 654, 657 (1988). See, also, *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

Christina McKinstry relies primarily on two cases to support her negligence claim against the county and Husker Steel, namely, *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956), and *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984).

In *Hickman, supra*, Parks contracted with the Officers Club at Offutt Air Force Base to make improvements which required excavation of a ditch or trench on an area near the Air Force Officers Club. A Major Morrow was in charge of the club at the time of an evening party attended by Hickman. When Hickman

left the club and walked toward the parking lot located beyond the excavation site, he fell into the excavation. Among its contentions to avoid liability or absolve its negligence, Parks claimed that Major Morrow, as manager of the club which had contracted for the improvement, should have taken precautions to protect against anyone's falling into the excavation. However, in characterizing an excavation as a "dangerous place" or an "operation likely to cause injury or damage," this court stated:

> The general rule, which governs where a party is responsible for a dangerous place, agency, instrumentality, or operation likely to cause injury or damage to persons or property rightfully in its proximity, is that he is charged with the duty of taking due and suitable precautions to avoid injury or damage to such persons or property, and his failure to take such precautions constitutes negligence. [Citations omitted.]
>
> This rule applied to excavations requires a contractor making an excavation on property of another to provide such protection as would guard persons rightfully on the property against any contingency that was reasonably to be anticipated. [Citations omitted.]
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> . . . .
>
> . . . A witness who was in charge of the work of the defendant [Parks] testified substantially that he did not take any steps to protect the east portion of the excavation but that he left that matter to Major Morrow who was in general charge of the operation of the club. There was no evidence however that Major Morrow had or exercised any directory or supervisory control over the performance of the defendant under its contract or of anything in relation thereto.
>
> The defendant could not be relieved from its responsibility to protect against the danger from the open excavation by reliance upon Major Morrow to protect against that danger. The person on whom the duty devolves is not excused from taking the necessary precautions by contracting with or relying on others to take necessary precautionary measures. [Citations

omitted.]

162 Neb. at 469-70, 76 N.W.2d at 409-10. See, also, *Rose v. Buffalo Air Service*, 170 Neb. 806, 104 N.W.2d 431 (1960): A person on whom a duty of due care devolves is not excused from taking necessary precautions by contracting with or relying upon others to take necessary precautionary measures.

Erickson, supra, involved a wrongful death claim as the result of Erickson's injuries when a transformer exploded, causing the transformer's door to break open and fatally strike Erickson. Monarch was the general contractor in construction of the transformer facility, but Monarch's subcontractor, Walters-Heiliger, installed the transformer. A jury found the subcontractor liable for its negligence and Monarch vicariously liable for its subcontractor's negligence. Judgment on the verdict was affirmed, and we said:

> Monarch contends that it cannot be held liable for the negligence of Walters-Heiliger. Monarch relies on the general rule that the employer of an independent contractor is not liable for physical harm caused to another by the act or omissions of the contractor or his servants. *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981). There are exceptions to this rule of nonliability. The general contractor remains liable for the negligence of the subcontractor "if he retains 'control' of the work—or if, by rule of law or statute, the duty to guard against the risk is made 'nondelegable'." *Funk v General Motors Corp.*, 392 Mich. 91, 101, 220 N.W.2d 641, 645 (1974).
>
> In the present case Monarch had a nondelegable duty to provide a facility which was safely wired. "The nondelegable duty exception is based upon the theory that certain responsibilities of a principal are so important that the principal should not be permitted to bargain away the risks of performance." *Arsand v. City of Franklin*, 83 Wis. 2d 40, 54, 264 N.W.2d 579, 586 (1978), at n.8.
>
> The nondelegable duty exception to the rule of nonliability was described by the court in *Witucke v Presque Isle Bank*, 68 Mich. App. 599, 610, 243 N.W.2d 907, 912 (1976): "[W]e believe that an essential element of

> the doctrine is the failure of the principal to see that all appropriate precautions are taken by the one to perform the inherently dangerous task. The doctrine, in short, says that the principal is negligent, and hence liable, because it has allowed the independent contractor to be negligent in performing the job. There is a nondelegable duty to see that the work is done with the requisite degree of care; when the contractor fails in fulfilling its duty of care, the principal has breached its own precautionary duty."

216 Neb. at 879-80, 347 N.W.2d at 105.

Referring to *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956), we stated in *Erickson v. Monarch Indus.*, 216 Neb. 875, 880, 347 N.W.2d 99, 106 (1984):

> [T]he defendant had entered into a contract with an officers' club to improve its facility. Plaintiff was injured when he fell into an open excavation. Defendant argued that it was not liable, as it had left the matter of protecting the site to the officer in charge of the club. We held the duty to protect against the danger to be nondelegable.

The *Erickson* court continued:

> In the present case Monarch entered into an agreement to construct the grain drying facility. Monarch employed Walters-Heiliger to perform the necessary electrical wiring. Walters-Heiliger was required to exercise utmost care and skill in providing the proper components and in wiring the facility, as it was providing a dangerous commodity. [Citations omitted.] Monarch could not delegate its duty to provide a facility that was wired safely.
>
> Monarch and Walters-Heiliger contend that after the facility was completed and accepted by Krieger [owner of facility], the contractor and subcontractor cannot be held liable for defects which injure third persons. The general rule was stated in *Stover v. Ed Miller & Sons, Inc.*, 194 Neb. 422, 425, 231 N.W.2d 700, 703 (1975): " 'A construction contractor is not liable for injuries or damage to a third person with whom he is not in contractual relation resulting from the negligent performance of his duty under his contract with the contractee where the injury or damage is sustained after the work is completed

and accepted by the owner.' "

The exception to this rule was described in *Florida Freight Terminals, Inc. v. Cabanas*, 354 So. 2d 1222, 1225 (Fla. App. 1978): "An independent contractor is not liable for injuries to third parties after the contractor has completed his work and turned the project over to the owner or employer and it has been accepted by him *unless* the parties were dealing with inherently dangerous elements or the defect at issue was latent and could not have been discovered by the owner or employer."

In *Simmons v. Owens*, 363 So. 2d 142, 143 (Fla. App. 1978), the court said: "The general rule . . . is subject to the exception that a contractor is not relieved of liability where he creates a dangerous condition or unreasonable risk which is latent and not discoverable by reasonable inspection." See, also, *Slavin v. Kay*, 108 So. 2d 462 (Fla. 1959).

In the present case the defect in the wiring of the transformer was latent and not reasonably discoverable by the owner, Krieger. Moreover, the installation of the electrical transformer was an inherently dangerous task such that the law will not relieve the contractors' liability for their negligence merely because Krieger accepted the facility.

216 Neb. at 881-82, 347 N.W.2d at 106.

In *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 213, 376 N.W.2d 301, 309 (1985), this court, citing *Erickson*, stated:

> A nondelegable duty means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another. [Citation omitted.] One on whom a nondelegable duty is enjoined may not, by employing an independent contractor, escape vicarious responsibility and liability for proper performance of that

nondelegable duty. [Citations omitted.]

See, also, *Greening v. School Dist. of Millard*, 223 Neb. 729, 393 N.W.2d 51 (1986).

"A general contractor, in control of the premises where work performance under a contract with the owner is being carried out, owes a duty to persons rightfully on the premises to keep the premises in a reasonably safe condition while the contract is in the course of performance." *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 265, 303 N.W.2d 476, 478 (1981). See, also, *Hand v. Rorick Constr. Co.*, 190 Neb. 191, 206 N.W.2d 835 (1973).

In McKinstry's case, it is beyond question that trenching, excavating, and earthwork were not part of the project contracted between Husker Steel and the county. The reason for the deliberate deletion or exclusion of such earthwork from the Husker Steel-county contract was the county's expressed wish and direction, consistent with the county's custom, that the county was independently obligated to supply all trenching or excavating for the bridge project. The evidence is virtually overwhelming, and the trial court concluded, that the trench's collapse might have been avoided by adequate sloping of the trench wall which, for all practical purposes, was perpendicular to the bottom of the trench. The trench wall was excavated at almost twice the appropriate angle which would have prevented the trench wall from collapsing on account of its own weight. Additionally, adequate shoring may well have checked the earthen wall's tendency to buckle under its own weight. Negligence, then, permeated the excavatory work. Whose negligence?

FINDING FOR THE COUNTY

Implicit in the district court's finding for the county is the conclusion that WeWeldit, not the county, had the duty to take precautionary measures which would have prevented the accident, namely, adequate shoring and an appropriate slope for the trench wall. Yet, in view of its agreement with Husker Steel, the county had the responsibility or obligation to provide excavatory work. Thus, in reference to the bridge construction and participation in the project, the county had a nondelegable duty to use due care to protect persons against injury from the

hazards or risks which inhered in the particular excavation, trenching, and earthwork undertaken by the county. See *Hickman v. Parks Construction Co.*, 162 Neb. 461, 76 N.W.2d 403 (1956). Also, the county was not relieved of its nondelegable duty when WeWeldit accepted the county's excavatory work for the bridge project. See *Hickman v. Parks Construction Co., supra*. The county's turning the finished earthwork, such as it was, over to WeWeldit did not absolve the county from liability for its negligence concerning the inherently dangerous trench excavated by the county. See *Erickson v. Monarch Indus.*, 216 Neb. 875, 347 N.W.2d 99 (1984). Nevertheless, the district court exonerated the county from its nondelegable duty by finding that such nondelegable duty had been delegated to or assumed by WeWeldit. Although the district court attributed all the negligence to WeWeldit, which, according to the district court, had breached its duty to take precautionary measures regarding the trench, the nondelegable duty imposed on the county as the result of the trench's inherently dangerous condition precluded a transfer or transposition of liability from the county to WeWeldit. Consequently, we find that the district court's conclusion, exonerating the county from liability for its negligence demonstrated by the record, is clearly erroneous. The judgment against McKinstry relative to the county is, therefore, reversed.

FINDING FOR HUSKER STEEL

McKinstry contends that Husker Steel, as a contractor, is liable for failure to provide safety in the construction site. There is no evidence that Husker Steel, as a general contractor, was "in control of the premises where work performance under a contract with the owner" was being carried out. *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 265, 303 N.W.2d 476, 478 (1981). To impose the duty on a contractor "to keep the premises in a reasonably safe condition while the contract is in the course of performance," the general contractor must be "in control of the premises." *Sullivan v. Geo. A. Hormel and Co., supra*. If Husker Steel may be characterized as a general contractor, nothing indicates that Husker Steel at any point controlled the construction site. Without such control of the construction site or "premises," Husker Steel, as a general

contractor, owed no duty to WeWeldit's employees regarding the construction site's reasonably safe condition during performance of the contract for construction of the bridge. Reduced to a fundamental expression, the exculpatory conclusion regarding Husker Steel's liability for safety in the construction site is no control, no liability.

McKinstry next contends that if there is a contractor-subcontractor relationship between Husker Steel and WeWeldit concerning the bridge project, then, in accordance with *Erickson v. Monarch Indus., supra*, Husker Steel could not delegate to WeWeldit the duty to provide safety in the bridge project, including the excavatory work which caused Eugene McKinstry's death. As a result of that nondelegable duty, McKinstry argues, Husker Steel was liable for negligence of WeWeldit in the excavatory work for the bridge. However, Husker Steel's role in the bridge project is not so comprehensive as characterized by McKinstry.

A contractor is one who enters into a contract with the owner of certain property to perform some type of work on that property. See *Richard v. Ill. Bell Telephone Co.*, 66 Ill. App. 3d 825, 383 N.E.2d 1242 (1978). On the other hand, a subcontractor is one who independently contracts with the contractor to do part of the work which the contractor has previously agreed to perform. See, *Miller et al. v. Cornell-Young Co. et al.*, 171 S.C. 228, 171 S.E. 790 (1933); *Murray v. Aaron Mizell Trucking Company*, 286 S.C. 351, 334 S.E.2d 128 (1985); *Richard v. Ill. Bell Telephone Co., supra.*

The Husker Steel-county contract did not require that Husker Steel supply any trenching, excavating, or earthwork, which work was left entirely and independently to the county. Beyond its blueprints and products supplied in the bridge project, Husker Steel never actively and directly participated in erecting the bridge. Only the county had the obligation to provide the earthwork for the bridge, which eventually caused Eugene McKinstry's death. Therefore, excavation or trenching for the bridge was a matter outside the contractual obligations imposed on Husker Steel as the result of its agreement with the county. Consequently, neither by contract nor by conduct did Husker Steel obligate itself for earthwork in erecting the bridge.

If Husker Steel, as a contractor, was not obligated to supply excavatory work for the bridge, WeWeldit, as Husker Steel's subcontractor, was not obligated to render excavatory work which its contractor had not agreed to perform and which its contractor had not otherwise undertaken as a part of the contracted bridge project. As an alternative expression of the situation, WeWeldit's participation in excavation or trenching for the bridge was work which Husker Steel had not agreed to perform. One can hardly be characterized as a subcontractor of work not to be performed by the contractor. Thus, if WeWeldit were negligent in the excavatory work, WeWeldit's negligence occurred outside Husker Steel's contracted work and, consequently, happened when WeWeldit was not acting as the subcontractor of Husker Steel. Under the circumstances, Husker Steel contracted no responsibility to supply excavation or trenching for the bridge project and, correspondingly, owed no duty to provide safety in the course of the excavatory work in erecting the bridge. Therefore, Husker Steel was not liable, directly or vicariously, for negligence in the fatal trenching or excavation. On account of the evidence, or lack of evidence, presented in the record which we have reviewed, we cannot conclude that the district court was clearly erroneous in its finding that Husker Steel was not liable for any negligence which caused the death of Eugene McKinstry. The judgment against McKinstry concerning Husker Steel is affirmed.

Regarding McKinstry's question about the admissibility of the OSHA regulations and in view of our disposition of other questions in this appeal, it is unlikely that the particular evidential question will arise on retrial of this matter.

Because we have reversed the judgment pertaining to the county, these proceedings are remanded to the district court for a new trial on McKinstry's claim against the county.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR A NEW TRIAL.

JOSEPH R. MCCASLIN AND THERESA M. MCCASLIN, APPELLEES, V. JOHN E. MEYSENBURG AND JANICE C. MEYSENBURG, APPELLANTS, DORIAN F. LEE ET AL., APPELLEES.

424 N.W.2d 331

Filed June 10, 1988. No. 86-380.

Adverse Possession. The permissive use of property cannot ripen into title by adverse possession until 10 years after it has been brought home to the owner in some plain and unequivocal manner that the person in possession is claiming adversely to him.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded with directions.

Robert J. Becker of Stalnaker, Becker, Buresh & Gleason, P.C., for appellants.

Clayton Byam and Joseph C. Byam of Byam & Byam, for appellees McCaslin.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

CHEUVRONT, D.J.

The plaintiffs-appellees, Joseph R. and Theresa M. McCaslin, brought an action to quiet title against the defendants-appellants, John E. and Janice C. Meysenburg, and the defendants Dorian F. and Glenna G. Lee. Following trial, the district court for Douglas County entered a decree on March 31, 1986, quieting title by adverse possession in the McCaslins. From this decree the Meysenburgs have appealed; however, the Lees did not appeal and the judgment of the district court is final as to them.

The property in question is a strip of land approximately 150 feet in length and tapering from a width of 3.3 feet on the west to 2.3 feet on the east. The western 75 feet of that strip is on the north edge of the Meysenburgs' property, and the remaining 75 feet is on the north edge of the Lees' property, all of which abuts a portion of the south line of the real estate owned by the McCaslins. The issue here concerns the effect of a 1959 unrecorded easement agreement between these parties'

predecessors in title.

In 1959, the Meysenburg property was owned by L.I. and Mary E. Reynolds and the McCaslin property was owned by Lee D. and Willa Seemann. On April 28, 1959, the Reynoldses and Seemanns executed an easement agreement whereby the Reynoldses granted the Seemanns what is called a permanent easement over a 2.2-foot-wide strip of land for the "purpose of constructing, maintaining and repairing a galvanized wire fence, six feet in height, braced with steel poles set in concrete foundations . . . ." Such a fence was constructed and remained on the property until partially removed in 1984 by the Meysenburgs. Although this easement provided that it was "a covenant running with the land and shall be binding upon the parties hereto, their heirs, executors, administrators, successors and assigns," it was never placed of record and neither the Meysenburgs nor the McCaslins had any knowledge of it until shortly before trial.

The McCaslins acquired their property from the Seemanns by deed dated May 12, 1959. The Meysenburgs acquired their property from successors of the Reynoldses by a deed dated March 30, 1982.

In 1978, the McCaslins suspected that part of the fence was on the Meysenburg property, which was confirmed by a survey done in 1980. Sometime in 1982, following the purchase of the property by the Meysenburgs, Joseph McCaslin informed John Meysenburg that the fence was not on the lot line. Subsequently, Meysenburg removed the fence, and this action was filed by McCaslin.

Following trial, the district court found that the McCaslins had been in open and adverse possession of the parcel in question for more than 10 years and that the original easement, being not of record, was of no legal consequence.

It is uncontroverted that the original possession of the land in question was permissive. The permissive use of property can never ripen into title by adverse possession unless there is a change in the nature of the possession brought to the attention of the owner or plain and unequivocal notice to the owner that the person in possession is claiming adversely. *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985); *Messersmith v. Klein*,

189 Neb. 471, 203 N.W.2d 443 (1973). In *Walsh v. Walsh*, 156 Neb. 867, 871-72, 58 N.W.2d 337, 340 (1953), we said:

> An interest in real estate may be obtained in the land of another by open, notorious, peaceable, uninterrupted, adverse possession for the statutory period of 10 years. But where it appears that such possession was permissive until a date which excludes any possibility of the running of the statutory period of 10 years, no easement or other interest therein can be obtained by prescription. Such proof destroys any presumption that the possession was adverse for the statutory period.

Here, the use of the strip in question did not change from the time of the original easement; further, the record reflects that the earliest date McCaslin brought his claim of ownership to the attention of the owners of the other property was in 1980. Because the use of the strip of land in question by the McCaslins or their predecessors in title was with the permission of the owners of the said land until 1980, they could not acquire title by adverse possession.

However, as previously noted, the Lees have not appealed from the judgment of the district court and as to them and their title, that issue is not before the court. The judgment is reversed as to the appellants Meysenburgs and the cause remanded with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

CECILIA NUTTELMAN, TRUSTEE OF L & M ENTERPRISE TRUST, APPELLANT, V. DENNIS JULCH ET AL., APPELLEES.

424 N.W.2d 333

Filed June 10, 1988. No. 86-542.

1. **Liens: Property: Words and Phrases.** Evidence that one holds a lien is not evidence of ownership. A lien is not a property right in or to the thing itself, but constitutes a charge or security thereon.
2. **Actions: Property: Proof.** In an action for ejectment there is no burden on the defendant to show title, but the plaintiff must show title in herself.

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 material facts, and when the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled.
4. **Courts: Jurisdiction: Appeal and Error.** Any order made by a district court after the vesting of jurisdiction in the Supreme Court is void and of no effect. The district court loses jurisdiction the instant an appeal is perfected.
5. **Appeal and Error.** This court will not consider issues on appeal which are not both assigned and discussed.
6. **Actions: Parties: Injunction.** A party litigant who brings successive lawsuits involving the same issues against the same parties, which are vexatious in nature, may be enjoined from continuing such action.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed as modified.

Cecilia Nuttelman, pro se.

Thomas H. Penke of Emery, Penke & Blazek, for appellees.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

HASTINGS, C.J.

This is an appeal by Cecilia Nuttelman, Trustee of L & M Enterprise Trust, "(Sovereign Individual)," generally complaining of the judgment of the district court which dismissed her petition in ejectment brought against Dennis Julch and others. She assigns as error the holding of the district court that there remained justiciable issues of fact to be resolved upon defendants' counterclaims, the enjoining of the plaintiff from commencing further litigation against the defendants, the overruling of her motion for summary judgment, and the dismissal of her petition in ejectment.

Plaintiff alleged in her petition that she and her husband were bodily removed from the land in question, "Section 9, Township 12, Range 1," in York County, by county officials on July 10, 1985, by means of a writ of assistance issued on May 29, 1985. She further alleged that the defendants knowingly and willingly trespassed on the real estate; that the plaintiff, "along with other Trustees," has legal estate in the land described; that

she is entitled to possession of the real property because it is, by law, owned by L & M Enterprise Trust; and that defendants unlawfully keep her from possession.

The defendants, for their answer and counterclaim, allege that a judgment was obtained on May 17, 1982, against Roy Nuttelman (Cecilia's husband) by the Stromsburg Bank of York County, Nebraska (Bank), in the amount of $64,500; that a court decree was obtained by the Bank on October 7, 1983, declaring a conveyance of the land by Roy and Cecilia Nuttelman to be in fraud of the Bank; that the land had been subject to levy and execution in satisfaction of the Bank's judgment, which execution occurred on February 4, 1985; that the ownership right of Cecilia Nuttelman as trustee for various trusts had been considered and adjudicated null and void by the district court for York County; that on February 4, 1985, the property was sold at judicial sale to McClure Land Unlimited for $115,000, which sale was confirmed by the district court and from which no appeal was taken; and that on May 7, 1985, a sheriff's deed was delivered to McClure and recorded in the office of register of deeds of York County on May 7, 1985, and on the same day was conveyed by McClure to Dennis Julch.

The counterclaim continues with allegations that Roy Nuttelman filed a chapter 7 bankruptcy petition on May 9, 1985, in which he claimed no ownership in the land; that on June 24, 1985, the U.S. Bankruptcy Court sustained defendant's motion for individual relief from the automatic stay provisions of the Bankruptcy Code; and that on September 7, 1985, Roy and Cecilia Nuttelman filed a document entitled "Mechanic's Lien" in the office of register of deeds of York County, claiming a lien interest in the land, and on December 2, 1985, filed an action to foreclose that lien, which was summarily dismissed on January 23, 1985, by the court, as having no foundation in law or fact. The defendants allege further litigation of a frivolous and vexatious nature brought by Roy and Cecilia Nuttelman for which they seek relief by injunction and money damages.

The record in this case is a procedural morass. It contains affidavits and showings which for the most part are largely irrelevant. However, we shall set forth as best we can those facts

which seem to have anything to do with the issues in the case.

In 1969, Roy Nuttelman inherited the land from his father. On November 15, 1978, he and his wife, Cecilia, conveyed the land to L & M Enterprise Trust. On March 17, 1980, Roy renewed a promissory note to the Stromsburg Bank in the amount of $70,000 plus interest. Only $5,500 on the note was paid when it became due on May 17, 1980. The Bank obtained a judgment on the note on May 17, 1982.

Apparently, for the purpose of seeking property against which to levy execution on its judgment, the Bank discovered the conveyance to L & M Enterprise Trust. Accordingly, on February 9, 1983, the Bank brought an action alleging that the purported conveyance to L & M was fraudulent. An order declaring the conveyance to be fraudulent and setting it aside was entered by the district court on October 7, 1983, and affirmed by this court in *Stromsburg Bank v. Nuttelman*, 218 Neb. 687, 358 N.W.2d 746 (1984).

Once the judgment of invalidity had become final, the Bank caused an execution to be issued on its judgment, the sheriff levied on the above property, and on February 4, 1985, the property was sold at a judicial sale to McClure. The sale was confirmed, and no appeal was taken from the confirmation.

On May 7, 1985, the deed to the property was delivered to McClure, which in turn conveyed the property to defendant Dennis Julch on the same day. Two days later, on May 9, Roy Nuttelman filed a petition in bankruptcy. The defendant Julch obtained relief from the automatic stay from the bankruptcy court and on July 9, 1985, obtained a writ of assistance commanding the sheriff to assist him in being placed in possession of the property, i.e., to oust the Nuttelmans from the land.

Being removed from the property apparently prompted a flurry of litigious activity on the part of the Nuttelmans and against the defendants, culminating in the present suit in ejectment.

The final order of the district court, and the one from which this appeal is taken, held that there remain justiciable issues of fact to be resolved upon the defendants' counterclaim; that plaintiff's motion for summary judgment is overruled; that

plaintiff's petition in ejectment has no basis in law or fact, fails to state a cause of action, and is dismissed; and that the plaintiff has continued upon a course of frivolous and vexatious litigation against the defendants and is enjoined from commencing or initiating further litigation against these defendants.

We will deal first with two of the plaintiff's assignments of error, i.e., that the trial court erred in overruling plaintiff's motion for summary judgment and erred in holding that the plaintiff had no basis in law or fact to sustain her action in ejectment.

The plaintiff's *husband's* rights and interests in the land passed to the purchaser upon confirmation of the sale. When the sale was confirmed and the deed delivered, legal title to the land passed from plaintiff's husband to the purchaser and its grantee, Dennis Julch. See Neb. Rev. Stat. § 25-1533 (Reissue 1985).

The plaintiff's argument is grounded on the premise that, even though her husband's legal interests in the property may have passed upon purchase, she had legal rights to the land which were not affected by the sale. Unfortunately, there are no facts in the record which bear this out, in spite of plaintiff's legal arguments that she and her husband held title in joint tenancy because they purchased the land; that they worked the land; that they previously had signed a mortgage on the land; and that she has a lien for labor, services, materials, and investments on and in the land. The undisputed facts are that title to this land was obtained originally by Roy by means of a devise from his father. There is nothing of record to establish that any title was ever conveyed to the plaintiff. The will of Roy's father did provide for a "charge" of $18,750 against the property, but plaintiff did not provide any evidence that she had inherited any land from the estate or that she had made any contribution toward "purchasing" the land from the estate. In fact, the evidence which she introduced confirmed that it was solely her husband who derived title to the land through the testamentary conveyance.

Plaintiff's claim that she presently holds a lien against the property which gives her a legal interest in the land must also

fail. Even if her claim of a lien for labor, services, etc., was valid, it is not proof of ownership rights to the property. Evidence that one holds a lien is not evidence of ownership; a lien is not a property right in or to the thing itself, but constitutes a charge or security thereon. See *Mapledge Corp. v. Coker*, 167 Neb. 420, 93 N.W.2d 369 (1958).

It is claimed by the plaintiff that the defendant Julch never met his burden of proving that he had good title, and, therefore, the plaintiff's title is good against his. Contrary to the plaintiff's contention, the defendant had no burden to prove good legal title to the land; this burden was solely the plaintiff's. "This action is one for ejectment so there is no burden on the defendant to show title, but the plaintiffs must show title in themselves." *Kozak v. State*, 189 Neb. 525, 527, 203 N.W.2d 516, 518 (1973), *overruled on other grounds Lillich v. Lowery*, 211 Neb. 757, 320 N.W.2d 463 (1982).

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 material facts, and when the moving party is entitled to judgment as a matter of law. The burden is on the moving party to show that no issues of material fact exist, and unless the party can conclusively do so, the motion must be overruled. *Janssen v. Trennepohl, ante* p. 6, 421 N.W.2d 4 (1988). On the basis of these rules, the judgment of the district court in overruling plaintiff's motion for summary judgment and sustaining defendants' motion as to the dismissal of the petition in ejectment was on a sound footing and is sustained.

The plaintiff makes one last argument to the effect that the judgment against Roy was insufficient to deprive her of her homestead rights. However, that argument is without merit, as the trial court, in confirming the sale of the land, found that the property was the homestead of the plaintiff's husband and set off $6,500 from the judgment. This setoff was in accordance with Neb. Rev. Stat. § 40-101 (Reissue 1984), which provides that a homestead allowance of $6,500 "shall be exempt from judgment liens, and from execution or forced sale . . . ."

Plaintiff complains of the trial court's determination that

there remain justiciable issues of fact to be resolved upon the defendants' counterclaims. These claims undoubtedly relate to the defendants' claim for damages due to vexatious litigation. The defendants argue that the counterclaim issue is moot, as the counterclaims were dismissed on July 8, 1986. However, plaintiff is correct in her contention that because she had already perfected her appeal to this court by July 8, jurisdiction had vested and the district court was without authority to issue an order dismissing the counterclaims. Any order made by the district court after the vesting of jurisdiction in the Supreme Court is void and of no effect. The district court lost jurisdiction the instant the appeal was perfected. *State v. Allen*, 195 Neb. 560, 239 N.W.2d 272 (1976).

The defendants' counterclaims relate to a claim of damages for vexatious litigation and libel, and, of course, also sought an injunction prohibiting plaintiff from filing further lawsuits. The argument portion of her brief addresses only the matter of the injunction. Therefore, under the rule that this court will not consider issues which are not both assigned *and* discussed, we will deal only with the matter of the injunction.

Neither party has directed any discussion of substance to the question of the availability of the injunction process to prohibit vexatious litigation, nor has either provided us with any legal authorities. Our own research discloses the following from 43A C.J.S. *Injunctions* § 47 at 26 (1978):

> It is generally held, whether the litigation complained of is numerous actions between the same parties or numerous actions brought by many against one, that equity may enjoin vexatious suits, not brought in good faith and instituted for annoyance or oppression or to cause unnecessary litigation, and such power exists independently of the power to prevent a multiplicity of actions.

Although not exactly on point, the holding and language of *Shevalier v. Stephenson*, 92 Neb. 675, 139 N.W. 233 (1912), is instructive on this point. This case involved a will contest in which the plaintiff, who was a substantial legatee under the will, was successful in having it admitted to probate. The case was appealed to the district court. During those proceedings, the

heirs claimed that the plaintiff had taken several thousands of dollars belonging to the estate, and several thousand dollars were found on her person. Thereupon, a settlement was made through the plaintiff's attorney. Plaintiff then brought an action in equity in the district court to obtain a new trial. In her petition she claimed that the settlement of the controversy which resulted in the judgment against her was obtained by duress and the fraud and misconduct of her lawyer conniving with those interested to defeat her. By cross-petition, one of the defendants alleged that in September of 1908, approximately 18 months before the present action was filed, the plaintiff had begun a similar action against these same parties, making similar allegations, and that when the issues were joined and the case was about to come to trial, plaintiff dismissed her action and immediately filed a second action making the same allegations. When that action was ready for trial, plaintiff again dismissed her petition and brought the present action. The prayer of the cross-petition was that plaintiff was bringing the litigation for the sole purpose of harassing and embarrassing the defendant and to cast a cloud on the title of the defendants. The trial court found in favor of the defendant and enjoined the plaintiff from bringing further litigation.

This court affirmed the judgment of the district court. In so doing, it stated:

> The principal contention between these parties was as to the probate of the proposed will. That issue had been determined in an action at law. If a party could bring successive actions for the same cause, and successively dismiss and again begin the action, the rights of the parties would never be determined in actions so brought and dismissed, and there would . . . never be a time when the court could stop such proceedings.

Id. at 680, 139 N.W. at 234-35.

That is essentially the case here. The ejectment action raises the issue of title to real estate. That was determined in the foreclosure action and the action to set aside a fraudulent conveyance. Plaintiff here is simply attempting to try the question of title again.

A party litigant who brings successive lawsuits involving the

same issues against the same parties, which are vexatious in nature, may be enjoined from continuing such action.

The court in *Shevalier* discussed the question of the breadth of the order of injunction and concluded that because it prevented litigation against the existing parties as to matters of the same nature, i.e., the adjustment and distribution of the estate, "we do not see that the decree has gone further than necessary for that purpose." *Id.* at 682, 139 N.W. at 235.

The decree in the present case may be somewhat broader than necessary in that it enjoins the plaintiff from "commencing or initiating any further suit or litigation, whether in law or equity," against the named defendants. We believe that the order granting the temporary injunction should be modified to limiting the restriction to litigation involving the title and peaceful possession and enjoyment of the described real estate.

With that modification, we find that the pleadings, 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 the material facts relating to the vexatious nature of the present litigation, and the defendants are entitled to judgment on that portion of their counterclaims as a matter of law.

The judgment of the district court is affirmed as modified by this opinion.

AFFIRMED AS MODIFIED.

ALBERT K. SCHMIDT, PERSONAL REPRESENTATIVE OF THE ESTATE OF ETHEL F. SCHMIDT, DECEASED, APPELLEE AND CROSS-APPELLANT, V. CLIFFORD J. SCHMIDT, APPELLANT AND CROSS-APPELLEE.

424 N.W.2d 339

Filed June 10, 1988. No. 86-546.

1. **Motions for New Trial.** A motion for new trial is addressed to the discretion of the trial court, and a new trial should only be granted for a legal cause and where

it appears that a legal right has been invaded or denied.

2. **Trial: Verdicts: Appeal and Error.** Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict of the jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured.
3. **Undue Influence: Gifts: Proof.** The elements necessary to be established to warrant a finding of undue influence are (1) that the person who made the gift was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence.
4. **Trial: Witnesses: Evidence.** Where testimony is given by a witness on direct examination from which an inference arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut the inference is admissible on cross-examination, and the opposing party is ordinarily entitled to pursue that line of cross-examination.
5. **Courts: 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, the Supreme Court will affirm the decision of the trial court.

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

Paul D. Boeshart of Baskins & Boeshart, for appellant.

John A. Gale of Gale Law Office, P.C., for appellee.

BOSLAUGH, WHITE, and SHANAHAN, JJ., and GITNICK and GARDEN, D. JJ.

GITNICK, D.J.

This case commenced as a suit brought by the First National Bank and Trust Company of North Platte, Nebraska, as conservator of Ethel F. Schmidt, plaintiff in the trial court; and upon her death, her son, Albert K. Schmidt, as personal representative of her estate, was substituted as party plaintiff in place of the conservator, to recover for a series of personal checks totaling $35,700, allegedly advanced as loans to Mrs. Schmidt's son, the appellant, Clifford J. Schmidt, defendant in the trial court. The jury found in favor of Clifford Schmidt and therefore concluded that the sums advanced by the decedent to her son were, in effect, gifts and not loans. The district court for McPherson County granted the motion of the plaintiff for a new trial on the ground that "the verdict [was] against the

greater weight of evidence." Clifford Schmidt, as the defendant, appeals from this ruling, and Albert Schmidt, personal representative, as plaintiff, cross-appeals.

We find that the trial court did not err in granting a new trial and affirm that decision for the reason hereinafter stated.

In coming to this conclusion, we reiterate our previous holdings that a motion for new trial is addressed to the discretion of the trial court, and a new trial should only be granted for a legal cause and where it appears that a legal right has been invaded or denied. It may not be granted for arbitrary, vague, or fanciful reasons. A trial judge should not grant a new trial simply because he has reached a different conclusion than did the jury. *Bentz v. Nebraska P.P. Dist.*, 211 Neb. 844, 320 N.W.2d 763 (1982); *Kremlacek v. Sedlacek*, 190 Neb. 460, 209 N.W.2d 149 (1973). Where a party has sustained the burden and expense of trial and has succeeded in securing a verdict of the jury on the facts in issue, he has the right to keep the benefit of that verdict unless there is prejudicial error in the proceeding in which it was secured. A verdict should not be set aside where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. A verdict by a jury based upon conflicting evidence will not be set aside on appeal unless it is clearly wrong. *Otto Farms v. First Nat. Bank of York, ante* p. 287, 422 N.W.2d 331 (1988); *Poppe v. Petersen,* 221 Neb. 877, 381 N.W.2d 534 (1986).

A review of the evidence in this case shows conflicts in the testimony of various witnesses, which the jury resolved in the defendant's favor.

The evidence was that Ethel Schmidt, mother of Clifford Schmidt, had written 14 checks totaling $35,700 to Clifford Schmidt from November 14, 1977, through December 31, 1982. Clifford Schmidt had assisted his mother in writing checks for her signature and paying bills and in attending to her financial affairs over the later years of her life. The testimony of Clifford Schmidt was that the various checks which he received from his mother had been given to him as "[a] gift or to help me out," as he needed financial help from time to time, and that he intended to pay back the sums received if he could. There was no

evidence in the record that the decedent ever treated the checks as a loan. No notation appears on any of the checks that they were either a gift or a loan, except that in the check register, in the notations to check Nos. 108 and 117, pertaining to the 14 checks payable to Clifford Schmidt which are the basis for this action, Clifford Schmidt had written thereon, "loan." He explained that he felt a sense of obligation to repay the amount of the checks if "I ever got to where I could" and apparently for this reason had noted the word "loan" thereon, but this had never been discussed with his mother. While one other check payable to the defendant, check No. 115, also bore the word "loan" in the check register entry pertaining to it, it is not among the checks sued on, as set forth in the amended petition and as detailed on a summary exhibit received in evidence. Other evidence concerning whether the checks sued upon were induced by the undue influence of the defendant over his mother was obviously resolved by the jury in the defendant's favor when it returned its verdict.

The evidence clearly raised issues of fact, and the jury chose to believe the defendant's version of the facts. There is sufficient evidence in the record to support the jury's decision. However, another issue raised in the cross-appeal of the plaintiff requires us to affirm the trial court's decision to grant a new trial and to discuss other issues raised in the plaintiff's cross-appeal.

On the cross-appeal, the plaintiff assigns as error the failure of the trial court to give certain requested instructions, the sustaining of objections to evidence relating to other checks designated as gifts to other family members as being beyond the scope of direct examination of the defendant, and the overruling of objections of plaintiff's counsel to the defendant's testimony as to conversations with his mother on direct examination as the answers constituted hearsay testimony.

We turn first to the requested instructions of plaintiff's counsel and the instructions of the court as given, as the plaintiff contends the trial court did not adequately explain the concept of undue influence, which was an issue in this case. We have carefully examined the instructions as given by the trial court on this issue. Essentially, these instructions have been

extracted from our decision in *McDonald v. McDonald*, 207 Neb. 217, 298 N.W.2d 136 (1980), and, when read as a whole, adequately and fairly present the matters covered in the requested instructions of plaintiff, and plaintiff's contention in this regard is without merit. However, because this matter is being remanded for a new trial, and in order to avoid any further appeal, we point out that the instructions, as given, did not detail the elements necessary to establish a case of undue influence, although neither party's counsel complained thereof. As we have previously said in another decision, the elements necessary to be established to warrant a finding of undue influence are (1) that the person who made the gift was subject to undue influence; (2) that there was opportunity to exercise undue influence; (3) that there was a disposition to exercise undue influence for an improper purpose; and (4) that the result was clearly the effect of such undue influence. See *McDonald v. McDonald, supra*.

We turn next to the plaintiff's assignment of error that the trial court permitted the defendant to testify concerning conversations he had with his mother, which the plaintiff contends constituted inadmissible hearsay. We point out that these conversations were between parties to this litigation, since the defendant's mother was the real party in interest, notwithstanding the suit was originally brought by the plaintiff bank, in a representative capacity as her conservator, which was replaced, upon her death, by her personal representative. Neb. Rev. Stat. § 27-801 (Reissue 1985), insofar as pertinent, states as follows: "(4) A statement is not hearsay if: . . . (b) The statement is offered against a party and is (i) his own statement, in either his individual or a representative capacity . . . ." Furthermore, the answers to which the hearsay objections were made, which were all to the effect that the defendant's mother said that she gave him the checks to help him out of his financial difficulties and that she did not mention that the funds constituted a loan, were not offered to prove the truth of her statements but, rather, to prove the statements were made. As such, we are not concerned about the decedent's intentions but instead how these intentions appeared as constituting one of the elements of a completed gift. While these words may appear to

be hearsay, in fact they constitute a verbal act and are not hearsay. Therefore, the plaintiff's contention in this regard is without merit. Accordingly, the trial court properly admitted this testimony.

Lastly, plaintiff contends that the trial court committed prejudicial error in limiting the scope of the plaintiff's cross-examination of the defendant concerning matters affecting the defendant's credibility. The defendant had previously testified that he had prepared the checks sued upon which bore no notation as to whether they were gifts or loans and also had prepared the two checks that indicated in the check register that they were given as loans. Plaintiff's counsel then, on cross-examination, proceeded to inquire regarding a series of checks prepared by the defendant for his mother, payable to her other children, which bore the notation thereon that those checks were gifts. The court, on objection by defendant's counsel that the checks to her other children had not been discussed in the direct examination, sustained the objection. We opine that while no direct examination had taken place regarding the checks to the decedent's other children, those checks and the notations appearing thereon were clearly relevant as showing the method used by the decedent and by the defendant when the decedent did make a gift to her children, and such testimony was proper as tending to rebut the testimony of the defendant that the checks to him bearing no mention of the word "gift" were nevertheless a gift. As we have previously stated, where testimony is given by a witness on direct examination from which an inference arises favorable to the party producing him, anything within the knowledge of the witness tending to rebut the inference is admissible on cross-examination, and the opposing party is ordinarily entitled to pursue that line of cross-examination. *Andersen v. Blondo Plaza, Inc.*, 186 Neb. 682, 186 N.W.2d 114 (1971). We further determine that such excluded cross-examination constituted prejudicial error, as provided in Neb. Rev. Stat. § 27-103 (Reissue 1985).

We then conclude that the ruling of the trial court granting the plaintiff a new trial was proper, although the assigned reason for such new trial given by the trial court was incorrect.

However, " '[w]here 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, the Supreme Court will affirm' " the decision of the trial court. *Chicago Lumber Co. v. School Dist. No. 71*, 227 Neb. 355, 365, 417 N.W.2d 757, 764 (1988).

Accordingly, we affirm the decision of the trial court in sustaining the plaintiff's motion for new trial.

AFFIRMED.

ASSOCIATED WRECKING AND SALVAGE CO., A CORPORATION, APPELLEE, V. WIEKHORST BROTHERS EXCAVATING & EQUIPMENT CO., A PARTNERSHIP, APPELLANT, UNIVERSAL OF OMAHA CASUALTY INSURANCE COMPANY, A CORPORATION, APPELLEE.

424 N.W.2d 343

Filed June 10, 1988. No. 86-552.

1. **Verdicts: Appeal and Error.** Generally, a jury's verdict will not be set aside unless it is clearly wrong.
2. **Pleadings.** The statute concerning the amendment of pleadings should be liberally construed to permit amendments when they are proposed at an opportune time and will be in the furtherance of justice.
3. **Pleadings: Proof.** Pleadings may not be amended at certain stages so as to change the issues or the quantum of proof as to any issue.
4. **Pleadings: Appeal and Error.** The decision to allow or deny amendments to the pleadings after trial has begun rests in the discretion of the trial court. Error may not be predicated on the exercise of this discretion in the absence of a showing of prejudice.
5. **Pleadings: Motions for Continuance: Appeal and Error.** If an amendment to a pleading during trial is permitted which does in fact create a prejudicial situation, no error on appeal on that ground may be urged absent a timely request for continuance.
6. **Contracts: Quantum Meruit.** Generally, there cannot be an express and an implied contract for the same thing existing at the same time.
7. _____: _____. It is only where parties do not expressly agree that the law interposes and raises a promise.
8. **Contracts: Quantum Meruit: Pleadings.** An implied contract on a point not covered by an express contract is not superseded by the express contract, and if each arises out of the same transaction, they may be pleaded and tried together.

9. **Directed Verdict: Appeal and Error.** This court will not set aside or direct a verdict in cases where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide the issues of fact.

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

Dan D. Stoller, for appellant.

John W. Steele of Schumacher & Gilroy, for appellee Associated Wrecking and Salvage Co.

HASTINGS, C.J., WHITE, and FAHRNBRUCH, JJ., and WOLF and MCGINN, D. JJ.

HASTINGS, C.J.

This was an action involving oral contracts. The district court found in favor of the plaintiff both on express contracts and on an action in quantum meruit, and for the defendant Wiekhorst Brothers Excavating & Equipment Co. on its cross-petition for liquidated damages assessed against it by the city of Omaha for failure to complete its contract with the city on time. Defendant appeals, assigning as error the action of the trial court in allowing plaintiff to amend its pleading during trial to add a cause of action for quantum meruit and in failing to grant a judgment on its cross-petition in the amount of $3,700, notwithstanding the verdict of $1,700. We affirm.

During the year 1984, the defendant was the general contractor on a sewer project with the city of Omaha in the 99th and Frederick Streets area. By oral contracts the plaintiff agreed to lease to the defendant a crane with services of an operator to lay concrete pipe in an open ditch or creekbed for the sum of $10,000, a front-end loader Caterpillar for $3,000 for 1 month, and the use of a wrecking bar. Plaintiff's evidence would establish that its responsibility was simply to lift pipe sections off a truck and lower them into a preprepared ditch, under certain conditions. The defendant's evidence, on the other hand, was to the effect that plaintiff was to do the whole job, as far as the crane usage, for $10,000, no matter what it took to do the job. This was to include rental of the crane, the operator, fuel, oil, grease, and any help to move the crane in and

out of the jobsite, "the whole shooting match."

The crane and crane operator were placed on the jobsite as agreed, but numerous delays in performing the job were encountered. The first two pipes were placed in the ditch, but had to be removed because they did not fit together. This was apparently caused by a defect in the manufacturing of the pipes. Plaintiff's owner told the defendant that this removal of improperly fitted pipes would cost extra because he was paid to lay pipes, not to remove and re-lay them.

There was also evidence that approximately six pipes were laid, but they sunk into the ditch or creekbed and had to be removed and replaced. This was due to an improper design of the rock bed, having called for 1 1/2-inch rock instead of 3-inch rock. The crane initially sat at the jobsite for several days, and during the delay to improve the bed, the crane was removed from the job to another jobsite. The crane was not returned to the storm sewer project for several weeks.

Later, a dispute arose among the workers. Plaintiff's crane operator claimed he was not receiving the help from defendant's workers which he was supposed to receive and walked off the job. He returned to work the next morning, but did not operate the crane as there was no one to help him and the defendant's manager did not want him there.

Ultimately, the defendant secured the services of another crane and completed the job. However, the completion of the project was 37 days late, and the defendant was charged $100 per day for late completion under the terms of its contract with the city.

Plaintiff claimed that it had completed approximately 50 percent of the job and billed the defendant for $5,000 for crane rental, $1,000 for setting and resetting the pipe that did not fit (8 hours at $125 per hour), $1,500 for extra work in removing and relaying pipes due to the improper bed (12 hours at $125 per hour), and $3,000 for Caterpillar rental. It was defendant's contention that plaintiff only completed approximately 30 percent of the job.

Several sets of pleadings have been filed. However, basically, the plaintiff claimed $3,000 for Caterpillar rental, $7,500 for crane rental, and $45 for use of a wrecking bar, all according to

specific rental contracts. The defendant, in its answer and cross-petition, alleged the failure of the plaintiff to substantially or materially perform its contract, and further sought reimbursement of the liquidated damages charged it by the city of Omaha.

During the course of the trial, and following plaintiff's rest, plaintiff was given leave to file a third amended petition alleging a cause of action in quantum meruit for its extra work in removing and relaying pipe on the two occasions previously stated in the fair and reasonable sum of $2,500. This was permitted over the objection of the defendant on the ground of surprise because it increased the prayer of the petition.

Although there were disputed questions of fact throughout the trial, they were decided adversely to the defendant by the jury. A jury's verdict will not be set aside unless it is clearly wrong. *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987). In any event, no error was assigned in this regard.

Confining our discussion to the two errors raised, we first consider the claim relating to the amended petition. That really presents two questions in one. First, Neb. Rev. Stat. § 25-852 (Reissue 1985) provides in relevant part: "The court may . . . in furtherance of justice, and on such terms as may be proper, amend any pleading . . . by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading . . . to the facts proved." This statute concerning amendment of pleadings should be liberally construed to permit amendments when they are proposed at an opportune time and will be in the furtherance of justice. *Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). Pleadings, however, may not be amended at certain stages so as to change the issues or the quantum of proof as to any issue. *Id.* The decision to allow or deny such amendment rests in the discretion of the trial court. *Id.*; *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986); *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983).

Error may not be predicated on the exercise of this discretion in the absence of a showing of prejudice.

"[A] party [who] has sustained the burden and expense of

> a trial and has succeeded in securing the judgment of a jury on the facts in issue . . . has a right to keep the benefit of that verdict unless there is prejudicial error in the proceedings by which it was secured."

Poppe v. Petersen, 221 Neb. 877, 884, 381 N.W.2d 534, 538 (1986).

The defendant objected to the amendment, not because it changed the issues, but simply because it increased the amount of the prayer for relief. No legitimate claim of prejudice was demonstrated by the defendant. If an amendment to a pleading during trial is permitted which does in fact create a prejudicial situation, no error on appeal may be urged absent a timely request for continuance on that ground. See *Schroll v. Fulton*, 213 Neb. 310, 328 N.W.2d 780 (1983).

The other part of the objection is somewhat different. That relates to defendant's claim that plaintiff was permitted to pursue a remedy both on an express contract and on a claim in quantum meruit. The defendant asserts that a party cannot plead an express contract and then prove and recover on quantum meruit, because an express contract precludes the existence of a contract implied by law or a quasi-contract.

In support of its contention, the defendant cites *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 833, 326 N.W.2d 182, 184 (1982), where we stated that "there cannot be an express and an implied contract for the same thing existing at the same time." We found that Siebler was "precluded from now seeking to have the court, on appeal, create a quasi-contract *in lieu of* the express contract upon which recovery was originally sought." (Emphasis supplied.) *Id.*

The defendant further relies upon *Reeves v. Watkins*, 208 Neb. 804, 305 N.W.2d 815 (1981), for the proposition that a party cannot recover upon a theory of quantum meruit where he pleads and relies during the trial solely upon an expressed contract. The gist of this message is that the allegations or pleadings and proof must agree. In other words, one must be sure to plead quantum meruit if he wishes to recover under that approach, which is exactly what plaintiff's third amended petition did.

Plaintiff's situation is contrasted from those cited by the

defendant as the plaintiff added a quantum meruit theory to *supplement* an express contract theory, not to act as a *substitute* for it. The theories were not exchanged, one for the other, but were to run side by side. Defendant's authorities are distinguishable in that they did not involve actions seeking recovery upon an original contract as well as upon a newly created quasi-contract.

Certainly, it is true that an implied contract cannot arise where an enforceable contract exists between the parties as to the same subject matter and a conflict would thereby result. *Siebler Heating & Air Conditioning, supra*; *Ryan v. Nelson*, 177 Neb. 130, 128 N.W.2d 592 (1964). However, one does not necessarily have to work to the exclusion of the other as "there may be an implied contract on a point not covered by an express contract . . . ." *Snater v. Walters*, 250 Iowa 1189, 1198, 98 N.W.2d 302, 306 (1959); *Smith v. Stowell*, 256 Iowa 165, 125 N.W.2d 795 (1964). "An implied agreement may be given effect where it is based on the subsequent conduct of the parties not covered by the express contract . . . ." 17 C.J.S. *Contracts* § 5 at 566 (1963).

> Where an express contract is silent as to some point or matter, recovery may then be had on an implied contract. . . . The right to recover in quantum meruit is independent of a claim on express contract and is based upon a promise implied in law to pay for beneficial services rendered knowingly accepted. *Campbell v. Northwestern National Life Insurance Co.*, 573 S.W.2d 496 (Tex. 1978).

Hoffman v. Deck Masters, Inc., 662 S.W.2d 438, 441 (Tex. Civ. App. 1983).

Other jurisdictions have dealt specifically with the issue of "extra work" and stated:

> It is clear that quantum meruit and contract theories of recovery can be pursued simultaneously when the quantum meruit claim is solely for "extra work." In a building contract, extra work is work which is not within the contemplation of the contracting parties and is not controlled by the contract.

Steinberg v. Fleischer, 706 S.W.2d 901, 906 (Mo. App. 1986). One example of extra work was the removal of debris and its

replacement with proper soil—as it was not within the written contract for construction, in the case of *Husar Industries v. A.L. Huber & Son, Inc.*, 674 S.W.2d 565 (Mo. App. 1984).

The central issue then becomes whether the alleged "extra work" was encompassed in the plaintiff's cause of action for the balance claimed due under the contract it had allegedly substantially performed. For if the extra work was required by the contract, the plaintiff cannot seek to be compensated under the idea of quantum meruit.

The expression "quantum meruit" means "as much as he deserves." Black's Law Dictionary 1119 (5th ed. 1979). The general principle of quantum meruit is a contract implied in law theory of recovery based on the equitable doctrine that one will not be allowed to profit or enrich oneself unjustly at the expense of another. If "benefits have been received and retained under such circumstances that it would be inequitable and unconscionable to permit the party receiving them to avoid payment therefor, the law requires the party receiving and retaining the benefits to pay their reasonable value." *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 69, 416 N.W.2d 216, 219 (1987).

The jury must necessarily have found that unjust enrichment flowed to the defendant from plaintiff's providing of additional services when the pipes did not fit and the rock bed was not adequate to support them. Quasi-contractual recovery via restitution of $1,250 was proper. The defendant clearly benefited from the labor of the plaintiff; thus, the plaintiff should be awarded the reasonable value of the services rendered. Stated another way, this law of restitution " 'deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss.' " *Ladenburger v. Platte Valley Bank of North Bend*, 180 Neb. 167, 170, 141 N.W.2d 766, 768 (1966).

Although this court has not specifically dealt with "extra work," Nebraska clearly recognizes cases based on causes of action on both a quantum meruit theory and an express contract. In the case of *Vantage Enterprises, Inc. v. Caldwell*, 196 Neb. 671, 244 N.W.2d 678 (1976), we endorsed the practice

of joining the two theories of recovery in a single petition. As authority for the proposition that Vantage should have joined its two theories in its original petition, we illustrated that

> [s]ection 25-701, R.R.S. 1943, specifically provides: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in any of the following classes: (1) The same transaction or transactions connected with the same subject of action; (2) contracts, express or implied; * * *." This court has consistently held that an action in quantum meruit may be joined in a petition with an action on an express contract, and a judgment based on either will satisfy the liability as to both claims where they have their origin in the same transaction. Rodgers v. Jorgensen, 159 Neb. 485, 67 N.W.2d 770 (1954); Umberger v. Sankey, 154 Neb. 881, 50 N.W.2d 346 (1951); Stout v. Omaha, L. & B. Ry. Co., 97 Neb. 816, 151 N.W. 295 (1915).

196 Neb. at 674, 244 N.W.2d at 680.

Although the *Vantage* holding concerned the application of the doctrine of res judicata to the use of the two theories in two separate lawsuits, the basis of the ruling was that where the facts arise out of the same transaction, an action on an express contract may be joined with an action for quantum meruit. See, also, *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

There was testimony from which the jury could, and obviously did, believe that when the problem of the removing and re-laying of the pipes occurred on the two separate occasions, Robert Hroch of the plaintiff warned Mr. Wiekhorst that this work would cost extra and that he would charge him for the time. Yet Wiekhorst continued to accept the plaintiff's services, knowing that they were not rendered gratuitously. Under such circumstances, and for quantum meruit purposes, the plaintiff reasonably notified the person sought to be charged that the plaintiff, in performing such services, was expecting to be paid by the person sought to be charged. See *Montes v. Naismith & Trevino Construction Co.*, 459 S.W.2d 691 (Tex. Civ. App. 1970).

This is the perfect scenario for the quantum meruit rationale to arise. With respect to the additional work to be performed, if any, by either party, there was no agreement. " 'It is only when parties do not expressly agree that the law interposes and raises a promise. . . .' " *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 833, 326 N.W.2d 182, 184 (1982), quoting 66 Am. Jur. 2d *Restitution and Implied Contracts* § 6 (1973). This implied-in-law contract then will act without regard to the intention or assent of the parties bound and will compensate the plaintiff for the reasonable value of labor and materials which it furnished. The law implies a promise to pay on the part of the defendant, when the additional labor was requested of the plaintiff's crane operator by the defendant's partner, Scott Wiekhorst, via signals, instructions, and orders. See *Bush v. Kramer*, 185 Neb. 1, 173 N.W.2d 367 (1969). The work was also knowingly accepted, used, and enjoyed by the defendant. The crane operator had never installed pipe in this manner before, and it was not the usual procedure.

The evidence of a stated rate, $125 per hour, was competent to show the value of the extra services. It was sufficient as prima facie proof of the reasonable value. See *Sorensen Constr. Co. v. Broyhill*, 165 Neb. 397, 85 N.W.2d 898 (1957). There was no evidence of probative value to the contrary.

Although plaintiff pleaded and proved a cause of action based on an express contract, it also sought recovery for different services based on extra work performed, evidence of which was introduced *before* the plaintiff moved for leave to amend. The amendment was made simply to conform pleadings to the proof. While recognizing our holdings in *Siebler Heating & Air Conditioning v. Jenson, supra*, and *Knoell Constr. Co, Inc. v. Hanson*, 205 Neb. 311, 287 N.W.2d 439 (1980), we necessarily recognize the logic of the rule from the Iowa case of *Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d 188 (Iowa App. 1984), and so hold, that an implied contract on a point not covered by an express contract is not superseded by the express contract, and if each arise out of the same transaction, they may be pleaded and tried together. Defendant's first assignment of error is without merit.

The assignment of error relating to the matter of liquidated

damages awarded defendant on its cross-petition comes to us because of the action of the trial court in overruling the motion to set aside the jury's verdict.

"This court will not set aside or direct a verdict in cases where the evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide the issues of fact." *Poppe v. Petersen*, 221 Neb. 877, 884, 381 N.W.2d 534, 538 (1986). Further, " '[a] jury verdict will not be disturbed on appeal unless it is clearly wrong.' " *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 892, 395 N.W.2d 481, 485 (1986); *Poppe v. Petersen, supra.*

In assessing an amount of $1,700 against the plaintiff, the jury must have found that the plaintiff was responsible for a 17-day delay in the project rather than the 37 days alleged by the defendant.

> On a motion for judgment notwithstanding the verdict, the moving party is deemed to have admitted as true all the material and relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences which can be deduced therefrom.

Havlicek v. Desai, 225 Neb. 222, 225, 403 N.W.2d 386, 389 (1987).

A review of the testimony in favor of the plaintiff shows that the crane operator was on the job the first day laying pipe. At that time, the project was already not on schedule. The progress reports also show no activity on 12 of 21 days due to rains and mud. The crane operator noted that he encountered problems in performing his duties from the start, as the road he was to use was not ready; it needed to be widened.

Although there was contrary evidence offered by the defendant, this placed a fact question before the jury, which decided the issue contrary to the defendant's position.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY A. GEORGE, APPELLANT.

424 N.W.2d 350

Filed June 10, 1988. No. 87-792.

1. **Criminal Law: Proof.** The burden is on the State to prove all essential elements of the crime charged.
2. **Criminal Law: Convictions: Proof.** To sustain a criminal conviction, the corpus delicti must be proved beyond a reasonable doubt.
3. **Convictions: Appeal and Error.** A judgment of conviction will not be reversed by the Supreme Court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law.

Appeal from the District Court for Nemaha County: ROBERT T. FINN, Judge. Reversed and dismissed.

Louie M. Ligouri, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is an appeal from the judgment of the district court which affirmed the conviction of the defendant by the county court for disturbing the peace under the provisions of Neb. Rev. Stat. § 28-1322(1) (Reissue 1985), a Class III misdemeanor. Assigned as errors are the failure of the evidence to support the conviction and the failure of the trial court to find that the defendant acted in self-defense under the provisions of Neb. Rev. Stat. § 28-1407(1)(a) (Reissue 1985). We reverse and dismiss.

The burden is on the State to prove all essential elements of the crime charged. *State v. Cronin*, 227 Neb. 302, 417 N.W.2d 169 (1987). To sustain a criminal conviction, the corpus delicti must be proved beyond a reasonable doubt. *State v. Rich*, 222 Neb. 394, 383 N.W.2d 801 (1986). However, a judgment of conviction will not be reversed by the Supreme Court on appeal unless the evidence is so lacking in probative force that it is insufficient as a matter of law. *State v. Schon*, 227 Neb. 482, 418 N.W.2d 242 (1988).

The incident out of which the charge in this case arose was an altercation on October 17, 1986, in a bar in Peru, Nebraska. The defendant and his brother Anthony were black students attending Peru State College. According to the testimony of the two brothers, Joe Whisler, a white male, began staring at Anthony, then came over to where the two brothers were sitting and, in addressing Anthony, called him a "nigger" and invited him outside, where, he said, he would whip him. Whisler continued to insult, harass, and provoke Anthony, finally shoving him. A shoving match ensued which escalated into a fistfight between Anthony and Whisler, who was then joined by two white friends who held Anthony while Whisler continued to punch him.

According to the testimony of both brothers, the defendant had not become involved in any of these activities until the odds against his brother seemed to be requiring an evening up. Again according to the brothers' testimony, the defendant began to pull the two white men off his brother, when he, the defendant, was struck, and he struck back.

The only testimony suggesting that the defendant had disturbed the peace of anyone came from the female bartender, Claire Shannon, who said that her peace was disturbed. However, she conceded that in her testimony given just the week before, when the three white men were prosecuted, she had stated that they did not disturb her peace and quiet. Her explanation was quite pragmatic: they were regular customers; they were always in the bar; and they were buying drinks. The defendant and his brother, she said, did not order anything. She was asked the question: "So, you're saying the fact that they [defendant and his brother] didn't order a drink, and the fact that they don't always come in there, interfered with your peace and quiet?" to which she answered, "Yeah."

Shannon claimed that the defendant started the fight and that she did not see anything happen before the defendant hit Whisler. However, again during her testimony at the previous trial, she said that she did not know what precipitated the fight. When asked what made her think the defendant started the fight, she said, "Same answer; for them to come in and not order anything . . . ."

On further cross-examination, she finally stated that she did not know who started the fight, and although she claimed the fighting lasted 10 to 15 minutes, she did not see one white person throw a punch.

The evidence upon which the defendant was convicted borders on the incredible. We have no problem finding that it was so lacking in probative force that it was insufficient as a matter of law.

The judgment of the district court affirming that of the county court is reversed and the complaint ordered dismissed.

REVERSED AND DISMISSED.

WESTERN FERTILIZER AND CORDAGE COMPANY, INC., APPELLEE, V. BRG, INC., ET AL., APPELLEES, CITY OF ALLIANCE, A MUNICIPAL CORPORATION, APPELLANT AND CROSS-APPELLEE, AND DAVID K. RICE, INTERVENOR-APPELLEE AND CROSS-APPELLANT.

424 N.W.2d 588

Filed June 17, 1988. No. 86-289.

1. **Real Estate: Dedication: Words and Phrases.** A dedication of real estate is a landowner's giving of a right or easement for public use.
2. **Mortgages: Dedication.** A mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee.
3. **Corporations: Presumptions.** Although, generally, there is a presumption that acts of corporate officers pertaining to ordinary corporate business transactions are authorized by the corporation, when a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction is required to make an inquiry into the officer's authority.
4. **Principal and Agent: Words and Phrases.** Apparent authority is the power which enables a person to affect the legal relationships of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestations to such third persons. A party who has knowingly permitted others to treat one as his agent is estopped to deny the agency.
5. _____: _____. Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency.
6. _____: _____. Apparent authority for which a principal may be liable must be

traceable to the principal and cannot be established by the acts, declarations, or conduct of an agent.

7. **Corporations: Principal and Agent: Ratification.** The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it.
8. **Principal and Agent: Ratification.** Essential to a valid and effective ratification of an unauthorized act is the principal's complete knowledge of the unauthorized act and all matters related to it.

Appeal from the District Court for Box Butte County: PAUL D. EMPSON, Judge. Affirmed.

Rodney P. Cathcart of Erickson & Sederstrom, P.C., and Walter R. Metz of Metz & Metz, for appellant.

Robert G. Simmons, Jr., of Simmons, Raymond, Olsen, Ediger, Selzer & Ballew, P.C., for appellee Western.

Herbert M. Sampson III of Sampson & Forney, for intervenor-appellee.

BOSLAUGH, CAPORALE, SHANAHAN, and GRANT, JJ., and BURKHARD, D.J.

PER CURIAM.

This is an action in equity filed by Western Fertilizer and Cordage Company, Inc. (Western), to foreclose a real estate mortgage and to determine the validity and priority of liens on the real estate for unpaid assessments claimed by the City of Alliance, appellant. David K. Rice, appellee, filed his "Petition in Intervention" asking for a determination of the validity and priority of a statutory construction lien which Rice claimed was due him for unpaid engineering services concerning the real estate. After denying the validity of Rice's construction lien, the district court for Box Butte County found that Western's mortgage was prior to the liens claimed by City of Alliance except as to one lot, on which priority of lien was found in favor of City of Alliance. The court ordered foreclosure of Western's mortgage and sale of the real estate, and reserved jurisdiction to determine distribution of any surplus if the sale proceeds

exceeded the amount due Western. City of Alliance appeals.

Rice did not directly appeal the denial of his construction lien, but raised the issue as a cross-appeal in his "Brief of Intervener-Appellee and Cross Appellant." Pursuant to Neb. Ct. R. of Prac. 1E (rev. 1986), Rice's cross-appeal was dismissed. See *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983), where this court held that an appellee cannot cross-appeal against another appellee. This appeal, therefore, does not address the district court's denial of Rice's lien.

Incorporated in 1959, Western was originally in the business of selling fertilizer and binding twine, but eventually became involved in farming and real estate investments. Western's original stockholders were Mr. and Mrs. Gordon Keeley. Gordon Keeley was president of Western at all times material to this action, and was also president of another corporation, Alliance Tractor and Implement Company (ATI). Max Garwood became an employee, and later a stockholder and vice president, of ATI. Garwood also became a stockholder and secretary-treasurer of Western, but, according to Keeley, was never a vice president of Western. Garwood initially testified that he had been a vice president of Western, but later retracted, admitting that he was only a secretary-treasurer for Western and was apparently confused due to his status as vice president of ATI.

On October 26, 1977, as president of Western, Keeley negotiated and executed a contract to sell a farm to BRG, Inc., for $239,400. Garwood was not active in this transaction. The parties do not dispute that, pursuant to the amended contract between BRG and Western, BRG became the owner of the real estate pursuant to the contract and that BRG gave Western a promissory note which was secured by a valid and recorded mortgage in favor of Western. BRG, owned by Carl Peterson, John Brittan, and David Rice, was in the business of investing in real estate, and planned to develop the property purchased from Western by building low cost, inexpensive residential homes on that land. Brittan was the president of BRG and negotiated the real estate purchase with Western's president, Keeley. The amended contract between BRG and Western provided that, upon payment of a specified amount, Western

would release individual lots from its mortgage, and further provided that Western would subordinate its mortgage by joining in any platting or dedication required to develop the land so long as such platting or dedication did not reduce the value of Western's security. On August 31, 1977, Keeley, as president of Western, signed an "Owner's Certificate and Dedication" in connection with a platting of "Block 1, Homestead Addition." Keeley also signed six partial releases between June 1979 and June 1980, releasing several lots from Western's mortgage.

The real estate conveyed to BRG and mortgaged to Western was developed by BRG and platted as several various "Homestead Additions," namely, Homestead Addition, Homestead First, Homestead Second, and Homestead Third, which were then divided into residential lots for sale. City of Alliance passed several ordinances approving the plats and establishing water, sewer, and street improvement districts. Regarding these ordinances, the City of Alliance engineer and city clerk both testified that they did not discuss the matters contained in the ordinances with officers of Western.

Keeley spent part of his time in Arizona, and during that time Garwood handled Western's day-to-day business needs, such as writing checks and paying bills. In 1977 Brittan asked Garwood to sign some plats and dedications on behalf of Western because Keeley was out of town. On April 20, 1977, Garwood signed three dedications which purported to grant City of Alliance an easement or right-of-way to construct and maintain various improvements upon parcels of the real estate owned by BRG and mortgaged to Western. Brittan signed the dedications on behalf of BRG, and Garwood signed: "[S] *Western Fertilizer & Cordage Co. Inc. by Max R. Garwood.*" Garwood also signed a "Ratification of and Consent to Replat" on July 7, 1978, on behalf of Western, as "Vice-President." There were three other plats and dedications executed that covered parcels of property owned by BRG and mortgaged to Western which were signed by Brittan on behalf of BRG, but were not signed by anyone on behalf of Western.

Other than the one dedication Keeley signed on August 31, 1977, Keeley was never asked to sign, and never signed, any

other plat or dedication on behalf of Western. Garwood never told Keeley that he had signed any plats and dedications on behalf of Western. Although Keeley drove by the land on occasion and observed construction in progress, he testified that since Western held BRG's note and mortgage on the property, he was not concerned with the activity on the land because BRG's payments were being made promptly. Keeley further testified that he had specifically told Garwood and Brittan that only he, Keeley, was to handle the platting, dedication, releases, and other matters on behalf of Western. However, neither Garwood nor Brittan could recall Keeley's telling them that.

Keeley and Garwood severed their business relationship in 1982, whereby Garwood became the owner of ATI and Keeley and his family owned Western. BRG defaulted on its note to Western late in 1982. Keeley testified that he first learned that Garwood had signed some plats and dedications on behalf of Western "in the early part of 1983." Shortly thereafter, Keeley complained to City of Alliance officials about Garwood's signing the plats and dedications on behalf of Western. In August of 1983 Keeley sent a letter to the Alliance city manager expressing his concerns about the purported plats and dedications and advised the city that Western did not join in or consent to the plats and dedications signed by Garwood. The letter also advised the city that BRG was in default and that it may be necessary for Western to foreclose its mortgage on the property.

Western brought an action to foreclose its mortgage on certain parcels of the land which it had sold to BRG. City of Alliance, BRG, Carl Peterson, and John Brittan were named as defendants in Western's foreclosure action. In its amended answer, the City of Alliance alleged that Western was guilty of laches and that the city had relied upon the apparent authority of Garwood in creating the improvement districts. City of Alliance further alleged that Western induced the city to create the districts and should be estopped from denying the validity of the dedications or districts. In its cross-petition, City of Alliance claimed lien assessments against the subject real estate totaling over $274,000, and asked for a determination that its

assessments be adjudged to be first liens against the real estate, and for foreclosure of such liens and sale of the property.

At trial, Western offered, and the court received without objection, separate sets of answers to requests for admissions and interrogatories served by Western upon BRG, Carl Peterson, John Brittan, and City of Alliance. Brittan and Peterson admitted that no proceedings at law had been instituted for recovery of the debt owed to Western. City of Alliance claimed it had insufficient information, and, therefore, did not admit that no proceeding at law had been instituted by Western to recover the debt owed by BRG.

The district court found that Western's mortgage had priority over all of the liens claimed by City of Alliance except as to the lot which Keeley had dedicated on behalf of Western. The court further held that Western was entitled to have its mortgage foreclosed and the property sold in order to satisfy Western's mortgage.

City of Alliance assigns 11 assignments of error which, in consolidated form, allege that the district court erred in failing to find that Garwood had actual or apparent authority to sign the plats and dedications on behalf of Western; in failing to find that Western ratified Garwood's acts of signing the plats and dedications; in failing to find that City of Alliance's assessments were properly levied and were first liens against the property; in finding that no action at law had been commenced for the recovery of Western's mortgage indebtedness; and in finding that Western's mortgage had priority over the city's liens and that Western was entitled to foreclose its mortgage.

Since this is an action to foreclose a real estate mortgage, which is equitable in nature, we review this appeal de novo in conformity with Neb. Rev. Stat. § 25-1925 (Reissue 1985). *Meek v. Gratzfeld*, 223 Neb. 306, 389 N.W.2d 300 (1986); *Tilden v. Beckmann*, 203 Neb. 293, 278 N.W.2d 581 (1979).

> In an appeal of an equity action, the Supreme 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 Supreme 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.

Hughes v. Enterprise Irrigation Dist., 226 Neb. 230, 234, 410 N.W.2d 494, 497 (1987); *Platte Valley Fed. Sav. & Loan Assn. v. Gray*, 226 Neb. 135, 409 N.W.2d 617 (1987).

Neb. Rev. Stat. § 77-1917.01 (Reissue 1986) provides in pertinent part:

> All cities, villages and sanitary and improvement districts in Nebraska shall have a lien upon real estate within their boundaries for all special assessments due thereon to the municipal corporation or district, which lien shall be inferior only to general taxes levied by the state and its political subdivisions.

City of Alliance concedes that if the assessments are not valid, then the city has no lien superior to Western's mortgage.

> It is beyond question that in order to render an assessment for improvements valid, the improvements may be constructed only on land in which the public has title or at least a valid easement. City of McCook v. Red Willow County, 133 Neb. 380, 275 N.W. 396. See, also, 14 McQuillan, Municipal Corporations (3d Ed.), § 38.179, p. 448.

Metropolitan Life Ins. Co. v. SID No. 222, 204 Neb. 350, 354, 281 N.W.2d 922, 924 (1979).

The plats and dedications signed by Garwood on behalf of Western purported to give City of Alliance easements or rights-of-way to construct and maintain the improvements. A "dedication" of real estate has been defined as a landowner's giving of a right or easement for public use. See, *City of Sioux City v. Tott*, 244 Iowa 1285, 60 N.W.2d 510 (1953); *Clark v. City of Grand Rapids*, 334 Mich. 646, 55 N.W.2d 137 (1952); *Hand v. Rhodes*, 125 Colo. 508, 245 P.2d 292 (1952). In this case, the owner-mortgagor, BRG, indisputably signed the plats and dedications. However, some plats were not signed by an officer of Western, the mortgagee, and others were signed "by Max R. Garwood," underneath Western's company name as it appeared on the various plats. In *Metropolitan Life Ins. Co. v. SID No. 222, supra*, we observed:

> "Fundamental to the law of real property is the rule

> that one may not convey or alienate a greater interest in land than he owns, and, consistently with this axiomatic principle, it is firmly established that a mortgagor cannot, without the consent of the mortgagee, make a dedication of the mortgaged premises so as to adversely affect the interest of the mortgagee." Annotation, 63 A.L.R.2d 1160. See, also, Morning v. City of Lincoln, 93 Neb. 364, 140 N.W. 638.

204 Neb. at 354-55, 281 N.W.2d at 925.

City of Alliance contends that Garwood had actual or apparent authority to sign the plats and dedications on behalf of Western or, alternatively, that Garwood's acts in signing the dedications were ratified by Western. Western, on the other hand, argues that Garwood had no authority to sign the dedications and thereby subordinate Western's mortgage and that Western neither consented to nor ratified the purported dedications.

On the issue of agency in this case, City of Alliance bears the burden of proving Garwood's authority and that Garwood's acts, for which Western is to be held accountable, were within the scope of Garwood's authority. See, *Wolfson Car Leasing Co., Inc. v. Weberg*, 200 Neb. 420, 264 N.W.2d 178 (1978); *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.*, 156 Neb. 366, 56 N.W.2d 288 (1953).

The proof in this case fails to establish the existence of Garwood's actual authority to sign the plats and dedications on behalf of Western. Keeley alone negotiated and executed the sale of the real estate to BRG for Western. City of Alliance has not directed our attention to a statute, charter, bylaw provision, resolution, or anything in the record, which might indicate that Garwood had actual or express authority to subordinate Western's mortgage by dedicating the parcels of land in question to the City of Alliance. Although, generally, there is a presumption that acts of corporate officers pertaining to ordinary corporate business transactions are authorized by the corporation, when a corporate officer acts outside the scope of ordinary business, no presumption of authority arises and the other party to the transaction is required to make an inquiry into the officer's authority. *PWA Farms v. North Platte State*

Bank, 220 Neb. 516, 371 N.W.2d 102 (1985); *Val-U Constr. Co. v. Contractors, Inc.*, 213 Neb. 291, 328 N.W.2d 774 (1983). City of Alliance presents no evidence and no authority to support a finding that, under the circumstances, Garwood's actions in subordinating Western's mortgage were an ordinary business transaction for Western. Absent presumptive authority, and any evidence showing actual authority, City of Alliance has failed to sufficiently show that Garwood had actual or express authority to sign the dedications on behalf of Western.

This court recently defined apparent authority as follows:

> "Apparent authority is the power which enables a person to affect the legal relations of another with third persons, professedly as agent for the other, from and in accordance with the other's manifestation to such third persons. A party who has knowingly permitted others to treat one as his agent is estopped to deny the agency."

Department of Banking v. Davis, 227 Neb. 172, 177, 416 N.W.2d 566, 569 (1987). " 'Apparent or ostensible authority to act as an agent may be conferred if the alleged principal affirmatively, intentionally, or by lack of ordinary care causes third persons to act upon the apparent agency.' " *Id.* (quoting *Wolfson Car Leasing Co., Inc. v. Weberg, supra*). However, apparent authority for which a principal may be liable must be traceable to the principal and cannot be established by the acts, declarations, or conduct of an agent. See, *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *Hassett v. Swift & Co.*, 222 Neb. 819, 388 N.W.2d 55 (1986).

Here, Keeley admitted that Garwood had authority to pay bills, write checks, and otherwise handle Western's day-to-day business affairs while Keeley was in Arizona. Whether Garwood's actions in signing the dedications were within the scope of Garwood's apparent authority is a question of fact which we must determine on the basis of all the circumstances of the transaction and the business of Western. See *Draemel v. Rufenacht, Bromagen & Hertz, Inc., supra*.

City of Alliance argues that since Keeley signed one dedication in August of 1977, and six releases thereafter, Keeley must have known that the real estate was being subdivided and

that the city would be relying on the dedications. The city also points to Keeley's observations of construction on the land in support of its argument that Western, through Keeley, knew or should have known about the dedications signed by Garwood. However, there is a total lack of proof that Keeley knew that Garwood signed the plats and dedications any earlier than 1983. Keeley testified that he first learned of Garwood's signings on behalf of Western in the early part of 1983, and Garwood testified that he never did tell Keeley about signing the plats and dedications. Since Keeley had earlier signed a dedication and six mortgage releases on behalf of Western, he could reasonably believe that if BRG and City of Alliance wanted Western to join any other dedications, plats, or releases, then they would have Keeley execute those for Western also.

In this case, Garwood believed that he had authority to sign the plats and dedications for Western. Garwood's belief, however, was not enough to bind Western by virtue of Garwood's apparent authority. What we said in *Nebraska Tractor & Equipment Co. v. Great Lakes Pipe Line Co.*, 156 Neb. 366, 56 N.W.2d 288 (1953), is quite pertinent to this case:

> In the absence of an apparent situation which demands the disclosure of the limitations upon the authority of an agent, a principal is not bound at his peril to disclose those limitations. Rather the burden is on the person dealing with a known agent, not to deal blindly and trust the agent's representations as to the extent of his powers, but to use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers. The rule is well stated as follows in 2 Am. Jur., Agency, § 95, p. 76: "A person dealing with a known agent is not authorized under any circumstances blindly to trust the agent's statements as to the extent of his powers; such person must not act negligently, but must use reasonable diligence and prudence to ascertain whether the agent acts within the scope of his powers. In other words, a person dealing with an agent assumes the risk of lack of authority in the agent. He cannot charge the principal by relying upon the agent's assumption of authority which proves to be unfounded. The principal, on the other hand, may act

> on the presumption that third persons dealing with his agent will not be negligent in failing to ascertain the extent of his authority as well as the existence of his agency." Cases cited from numerous jurisdictions abundantly support the stated principle.

156 Neb. at 376-77, 56 N.W.2d at 293.

It cannot be said that there was any act or failure to act on the part of Western or its president, Keeley, which created in Garwood an ostensible or apparent agency on which the City of Alliance was entitled to rely without inquiry as to Garwood's authority. Indeed, City of Alliance and BRG executed three dedications without a signature from any Western officer, thereby further discrediting the city's claimed reliance on Garwood's authority. Therefore, City of Alliance has failed to show that Garwood had ostensible or apparent authority to sign the plats and dedications for Western, and Western is not estopped from denying Garwood's authority to sign such documents since Western did nothing to cause an appearance of authority in Garwood. See *Rodine v. Iowa Home Mutual Cas. Co.*, 171 Neb. 263, 106 N.W.2d 391 (1960).

Next, City of Alliance argues that Western ratified Garwood's actions.

> "The unauthorized acts of an officer of a corporation may be ratified by the corporation by conduct implying approval and adoption of the act in question. Such ratification may be express, or may be inferred from silence and inaction, and if the corporation, after having full knowledge of the unauthorized act, does not disavow the agency and disaffirm the transaction within a reasonable time, it will be deemed to have ratified it."

D & J Hatchery, Inc. v. Feeders Elevator, Inc., 202 Neb. 69, 74, 274 N.W.2d 138, 141 (1979) (quoting *Citizens Savings Trust Co. v. Independent Lumber Co.*, 104 Neb. 631, 178 N.W. 270 (1920)). See, also, *Bank of Valley v. Shunk*, 215 Neb. 25, 337 N.W.2d 118 (1983); *Drainage District v. Dawson County Irrigation Co.*, 140 Neb. 866, 2 N.W.2d 321 (1942). However, essential to a valid and effective ratification of an unauthorized act is the principal's complete knowledge of the unauthorized act and all matters related to it. *C I T Financial Services of*

Kansas v. Egging Co., 198 Neb. 514, 253 N.W.2d 840 (1977); *Rodine v. Iowa Home Mutual Cas. Co., supra.* Here, as stated earlier, Keeley had no knowledge of Garwood's unauthorized acts until the early part of 1983, and shortly after discovery of those acts Keeley complained to officials of the City of Alliance. In August of 1983, Keeley sent the city a letter disavowing the plats and dedications signed by Garwood. On these facts, Western did not ratify Garwood's unauthorized acts and is not bound by them.

In sum, the plats and dedications signed by Garwood for Western were not properly executed by a duly authorized agent of Western. Therefore, Western did not sign or consent to the dedications, and, consequently, the assessments for improvements upon the land mortgaged to Western are not valid as against Western's mortgage, and are inferior thereto.

Finally, City of Alliance argues that Western failed to prove that no proceedings at law had been instituted for recovery of Western's mortgage indebtedness. As required by Neb. Rev. Stat. § 25-2142 (Reissue 1985), Western alleged in its petition to foreclose its mortgage that no action at law had been commenced to recover the indebtedness owed by BRG and secured by the mortgage to Western. We have held that the burden is on the mortgagee seeking foreclosure to establish by prima facie proof such negative allegation when controverted. See, *Western Pipe & Supply, Inc. v. Heart Mountain Oil Co., Inc.*, 179 Neb. 858, 140 N.W.2d 813 (1966); *Bankers Life Co. v. Peterson*, 178 Neb. 205, 132 N.W.2d 377 (1965); *United Benefit Life Ins. Co. v. Holman*, 177 Neb. 682, 130 N.W.2d 593 (1964). Western offered into evidence, and the district court received without objection, answers to requests for admissions and interrogatories answered by BRG, Peterson, Brittan, and City of Alliance. Although City of Alliance denied that Western had not commenced an action at law to collect the debt owed by BRG, Peterson, Brittan, and BRG admitted that no proceeding at law had been had for recovery of Western's mortgage indebtedness. Whatever objection may have been available to City of Alliance, no objection was made and no limitation on the use of the answers was requested. Consequently, City of Alliance cannot complain in this appeal that the answers or

admissions of the other parties to the litigation are used against the city in establishing that no action at law had been had for recovery of the debt secured by Western's mortgage. See, *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 371 N.W.2d 102 (1985); *McClemens v. United Parcel Serv.*, 218 Neb. 689, 358 N.W.2d 748 (1984).

AFFIRMED.

LYNN ENGLEMAN, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, THIRD-PARTY PLAINTIFF, AND FLOYD ENGLEMAN, THIRD-PARTY DEFENDANT, APPELLEES.
KENTON D. SCHAUB, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, THIRD-PARTY PLAINTIFF, AND FLOYD ENGLEMAN, THIRD-PARTY DEFENDANT, APPELLEES.
RUTH ENGLEMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF DONALD ENGLEMAN, DECEASED, APPELLANT, V. NEBRASKA PUBLIC POWER DISTRICT, THIRD-PARTY PLAINTIFF, AND FLOYD ENGLEMAN, THIRD-PARTY DEFENDANT, APPELLEES.

424 N.W.2d 596

Filed June 17, 1988. Nos. 86-580, 86-581, 86-582.

1. **Motions to Dismiss.** In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
2. _____. In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom the motion is made 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 in favor of the party against whom the motion is made, the case may not be decided as a matter of law.
3. **Public Utilities: Electricity: Negligence.** A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines.
4. _____: _____: _____. The degree of care a power company must exercise varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to

persons and property. However, power companies are not insurers and are not liable for damages in the absence of negligence.

5. _____: _____: _____. The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation's arising which might lead to such injuries. Where circumstances are such that the probability of danger to persons having the right to be near an electrical line is reasonably foreseeable, power companies may be held liable for injury or death resulting from contact between the powerline and a movable machine.
6. **Public Utilities: Negligence.** Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence.
7. **Negligence: Words and Phrases.** Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury.
8. **Political Subdivisions Tort Claims Act: Appeal and Error.** Upon review in the Supreme Court, the findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983), will not be disturbed unless they are clearly wrong.
9. **Negligence: Words and Phrases.** One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent.
10. _____: _____. To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her act.
11. **Public Utilities: Electricity: Negligence.** One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injury, and this is true even of an adult who is wholly unskilled in the handling of electricity.
12. **Trial: Witnesses: Pretrial Procedure.** The trial court, under proper circumstances, has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed.

Robert D. Kinsey, Jr., and William W. Mickle II of Nelson & Harding, for appellants Ruth Engleman and Kenton Schaub.

James R. Hancock of Hancock & Denton, P.C., for appellant Lynn Engleman.

Francis L. Winner of Winner, Nichols, Douglas, Kelly and Arfmann, for appellee Nebraska Public Power Dist.

Leland K. Kovarik of Holtorf, Kovarik, Nuttleman, Ellison, Mathis & Javoronok, P.C., for appellee Floyd Engleman.

HASTINGS, C.J., CAPORALE, GRANT, and FAHRNBRUCH, JJ., and CHEUVRONT, D.J.

FAHRNBRUCH, J.

Plaintiffs in these three consolidated cases appeal the trial court's dismissal of their claims for damages arising out of the death of one man and injuries to two others when the grain auger they were moving came in contact with a 7,200-volt powerline. We affirm.

Donald Engleman was killed and Kenton D. Schaub and Lynn Engleman were injured in the accident on the Floyd Engleman farm near Mitchell, Nebraska. Floyd Engleman is the father of Lynn Engleman and younger brother of Donald Engleman, whose suit was brought by his wife, Ruth Engleman, as personal representative of Donald's estate. Schaub was a friend of the Englemans. Hereafter, for clarity, the Englemans will be referred to by their first names.

The powerline was installed, owned, and maintained by the defendant Nebraska Public Power District (NPPD). In the petitions, each plaintiff alleged that NPPD was negligent (1) in failing to warn the plaintiffs of the dangers incident to contacting a high-voltage powerline, (2) in failing to provide safe electrical current to the Engleman farm by use of insulated overhead conductors or by use of underground conductors, and (3) in its placement and maintenance of the high-voltage line on the Engleman farm. Schaub and Donald also alleged that NPPD was negligent in failing to provide low-voltage conductors to the farm rather than the high-voltage line.

In its answers, NPPD denied liability and alleged that the death and injuries were caused by the negligence of the decedent, the injured parties, and Floyd, whom NPPD named a third-party defendant. NPPD claimed that the decedent and injured men were contributorily negligent by not cranking down the auger, thereby permitting the auger to come into

contact with a powerline, and by failing to move the auger via a safe route. NPPD also claimed that the plaintiffs assumed the risk of injury or death when they pushed the auger into the wire, but that issue is not before this court.

After the plaintiffs adduced evidence and rested, the trial court directed verdicts in favor of the defendants, NPPD and Floyd, and dismissed the plaintiffs' petitions.

Originally, the plaintiffs filed their claims with the defendant NPPD under the Political Subdivisions Tort Claims Act, Neb. Rev. Stat. §§ 23-2401 et seq. (Reissue 1983). The claims were denied. The plaintiffs then filed their cases in the Scotts Bluff County District Court.

The appeals for Donald and Schaub assign five errors, which may be summarized as the district court's erring in directing verdicts for the defendants and in prohibiting Dr. William Hanna from testifying as an expert witness. Lynn adopted the other two plaintiffs' assignments of error and added others which, when narrowed, claim the district court failed to determine the degree of defendant NPPD's negligence as compared to the plaintiff's negligence.

At the time of the accident, 7,200 volts of power were supplied to the Engleman farm by lines from a pole near the farmstead's east boundary. The lines connected with a transformer on a pole in the center of the farmstead. From there, lower voltage power was distributed to the home, a shop/garage, a scale house, a stock handler, and a feed and storage building. The 7,200-volt line was installed on the Engleman farm in October 1978. Before that, the farm was served by a 220-volt line.

On the morning of October 16, 1983, Donald and Schaub went into Sweet Alice's cafe, which is located between Gering and Scottsbluff, Nebraska. Floyd and his wife were eating breakfast there. Floyd invited Donald to help him process cattle. Shortly thereafter, Floyd and his wife returned to their farm and began processing their cattle. Donald arrived about a half hour later and helped transport the cattle, after they were processed, to a pen.

While Donald was transporting the cattle, two or three trucks arrived and corn was dumped on the ground, since

Floyd's grain bins were full. Floyd asked Donald if he would help move a grain auger so the corn could be piled in the front yard of the farmstead. The upper end of the 60-foot auger was in a circular grain bin. The auger's lower end was on a concrete slab near the bin.

Meanwhile, Schaub arrived at the farm and overheard the conversation about moving the auger. He attempted to disengage its power take-off attachment from a tractor but was unable to separate the auger and tractor. He did, however, crank up the auger so its upper end would clear the top of the grain bin.

Floyd disengaged the power take-off and swung the lower end of the auger around. Donald suggested the auger be moved with the tractor. Floyd said it would be quicker to move the auger by hand. Donald moved the tractor away from the auger. Lynn, although he farmed elsewhere, lived with his parents. Lynn was talking to Schaub when Floyd said: "Let's move the auger." Lynn positioned himself on the low end of the auger and was the first to grab it. Floyd took hold of the auger behind Lynn. Donald was positioned opposite Lynn. Schaub was behind Donald.

The four men pulled the auger's lower end underneath the 7,200-volt wire. Although it was possible to do so, the auger's upper end was not depressed sufficiently to clear contact with the powerline. The auger could have been depressed so that it would have been no higher than 5 feet above the ground at its highest point. That would have given the auger more than 16 feet of clearance under the powerline.

When the auger had been moved 40 to 50 feet to the south, Floyd saw Donald and Lynn fall to the ground. Although Lynn fell to the ground, his right hand was still in contact with the auger. Floyd observed Schaub thrown from the auger. When he saw sparks coming from Lynn, Floyd realized that the upper portion of the auger had made contact with the 7,200-volt line. Floyd was unaffected because he was wearing gloves and rubber-soled shoes without any nails in them.

Floyd moved Lynn away from the auger and administered first aid to him. Floyd then attempted to revive Donald. Schaub ran to the farmhouse and telephoned for help. An ambulance

arrived and transported Donald and Lynn to a hospital, where Donald was pronounced dead. It is unclear whether Schaub was admitted to the hospital. Because the trial was bifurcated as to liability and damages, the full extent of Schaub's and Lynn's injuries is not disclosed in the record.

After the auger was moved away from the phase or "hot" line, an NPPD line superintendent measured the distance from the ground to the point on the line where the auger had made contact. That distance was 21 feet 3 1/2 inches. Although not measured, the neutral line was higher than the phase line. At the time of the accident, the specifications book used by NPPD in determining how high a wire should be tracked the National Electrical Safety Code. Recommended clearance from the ground for a wire such as the one at issue was 20 feet 9 inches.

The evidence reflects that the powerline and the transformer and its pole were open and obvious to anyone entering the farm. The auger contained a warning sign which stated, "DANGER; Electrocution Hazard. This Machine is not Insulated. Keep away from overhead electric wires and devices. Failure to do so will result in serious injury or death." Additionally, the auger contained another cautionary sign which stated in part, "lower machine below level of power lines before moving." Although Floyd testified that corn dust covered the warnings, a photo taken shortly after the accident and received in evidence, exhibit 36, reflects that the warnings were visible.

In sustaining a motion to dismiss, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987). See, also, *Cimino v. W. A. Piel, Inc.*, 227 Neb. 196, 416 N.W.2d 505 (1987). In considering the evidence for the purpose of ruling on a motion to dismiss, the party against whom the motion is made 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 in favor of the party against whom the motion is made, the case may not be decided as a matter of law. *Tiede v. Loup Power Dist., supra*; *Herman*

v. Bonanza Bldgs., Inc., 223 Neb. 474, 390 N.W.2d 536 (1986); *Kahrhoff v. Kohl*, 219 Neb. 742, 366 N.W.2d 128 (1985).

A power company engaged in the transmission of electricity is required to exercise reasonable care in the construction and maintenance of its lines. *Tiede v. Loup Power Dist., supra*; *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984); *Roos v. Consumers Public Power Dist.*, 171 Neb. 563, 106 N.W.2d 871 (1961).

The degree of care varies with the circumstances, but it must be commensurate with the dangers involved, and where wires are designed to carry electricity of high voltage, the law imposes the duty to exercise the utmost care and prudence consistent with the practical operation of the power company's business to avoid injury to persons and property. However, power companies are not insurers and are not liable for damages in the absence of negligence. *Tiede v. Loup Power Dist., supra*; *Suarez v. Omaha P.P. Dist.*, 218 Neb. 4, 352 N.W.2d 157 (1984); *Rodgers v. Chimney Rock P.P. Dist., supra*.

The principal basis for determining the liability of a power company for injuries resulting from contact between its wires and a movable machine is the foreseeability of a situation's arising which might lead to such injuries. Where circumstances are such that the probability of danger to persons having the right to be near an electrical line is reasonably foreseeable, power companies may be held liable for injury or death resulting from contact between the powerline and a movable machine. *Tiede v. Loup Power Dist., supra*; *Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970).

Power companies must anticipate and guard against events which may reasonably be expected to occur, and the failure to do so is negligence. *Tiede v. Loup Power Dist., supra*; *Suarez v. Omaha P.P. Dist., supra*; *Rodgers v. Chimney Rock P.P. Dist., supra*; *Gillotte v. Omaha Public Power Dist., supra*; *Roos v. Consumers Public Power Dist., supra*.

The trial court, in directing verdicts in favor of NPPD and Floyd, found that Lynn, Donald, and Schaub were "guilty of negligence and contributory negligence." That NPPD was negligent in installing and maintaining the 7,200-volt line on Floyd's farm is inherent in those findings. But our inquiry does

not end there.

It becomes necessary to determine whether Lynn, Donald, and Schaub were each negligent in a degree sufficient to bar recovery of damages as a matter of law. The trial judge held that they were. That means that by comparison each plaintiff's negligence was more than slight and that each defendant's negligence was less than gross. See, Neb. Rev. Stat. § 25-21,185 (Reissue 1985); *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 255 N.W.2d 272 (1977). "Contributory negligence is conduct for which the plaintiff is responsible, amounting to a breach of the duty imposed upon persons to protect themselves from injury and which, concurring with actionable negligence on the part of the defendant, is a proximate cause of injury." *Phillips v. City of Omaha*, 227 Neb. 233, 238-39, 417 N.W.2d 12, 16 (1987); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987); *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987).

Upon review in the Supreme Court, the findings of fact of the trial court in a proceeding under the Political Subdivisions Tort Claims Act will not be disturbed unless they are clearly wrong. *Steinauer v. Sarpy County*, 217 Neb. 830, 353 N.W.2d 715 (1984); *Rodgers v. Chimney Rock P.P. Dist., supra*.

We cannot say that the trial court was clearly wrong in finding that Lynn, Donald, and Schaub were contributorily negligent in a degree more than slight. Nor can we say that the trial court was clearly wrong in finding that NPPD's negligence was less than gross when compared to the negligence of the decedent and injured men.

One who is capable of understanding and discretion but who fails to exercise ordinary care and prudence to avoid defects and dangers which are open and obvious is negligent or contributorily negligent. *Tiede v. Loup Power Dist., supra*; *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987).

To constitute want of due care on the plaintiff's part, it is not necessary that he or she have anticipated the exact risk which occurred or that the peril was a deadly one; it is sufficient that the plaintiff knew or should have known that substantial injury was likely to result from his or her act. *Tiede v. Loup Power*

Dist., supra; *Utsumi v. City of Grand Island*, 221 Neb. 783, 381 N.W.2d 102 (1986); *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984). One who has notice of a dangerous condition of a wire or other electrical appliance and voluntarily or recklessly brings himself or herself into contact with it, as by touching it with conductors of electricity, is guilty of negligence and cannot hold the power company liable for the resulting injury, and this is true even of an adult who is wholly unskilled in the handling of electricity. *Tiede v. Loup Power Dist., supra*; *Rodgers v. Chimney Rock P.P. Dist., supra*; *Disney v. Butler County Rural P. P. Dist.*, 183 Neb. 420, 160 N.W.2d 757 (1968).

In the present case, the evidence shows that the wire conductors at issue were open and obvious to anyone entering the Engleman farm. Plaintiffs called a psychologist, who testified as an expert in human factors. She stated that Donald, Lynn, and Schaub knew at the time they were moving the auger that the powerlines were there and were dangerous, but "forgot" about them. They made an "error of omission," the expert said.

Lynn lived on Floyd's farm and knew before October 16, 1983, that the wires between the transformer pole and tap pole were electric wires. He also knew that if an auger he was working with came in contact with an overhead powerline, there was a good chance of being killed by electrocution. Lynn further admitted he helped move an auger under the electric line in question on occasion before October 16, 1983. However, before moving the auger prior to October 16, 1983, it was cranked down sufficiently to clear the powerline.

Schaub testified that during the 3 years before the accident, he had been on Floyd's farm some 45 to 90 times. He had also done painting and shingling on the farm's buildings. Before October 16, 1983, Schaub had noticed power poles and electric wires in the farmyard. He said he knew that electricity is dangerous and can either kill or seriously injure a person if an electrical conductor is touched.

Before his electrocution, Donald visited Floyd's farm about once a month for 5 years. In addition, he hauled cattle from the farm once or twice a year. During the periods Donald was on the

farm, the electrical overhead powerlines were open and obvious to view. In fact, he drove underneath them. As stated by the human factors expert, when the auger was being moved, Donald knew the powerlines were there and that they were dangerous. He forgot about them.

In several cases, this court has held that a plaintiff's knowledge of the existence of a high-voltage electrical line coupled with a plaintiff's contact with that line constitutes negligence sufficient to bar recovery as a matter of law. *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987). At a minimum, the causes of action involving Donald, Lynn, and Schaub fall within that category of cases.

Considering that the powerlines and transformer on Floyd's farm were open and obvious; that Donald, Schaub, and Lynn were familiar with the farm; that they all knew the powerlines were there and were dangerous; and that they failed to lower the auger sufficiently to clear the powerlines or to move the auger on a route that would be safe; we cannot say the trial judge was clearly wrong in finding the decedent and injured men negligent in a degree sufficient to bar them recovery as a matter of law. The record reflects that Donald, Lynn, and Schaub individually and collectively breached their duty to protect themselves from injury. *Tiede v. Loup Power Dist., supra*; *McMullin Transfer v. State*, 225 Neb. 109, 402 N.W.2d 878 (1987).

With respect to Lynn's assignment of error regarding the degree of negligence of the parties, the district court did make a comparative finding. Inherent in the trial court's finding that the contributory negligence of Donald, Lynn, and Schaub barred recovery as a matter of law are the further findings (1) that each defendant was negligent and (2) that each plaintiff's contributory negligence was more than slight and each defendant's negligence was less than gross when the parties' negligence is compared. The trial court was not clearly wrong in those findings.

In rejecting the expert testimony of Dr. William Hanna, the trial judge found that it would be unfair to permit him to testify as an expert. This was because the plaintiffs failed to notify NPPD that they would call Dr. Hanna as an expert until the

Friday before the trial, which started on the following Monday. The judge found that was too late for NPPD to prepare interrogatories or deposition for such testimony. The plaintiffs did not reveal at the pretrial conference that they would call Dr. Hanna as an *expert* witness.

> "The trial court has discretionary power to exclude the testimony of a witness whose identity is deliberately withheld in discovery under proper circumstances. The trial court would also have discretion to impose an alternative sanction to effectively protect against harm due to lack of prior knowledge of the witness, such as continuing the hearing or deferring the questioning of such a witness. The object of the rule requiring the disclosure of the names of witnesses before trial is to enable the parties to discover the truth and eliminate surprise, and, dependent on the facts, the overall policy of discovering all the truth, in some circumstances, might be more adequately served by permitting testimony after postponement until the element of surprise has been eliminated. These matters, however, are primarily within the broad discretion of the trial court."

Priest v. McConnell, 219 Neb. 328, 332, 363 N.W.2d 173, 176 (1985); *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 144 N.W.2d 154 (1966).

The trial judge found that in the interest of justice, Dr. Hanna's expert testimony should not be allowed. Under the circumstances shown in the record, the trial judge did not abuse his discretion. Therefore, the assignment of error regarding Dr. Hanna's expert testimony is without merit.

We have considered all of the appellants' assignments of error and find they have no merit. Therefore, the dismissal of all three cases by the trial court after the plaintiffs adduced evidence and rested should be affirmed.

AFFIRMED.

DWAYNE D. LARSON, APPELLANT, V. HOLLY JENSEN, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLEE.

424 N.W.2d 352

Filed June 17, 1988. No. 86-615.

1. **Administrative Law: Appeal and Error.** This court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
2. **Implied Consent: Blood, Breath, and Urine Tests.** It is established that as a condition precedent to a valid request by an officer to submit to a chemical test under the implied consent law, the arresting officer must have "reasonable grounds" to believe that the licensee was either driving a motor vehicle or in actual physical control of same while under the influence of intoxicating liquor.
3. **Statutes: Legislature: Intent.** Statutes in noncriminal matters are not to be given retroactive effect unless the Legislature has clearly expressed a contrary intention.

Appeal from the District Court for Howard County: WILLIAM H. RILEY, Judge. Affirmed.

John B. McDermott of McDermott, Depue & Zitterkopf, for appellant.

Robert M. Spire, Attorney General, and Janie C. Castaneda, for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

GRANT, J.

This is an appeal from an order of the district court for Howard County affirming an order of the director of the Department of Motor Vehicles revoking the motor vehicle operator's license of appellant, Dwayne D. Larson, for a period of 1 year for appellant's refusal to take a breath test.

The record shows that a hearing was held before a hearing examiner of the department on September 9, 1985. Larson's driver's license was revoked by the director of the department on October 4, 1985. Appellant timely appealed to the district court for Howard County, where the court heard the appeal "as in equity without a jury" and determined anew all questions raised before the director, as provided in Neb. Rev. Stat.

§ 60-420 (Reissue 1984). After the hearing on June 13, the district court revoked appellant's license by order rendered July 8, 1986. Larson appeals to this court.

The record shows that at approximately 2 a.m. on July 13, 1985, a Hall County deputy sheriff clocked Larson's automobile at 71 m.p.h. on a road in Hall County where the speed limit was 55 m.p.h. Larson drove his vehicle about 1 mile after the deputy turned on the red lights on his sheriff's vehicle, and finally stopped at a point 1/2 mile into Howard County, which adjoins Hall County on the north.

After the stop, the deputy asked Larson if he had been drinking that night. Larson told the deputy he had had "five or six beers." The deputy then asked him to perform various field sobriety tests, such as reciting the alphabet and walking a straight line. The deputy testified that Larson so performed the tests that the deputy thought appellant was "borderline" as far as being required to take a breath test to determine if the appellant had "ten-hundredths of one per cent or more by weight of alcohol in his . . . body fluid," as proscribed by Neb. Rev. Stat. § 39-669.07 (Reissue 1984). The deputy decided "to just let him have a seat back in [Larson's] car" and advised Larson that he, the deputy, "was going to write a citation for speeding."

The deputy wrote out the citation for speeding 71 m.p.h. in a 55-m.p.h. zone and explained to Larson the speeding ticket, the court date, and the fact that he could plead guilty or not guilty. The deputy then asked Larson to sign the citation, as required by statute, to state that he would appear in court on or before the designated court date. Larson told the deputy he would not sign the citation and that he wanted to go to jail because he had had a fight with his wife and did not have any reason to go home. The deputy explained to appellant that he had to sign the citation or the deputy would be required to take appellant to jail in Grand Island, and again asked appellant to sign the citation.

The appellant then said he was not going to sign anything. The deputy testified:

> A. I decided that I had misjudged. That he was possibly more intoxicated than I first thought. I asked him — I had told him that if he didn't sign the ticket, he would go to

> jail, and I asked him to step out of his car and I advised him I was going to arrest him for speeding and operating a motor vehicle under the influence.

The deputy further testified that appellant was becoming argumentative and that the deputy felt he had misjudged defendant's condition, based partly on the facts that Larson did not seem to realize he was getting a "break" in being allowed to continue to his home in St. Libory and that, "[n]ormally, no one wants to go to jail . . . ."

The deputy took Larson back to Grand Island. There, defendant refused to take a breath test after being fully and properly informed of all his statutory rights in that regard.

After the district court order revoking his license for 1 year, Larson appealed to this court, alleging two errors: (1) that the district court erred "in finding the evidence sufficient to sustain a violation of the implied consent law," and (2) that the 1-year revocation was excessive because it exceeds the 6-month statutory penalty "which went into effect on April 19, 1986." We affirm.

We first note an objection made by the State during oral argument of this case, that the district court for Howard County did not have jurisdiction to determine plaintiff's appeal of the director's order of revocation. A motion to dismiss for lack of jurisdiction was filed by the State and overruled by the district court for Howard County. The State did not cross-appeal on this issue, and the question is not briefed by the parties. Nonetheless, since the issue of jurisdiction is raised, we will consider it. Although this is a civil case, the State's position seems to be based on the provisions of Neb. Rev. Stat. § 29-1301 (Reissue 1985), which provides that all criminal cases shall be tried in the county where the offense was committed. In this case, Larson refused to take the required breath test in Hall County, was arrested in Howard County for incidents occurring in both Howard and Hall Counties, and filed his petition in Howard County. We note only that this proceeding does not involve criminal action and that Neb. Rev. Stat. § 39-669.18 (Reissue 1984) provides that any person aggrieved because of an administrative revocation may appeal to the district court "where the alleged events occurred for which he was arrested, in

the manner prescribed in section 60-420." Section 60-420 provides in part that a person aggrieved by any order of the director may appeal "to the district court of the county in which such person resides . . . ." The record before us shows that Larson resides in Howard County and that some of the events for which he was arrested occurred in Howard County. In view of the circumstances in this record and the manner in which the issue is presented, we determine the district court for Howard County did not err in holding it had jurisdiction of Larson's petition.

This court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record. *Jamros v. Jensen*, 221 Neb. 426, 377 N.W.2d 119 (1985). Appellant contends that since the deputy sheriff had initially determined to issue a citation for speeding and not to arrest defendant for driving while under the influence of intoxicating liquor, any subsequent decision of the deputy was a "clearly retaliatory action" (Brief for Appellant at 10) based on the deputy's irritation at Larson's refusal to sign the speeding citation. We agree fully with the director and the district court and hold, as set out in the trial court's order,

> that the plaintiff was the operator of a motor vehicle and was requested by proper authority to submit to a chemical test for the determination of alcohol in the body fluids; that the plaintiff refused to take the test; that the refusal was not reasonable and that the motor vehicle operator's license and the operating privileges thereunder should be revoked for the statutory period.

We agree with Larson's contention that, as stated in *Emmons v. Jensen*, 221 Neb. 444, 447, 378 N.W.2d 147, 149 (1985),

> [i]t is established that as a condition precedent to a valid request by an officer to submit to a chemical test under the implied consent law, the arresting officer must have "reasonable grounds" to believe that the licensee was either driving a motor vehicle or in actual physical control of same while under the influence of intoxicating liquor. § 39-699.08.

We do not agree with Larson's apparent contention that once a law enforcement officer determines not to arrest a motorist

for drunk driving, that determination forecloses the officer from later determining to arrest the motorist for the offense. In this case, Larson's actions furnished ample evidence for the deputy's change in his decision to issue only a speeding citation. After the deputy had determined to issue the citation and had so informed Larson, Larson became argumentative and insisted on being taken to jail. As the deputy testified, a desire to go to jail is not normally expressed when a motorist is arrested for speeding, and the fact that one fails to recognize when good things are happening to one indicates an impaired judgment. Those facts, added to the "borderline" condition of Larson and Larson's admitted consumption of "five or six beers," furnish more than sufficient evidence to support the deputy's change of decision. To paraphrase, Larson succeeded in snatching confinement from the jaws of liberty in that his own conduct subsequent to the deputy's initial decision furnished sufficient additional evidence to support his arrest for driving while intoxicated.

The totality of circumstances in this case supports our holding that the deputy had reasonable grounds to believe that appellant Larson was operating a motor vehicle while under the influence of alcohol and to arrest him. The deputy's later request to Larson was proper, and Larson's refusal was unreasonable. Appellant's first assignment is without merit.

Larson then contends, in his second assignment of error, that the 1-year revocation of his license was unreasonable in that it exceeded the maximum statutory penalty of 6 months, as set out in Neb. Rev. Stat. § 39-669.16 (Cum. Supp. 1986). The 6-month revocation period became effective on April 19, 1986. Before that time, the statutory revocation was 1 year, as expressed in § 39-669.16 (Reissue 1984).

In *Moore v. Peterson*, 218 Neb. 615, 617, 358 N.W.2d 193, 194-95 (1984), this court held, in connection with an earlier amendment to § 39-669.16,

> The arrest and refusal in this case was made on July 2, 1982, prior to the effective date of the 1982 amendment to Neb. Rev. Stat. § 39-669.16 (Reissue 1978). Consequently, the statute as it existed prior to the amendment is applicable . . . even though the hearing before the director

took place on August 26, 1982, after the effective date of the amendment."

Similarly, in this case, Larson's arrest and refusal on July 13, 1985, as well as the administrative hearing and decision of revocation, took place before the amendment to § 39-669.16 which took effect on April 19, 1986. The basis for such holdings is the general rule in this state that statutes in noncriminal matters are not to be given retroactive effect unless the Legislature has clearly expressed a contrary intention. *Moore v. Peterson, supra*; *Wheelock & Manning OO Ranches, Inc. v. Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978).

Suspension of one's driving privileges is not a criminal matter, and our examination of 1986 Neb. Laws, L.B. 153, effective April 19, 1986, does not disclose any intention on the part of the Legislature that the amended 6-month revocation period was intended by the Legislature to be retroactively applied. Appellant's second assignment is without merit.

The judgment of the district court is affirmed.

AFFIRMED.

IN RE APPLICATION OF BIJK ENTERPRISES, INC. BIJK ENTERPRISES, INC., APPELLEE, V. YELLOW CAB CO. ET AL., APPELLANTS.

424 N.W.2d 356

Filed June 17, 1988. No. 86-685.

1. **Public Service Commission: Appeal and Error.** In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary.
2. _____: _____. If there is evidence to sustain the findings and action of the Public Service Commission, the Supreme Court cannot intervene.
3. **Public Service Commission: Motor Carriers: Proof.** The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the

service; and that the proposed service will be consistent with the public interest.

4. **Public Service Commission.** The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination peculiarly resting in the judgment of the Public Service Commission.

Appeal from the Nebraska Public Service Commission. Affirmed.

Marshall D. Becker and Jeffrey W. Meyers, for appellants.

Robert M. Zuber of Zuber & Ginsburg, for appellee.

BOSLAUGH, WHITE, CAPORALE, and GRANT, JJ., and NORTON, D.J.

BOSLAUGH, J.

The protestants, Yellow Cab Co., Checker Cab Co., Happy Cab Co., doing business as Happy Cab, Airport Transportation Co., and Safeway Cabs, Inc., have appealed from the order of the Nebraska Public Service Commission granting the applicant, BIJK Enterprises, Inc., of Omaha, Nebraska, authority to transport passengers and their baggage and articles from retail stores for delivery between points within a 50-mile radius of Omaha over irregular routes under continuing contracts with Borsheim Jewelry, Reagan Buick, Quality Lincoln-Mercury, and the Marriott Hotel.

The record shows that the applicant, BIJK, is a corporation composed of Jerry *B*evins, William *I*senberger, Richard *J*ennings, and Dennis *K*nowlton, whose initials of their last names form the name BIJK. All four are taxicab drivers in Omaha, Nebraska, who lease their cabs from one of the protestants, Happy Cab.

In August 1984, Isenberger became involved in the transportation of customers of Reagan Buick needing transportation to or from Reagan Buick while their automobiles were being serviced. According to Ellis Hoffine, the service director for Reagan Buick and adviser to Quality Lincoln-Mercury, the service provided by Happy Cab taxi service was not cost-effective, and complaints had been made by customers utilizing the service. Among the complaints were the facts that cab drivers took unnecessarily long routes,

customers had to wait for extended periods of time, and there was a poor coordination of service.

After talking with Isenberger about his dissatisfaction with the taxi service, Hoffine asked Isenberger to assume responsibility for the courtesy car service, to which Isenberger agreed. Isenberger proceeded to seek out additional drivers, all of whom now comprise BIJK Enterprises, and to establish and fund a communication/dispatch system in which his wife functioned as dispatcher. Isenberger then arranged a work schedule whereby three vehicles would leave from Reagan Buick with customers for transport at 7:20 a.m., all vehicles heading in different directions, one west, one northeast, and one southeast. Instead of transporting one customer at a time, Isenberger arranged the service so that passengers traveling to the same general vicinity could be delivered together, thus decreasing the cost to the car dealership and minimizing the length of time a customer would have to wait for transportation. After delivering the customers, the cabs returned to Reagan Buick. After about 10:30 a.m., only one driver remained at Reagan Buick for dispatch, and an additional driver served as backup. Identical service was also to be provided for Quality Lincoln-Mercury.

After implementation of this service by Isenberger, Hoffine testified that the service to customers had improved and that he was satisfied with the service. He also stated that if the applicants were denied authority to continue the courtesy car service, both car dealerships would return to their own courtesy car system, as opposed to resuming service by Happy Cab. While operating the courtesy car service for the car dealerships, Isenberger entered into an agreement with Borsheim Jewelry to provide package delivery service for Borsheim.

In addition to these services, Isenberger occasionally transports passengers for the Marriott Hotel to and from Eppley Airport in Omaha. At the time of BIJK's application, the Marriott had a contract with Airport Transportation Co. for the transportation of hotel guests. Gilbert Cohen, the office manager of the Omaha Marriott, who is responsible for the limousine and taxicab services utilized by Marriott, testified as to numerous reasons why Marriott was dissatisfied with the

service provided by Airport Transportation, including the quality of service, the availability or lack thereof of drivers on an on-call basis, communication difficulties with the dispatch office, problems with van drivers being reckless as well as falling asleep at the wheel, written complaints from hotel guests, and mechanical problems with vans, including doors that did not close properly, rattling seats, improperly working seatbelts, and unsanitary vans.

Cohen was interested in obtaining friendly, courteous drivers who offered safe and convenient transportation, and although he had expressed his complaints regarding the van service to Ira Wayne Anderson, vice president of Happy Cab, Yellow Cab, Checker Cab, and Airport Transportation, the problems remained unsolved. Anderson had told Cohen that if he did not like the service provided, he should "drop it." Cohen had previously tried to contract for courtesy car services but found the cost prohibitive. The Marriott is not interested in a taxi service, but wants contract carrier service, finding it a necessity because of cost and distances involved.

Cohen was familiar with Isenberger because of taxi service he had provided to Marriott guests. Cohen contacted Isenberger and spoke with him about performing a prearranged limousine service for Marriott. As a result, a contract was proposed, agreeable to both parties, whereby BIJK would provide the services desired by Marriott.

Based on these tentative contracts, BIJK filed its application to obtain authority to act as a contract carrier to provide courtesy car service for the two car dealerships and a shuttle van service for the Marriott Hotel, as well as a package delivery service for Borsheim Jewelry. At the time of the application, BIJK had leased a 1986 Buick LeSabre 9-passenger station wagon and had made arrangements to lease a 15-passenger van and two additional station wagons. In addition to the equipment, BIJK had acquired $1 million of liability insurance and $10,000 of cargo insurance.

Protests were filed by the appellants, who hold authority to transport passengers and their baggage between various points, alleging that they currently provide all of the services requested to be performed by the applicant. Safeway Cabs joined in the

protest as well as in this appeal, but offered no testimony.

The only witness appearing on behalf of the protestants was Anderson, vice president of the cab companies and Airport Transportation. The cab companies are currently authorized to transport passengers within the city of Omaha. Airport Transportation operates to and from the Omaha airport and delivers packages within Omaha. If the four stockholders of BIJK cease leasing cabs from Happy Cab, it would lose about $1,100 per week.

The commission granted the applicant's request in its entirety.

"In an appeal from an order of the Nebraska Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question was unreasonable or arbitrary." *In re Application of Silvey Refrig. Carr.*, 226 Neb. 668, 676, 414 N.W.2d 248, 254 (1987); *In re Application of Renzenberger, Inc.*, 225 Neb. 30, 402 N.W.2d 294 (1987); *In re Application of Northwestern Bell Tel. Co.*, 223 Neb. 415, 390 N.W.2d 495 (1986).

> If there is evidence to sustain the findings and action of the Public Service Commission, the Supreme Court cannot intervene. Where the commission's finding is against all evidence, the Supreme Court may hold that such finding by the commission is arbitrary. *In re Application of Red Carpet Limo. Serv., Inc., supra.* See, also, *In re Application of Greyhound Lines, Inc.*, 209 Neb. 430, 308 N.W.2d 336 (1981). A commission's or agency's action is arbitrary if taken in disregard of facts or circumstances and without some basis which would lead a reasonable and honest person to the same conclusion. *In re Appeal of Levos*, 214 Neb. 507, 335 N.W.2d 262 (1983); *Haeffner v. State*, 220 Neb. 560, 371 N.W.2d 658 (1985).

Renzenberger, supra at 35, 402 N.W.2d at 298.

The protestants' five assignments of error are all based on their contention that the applicant failed to meet the statutory requirements. Neb. Rev. Stat. § 75-309 (Reissue 1986) provides in part that

> [i]t shall be unlawful for any common or contract

> carrier by motor vehicle . . . to engage in any instrastate operations on any public highway in Nebraska unless there is in force with respect to such common carrier a certificate of public convenience and necessity, or a permit to such contract carrier, issued by the commission authorizing such operations.

Neb. Rev. Stat. § 75-311 (Reissue 1986) sets forth the requirements necessary in order to obtain a permit to operate as a contract carrier:

> A permit shall be issued to any qualified applicant therefor, authorizing in whole or in part the operations covered by the application, if it appears after notice and hearing from the application or from any hearing held thereon that the applicant is *fit, willing, and able properly to perform the service of a contract carrier* by motor vehicle, and to conform to the provisions of sections 75-301 to 75-322.01 and the lawful requirements, rules and regulations of the commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be *consistent with the public interest by providing services designed to meet the distinct needs of each individual customer* or a specifically designated class of customers as defined in subdivision (10) of section 75-302. Otherwise, such application shall be denied.

(Emphasis supplied.)

> The burden is upon an applicant for authority to operate as a contract carrier intrastate to show that the proposed service is specialized and is designed to meet the distinct needs of the contracting shippers; that applicant is fit, willing, and able to perform the service; and that the proposed service will be consistent with the public interest. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 188 Neb. 584, 198 N.W.2d 195 (1972); *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968).

In re Application of Silvey Refrig. Carr., supra at 674-75, 414 N.W.2d at 253 (1987).

Specifically, appellants argue that (1) the applicant is not fit, willing, and able to perform the proposed service; (2) there is no

demand for the proposed service; (3) there is no distinct need which could not be met by common carriers; and (4) the proposed operation is not consistent with the public interest.

The protestants concede that no authority is necessary for BIJK to deliver packages for Borsheim Jewelry within the city of Omaha. Thus, the appeal relates only to the proposed transportation services for Reagan Buick, Quality Lincoln-Mercury, and the Marriott Hotel.

The protestants rely solely on the issue of financial fitness in contending that BIJK is not fit to perform. We believe the applicant in this case demonstrated financial fitness. The financial statement submitted with the application evidenced a net worth of $4,000. Additionally, Isenberger testified that arrangements for acquiring all necessary equipment had been made. At the time of the hearing, BIJK was leasing a 1986 Buick 9-passenger station wagon and had made arrangements to lease a van and two additional station wagons. The record also shows that the applicant had obtained both liability and cargo insurance.

In addition to financial fitness, the applicant has shown that it is willing and able to perform the requested services. Isenberger has been in complete charge of the courtesy car service for Reagan Buick and Quality Lincoln-Mercury since November of 1984. He has not only coordinated those services but has carried them out to the satisfaction of the dealership's management. Isenberger has proposed a contract acceptable to Marriott.

Although the appellants assigned as error that the commission erred in finding there was a demand for the types of services offered by the applicant, the error was not discussed. "Errors not properly assigned will not be considered. Both the rules of this court and prior case law require that each error relied upon for reversal be separately and concisely stated and discussed." *State v. Bonczynski*, 227 Neb. 203, 204-05, 416 N.W.2d 508, 510 (1987); Neb. Ct. R. of Prac. 9D(1)d (rev. 1986). Although the statute relating to permits for contract carriers does not require proof of demand, the record shows a demand for the services to be performed by the applicant. For these reasons, this assignment lacks merit.

As to need, the protestants concede that, in regard to the Marriott, "there was some evidence demonstrating a request for Applicant's service, and that the action of the Commission in regard to granting authority to serve this particular company probably does not constitute reversible error." Brief for Appellants at 12. As to Reagan Buick and Quality Lincoln-Mercury, the testimony of Hoffine demonstrated that both car dealerships have distinct needs for a nontaxi courtesy car service. The needs of Reagan Buick and Quality Lincoln-Mercury were distinct and could not be met by a taxi service.

In addition, testimony from Isenberger indicated that one individual was assigned to serve the transportation needs of the dealerships throughout the entire day and that a second individual would be available as backup help if necessary. BIJK very obviously proposes to offer an innovative and customer-tailored service which was not provided by and could likely not be found with a taxi service.

As to the public interest, the courtesy car service proposed by BIJK and requested by Reagan Buick and Quality Lincoln-Mercury is specifically necessary for the car dealerships to gain customer satisfaction and promote public relations. The evidence as to the numerous complaints by customers prior to Isenberger's performance of the courtesy service demonstrates that the public interest was not being properly served. The commission found that "[n]othing in this record would indicate that the grant of this application would be inconsistant [sic] with the public interest."

This court, in addressing the issue of public interest, has stated:

> " 'As we have often said, this determination by the Commission is a matter peculiarly within its expertise and involves a breadth of judgment and policy determination that will not be disturbed by this court in the absence of a showing that the action of the Commission was illegal or arbitrary, capricious, and unreasonable. The striking of the balance between the competing interests of legitimate competition and the protection of the public interest are matters of legislative and administrative determination

> peculiarly resting in the judgment of the Commission. [Citation omitted.] . . . "The determination of the public interest in such a case is one that is peculiarly for the determination of the commission. If there is evidence to sustain the finding of the commission, this court cannot intervene." ' *Robinson v. National Trailer Convoy, Inc.*, 188 Neb. 474, 475-76, 197 N.W.2d 633, 635 (1972)." *In re Application of ATS Mobile Telephone*, 213 Neb. 403, 411, 330 N.W.2d 123, 128 (1983).

In re Application of Northwestern Bell Tel. Co., 223 Neb. 415, 418, 390 N.W.2d 495, 498 (1986).

The record supports the finding by the commission that the transportation services proposed are consistent with the needs of the public.

The record shows that the commission acted within the scope of its authority, and its action was not unreasonable or arbitrary. Its order is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ROBERT W. LADEHOFF, APPELLANT.

424 N.W.2d 361

Filed June 17, 1988. No. 87-294.

1. **Criminal Law: Intent.** Intent may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct.
2. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence; such matters are for the finder of fact, and the verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Criminal Law: Indictments and Informations.** The general rule which is followed by the Supreme Court is that where the several offenses charged in a multicount indictment or information involve factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count.
4. **Criminal Law: Appeal and Error.** The factual findings of a judge who serves as

the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.

Appeal from the District Court for Butler County: WILLIAM H. NORTON, Judge. Affirmed.

William G. Line of Kerrigan, Line & Martin, for appellant.

Robert M. Spire, Attorney General, and LeRoy W. Sievers, for appellee.

BOSLAUGH, CAPORALE, and GRANT, JJ., and MULLEN, D.J., and COLWELL, D.J., Retired.

MULLEN, D.J.

As the result of a bench trial in the district court for Butler County, defendant-appellant, Robert W. Ladehoff, was convicted of count I of the information, theft by deception, in violation of Neb. Rev. Stat. § 28-512 (Reissue 1985). The district court found Ladehoff not guilty of count II of the two-count information due to a lack of sufficient evidence. The district court sentenced Ladehoff to probation for a period of 5 years, which included, among other conditions, payment of restitution in the amount of $17,012.84 and a jail sentence of 90 days to be served at the conclusion of probation.

Five errors are assigned, which can be summarized as follows: (1) The court erred in failing to sustain defendant's motions for judgment of acquittal at the close of the State's case, at the close of the defendant's case, and at the close of all the evidence; (2) the court erred in finding the defendant guilty beyond a reasonable doubt, as such judgment was not supported by the evidence and was contrary to law; and (3) the court erred in rendering a finding of guilty on count I of the information, which was inconsistent with its finding of not guilty on count II of the information, the adduced evidence being identical except for dates and the amount of money involved.

We affirm.

In August 1985, Robert Ladehoff was in the business of buying and selling grain in Linwood, Butler County, Nebraska, under the name of Ladehoff Grain Company. He ran the grain elevator in Linwood from 1978 until 1985, but he had been in

the grain elevator business since approximately 1972.

Some farmers with whom Ladehoff dealt participated in a government feed grain program which would entitle the farmers to loans on some of their grain that they raised and stored. The loans were made through the Commodity Credit Corporation (CCC), which was a part of the U.S. Department of Agriculture. The loans were administered at the local level by the Agricultural Stabilization and Conservation Service (ASCS). Grain became the collateral for the CCC loan, which resulted in the CCC's having a lien interest in the grain. When a farmer wanted to sell the grain, he would need to receive authorization from the ASCS office. As in this case, the buyer would usually be the operator of a grain elevator who, after a deal had been struck, would pay the local ASCS the CCC's lien interest, pay the farmer any amounts in excess of the lien, and then attempt to sell the grain to another in an amount sufficient to pay his costs and make a profit. This process buttressed the allegations of both counts brought against the defendant, Ladehoff, which are recited in substantial part as follows:

> Count One
>
> that ROBERT W. LADEHOFF, on or about August 09, August 12, August 13, August 14, and August 15, 1985, in Butler County, Nebraska, did then and there obtain property of JAMES KEELER and ELLERY RENNER by deception, to-wit: by creating or reinforcing a false impression that said ROBERT W. LADEHOFF would pay the commodity credit corporation the amount of $17,012.84 to release the commodity credit corporation's lien on corn owned by JAMES KEELER and ELLERY RENNER, and did thereby obtain corn of a value in excess of one thousand dollars the property of another.
>
> Count Two
>
> that ROBERT W. LADEHOFF, on or about August 03 and August 04, 1985, in Butler County, Nebraska, did then and there obtain property of JAMES KEELER and ELLERY RENNER by deception, to-wit: by creating or reinforcing a false impression that said ROBERT W. LADEHOFF would pay the commodity credit corporation the amount of $9,655.12 to release the

commodity credit corporation's lien on corn owned by JAMES KEELER and ELLERY RENNER, and did thereby obtain corn of a value in excess of one thousand dollars the property of another.

The defendant sold corn to certain buyers in July and August 1985, and was paid for it by August 19, receiving payment on each delivery within 7 to 10 days afterward.

One of the alleged victims in counts I and II, James Keeler, contracted to sell grain to Ladehoff in early July 1985. Keeler's grain was encumbered by a lien to the CCC. The defendant was made aware of the lien, the standard practice of paying the lienholder and then the seller was agreed upon, and, in fact, both the CCC and Keeler were paid. Keeler testified that on subsequent sales the same procedure was ostensibly followed by the defendant, including his receiving the settlement sheet issued by the defendant which indicated that the CCC had been paid. Regarding the transactions in question, Keeler was paid the amount due him after Ladehoff deducted the amount owed the CCC, but the CCC in fact was not paid. In the autumn of the year the defendant filed for a chapter 7 bankruptcy, and the nonpayments came to light.

The defendant concurs with the substance of Keeler's testimony, but denies that he ever intended not to pay the CCC, asserting that his "cash flow problems" impeded timely payment. Ladehoff never disclosed to Keeler that he had not paid the CCC, as indicated in the settlement sheets. The checks to the CCC were prepared but never sent. Ladehoff's checking accounts corroborated his testimony of cash-flow problems during the summer of 1985; however, substantial sums of money were available to him during this time period if he had desired to pay this obligation rather than others.

The crime of theft by deception is found at § 28-512, and as it relates to this case states: "A person commits theft if he obtains property of another by deception. A person deceives if he intentionally: (1) Creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind . . . ." *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860 (1984), upheld the constitutionality of § 28-512(1). *Sailors* was also a case of theft by deception involving the buying and

selling of grain. In that case we said: "It is the required element of guilty knowledge, criminal intent, which distinguishes a civil breach of contract from theft by deception—a person's knowingly creating a false impression in order to obtain another's property." *Id.* at 699-700, 352 N.W.2d at 864.

The intent of the defendant may be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his or her conduct. *State v. Robb*, 224 Neb. 14, 395 N.W.2d 534 (1986).

The State offered evidence that showed the defendant had prior dealings with other parties under similar circumstances and failed to pay their CCC liens. This evidence was received into evidence without objection to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Neb. Rev. Stat. § 27-404(2) (Reissue 1985).

The defendant asserts that because count II of the information was dismissed, his conviction on count I of the information resulted in the trial court's rendering inconsistent verdicts.

The defendant distinguishes the two counts by diminishing the differences as to the dates of the transactions and the defendant's knowledge of his worsening financial condition.

The transactions alleged in count II occurred 5 days before those in count I began. By that time the finder of fact could conclude beyond a reasonable doubt that although the defendant may not have had the requisite criminal intent to commit the crime charged on the dates contained in count II, he would have had the knowledge of his weakened financial condition occasioned by those transactions alleged in count II. From that knowledge of the unpaid liens the trial court could infer the requisite criminal intent to commit the crime alleged in count I.

In a multicount information involving factual variations, such as different times, dates, places, property, or victims, the finding on one count will not ordinarily be held inconsistent with that on any other count. *State v. Fletcher,* 221 Neb. 562, 378 N.W.2d 859 (1985); *State v. Eagle Deer,* 205 Neb. 249, 286 N.W.2d 770 (1980).

> [I]n determining the sufficiency of the evidence to sustain a criminal conviction, it is not the province of this court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact. The verdict must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.

State v. Eichelberger, 227 Neb. 545, 549, 418 N.W.2d 580, 584 (1988); *State v. Patman*, 227 Neb. 206, 416 N.W.2d 582 (1987); *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

The trial court had sufficient evidence beyond a reasonable doubt to find that the defendant had the requisite criminal intent to commit the crime charged. The uncontroverted evidence showed that the defendant obtained the grain from the farmer and sold it to a willing buyer, whereupon he paid the farmer his share of the proceeds but intentionally chose not to pay the money due the farmer's lienholder. The settlement sheet was falsely prepared by the defendant to show the proper payments, and checks were prepared for the lienholder but were never sent.

The factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986).

The assignments of error are without merit. Accordingly, the judgment and sentence of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. JOE MONASTERO, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. MARLENE "MARDY" MCCULLOUGH, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. SAM KATZMAN, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. WILLIAM M. KATZMAN, APPELLEE.
STATE OF NEBRASKA, APPELLANT, V. BERNICE LABEDZ, APPELLEE.

424 N.W.2d 837

Filed June 17, 1988. Nos. 87-387, 87-388, 87-389, 87-390, 87-391.

1. **Constitutional Law.** Speech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes.
2. _____. Not all speech is protected by the first amendment. As speech, fraud, misrepresentation, and deceit are unprotected by the first amendment.
3. **Due Process: Criminal Law: Statutes.** Due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials.
4. _____: _____: _____. The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.
5. **Words and Phrases: Initiative and Referendum.** *Falsely*, as used in Neb. Rev. Stat. § 32-713 (Reissue 1984), means deliberately or intentionally and refers to an act, "to swear," done with the actor's knowledge. *Falsely*, as used in § 32-713, specifies the element of deliberate or intentional untruth or deceit regarding a circulator's swearing to a petitioner's signature on an initiative petition, that is, the circulator's false swearing must be an intentional or deliberate act.
6. **Constitutional Law: Standing: Statutes.** Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the first amendment rights of other parties not before the court.
7. _____: _____: _____. To have third-party standing to assert that a statute is overbroad and prohibits or impermissibly restricts freedom of speech, a defendant's conduct, as "speech," must be within the purview of the statute claimed to be overbroad.
8. _____: _____: _____. For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Exceptions sustained, and cause remanded for further proceedings.

Robert M. Spire, Attorney General, and William L. Howland, and Ronald L. Staskiewicz, Douglas County Attorney, for appellant.

Thomas J. Guilfoyle of Frost, Meyers, Guilfoyle & Westover, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In separate informations filed in the district court for Douglas County, the State charged the defendants, Joe Monastero, Marlene "Mardy" McCullough, Sam Katzman, William M. Katzman, and Bernice Labedz, with two counts of falsely swearing to a signature upon an initiative petition, in violation of Neb. Rev. Stat. § 32-713 (Reissue 1984). The charges arose from activity relative to the initiative petition to provide a state lottery. Each defendant filed the identical motion to quash the information, alleging that Neb. Rev. Stat. § 32-705 (Cum. Supp. 1986) and § 32-713, when read jointly, violated both the Nebraska Constitution and the U.S. Constitution. The district court sustained the defendants' motions. Pursuant to Neb. Rev. Stat. § 29-2315.01 (Reissue 1985), the State has taken exception to the district court's rulings and has appealed to this court.

As the result of Neb. Const. art. III, § 2, the people of Nebraska have reserved the power of the initiative for enactment of laws and constitutional amendments through the initiative petition signed by "electors of the state." Neb. Const. art. III, § 4, directs that the constitutional provisions regarding the initiative "shall be self-executing, but legislation may be enacted to facilitate their operation."

Neb. Const. art. VI, § 1, provides: "Every citizen of the United States, who has attained the age of eighteen years, and has resided within the state and the county and voting precinct for the terms provided by law, shall . . . be an elector." Neb.

Const. art. VI, § 2, states: "No person shall be qualified to vote who is non compos mentis, or who has been convicted of treason or felony under the laws of the state or of the United States, unless restored to civil rights."

For an initiative petition, § 32-705 prescribes the contents of the petition circulator's affidavit and the "warning," both required to be written on each page of the petition; specifies qualifications for a petition circulator; and prohibits a "hired and salaried" circulator:

> Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and below the signatures an affidavit in substantially the following form:
>
> STATE OF NEBRASKA)
>) ss.
> COUNTY OF _____)
>
> _____, being first duly sworn,
> Name of Circulator
>
> deposes and says that he or she is the circulator of the foregoing petition containing _____ signatures; that he or she is a registered *and* qualified voter of the State of Nebraska and county wherein the signatures were obtained; that each person whose name appears on the petition sheet personally signed the petition in the presence of affiant; . . . that each petitioner when he or she signed this petition was a legal and qualified voter of the state and county and qualified to sign the same, and that affiant stated to each petitioner before he or she affixed his or her signature the legal effect and nature of such petition.
>
> _____
> Circulator
>
> _____
> Address
>
> Subscribed and sworn to before me, a notary public, this _____ day of _____, 19___, at _____, Nebraska.
>
> _____
> Notary Public
>
> Every sheet of every petition mentioned in sections 32-702

to 32-704 containing signatures shall have upon it and above the signatures a statement in substantially the following form:

WARNING: Any person signing any name other than his or her own to any petition, any person knowingly signing his or her name more than once for the same measure at one election, any person who is not, at the time of signing or circulating the same, a registered voter *and* qualified to sign or circulate the same, any person who falsely swears to any signature upon any such petition, any person who accepts money or other things of value for signing the petition, any circulator who offers money or other things of value in exchange for a signature upon any such petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713 shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, by imprisonment in the Department of Correctional Services adult correctional facility not exceeding two years, or by both such fine and imprisonment. Such statement shall be printed in boldfaced type.

. . . .

Every circulator of a petition shall be of the constitutionally prescribed age or upwards, and a resident and a registered *and* qualified voter of the State of Nebraska and of the county wherein the petitioners reside, except that any person, otherwise qualified, may circulate one or more petitions outside of the county of his or her residence if he or she shall first have filed with the Secretary of State a bond, approved by the Attorney General, in the sum of five hundred dollars, conditioned that in the procuring of signatures to such petition or petitions he or she will conform to all the requirements of sections 32-702 to 32-713. . . . *Any circulator circulating petitions under sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions. A circulator may be paid for his or her expenses incident to circulation of petitions, such as meals, travel, and lodging.* All signatures secured in a manner contrary

> to sections 32-702 to 32-713 shall not be counted. Clerical and technical errors in a petition shall be disregarded if the forms herein prescribed are substantially followed.

(Emphasis supplied.)

Among its provisions, § 32-713 specifies a petitioner's qualifications to sign an initiative petition, and sets out the crime of "false swearing" to a signature on an initiative petition:

> *Every person who is a qualified elector of the State of Nebraska may sign an initiative or a referendum petition of any measure upon which he or she is legally entitled to vote; Provided, that no elector shall be qualified to sign or circulate any initiative or referendum petition unless he or she shall be registered as an elector at the time of signing, or unless he or she shall file with the petition an affidavit setting forth the fact that he or she is a qualified elector. . .* . The *express purposes* of the provisions of this section are to aid and assist the Secretary of State and the county clerk or election commissioner in determining the validity of signatures, the electoral qualifications of the signers, and sufficiency of the petition, and *to prevent fraud, deception, and misrepresentation in the circulation and signing of a petition. Any person* signing any name other than his or her own to any petition, or knowingly signing his or her name more than once for the same measure at one election, or *who is not, at the time of signing or circulating the same, a legal voter and qualified to sign or circulate the same, or any person who shall falsely swear to any signature upon any such petition*, or any person who accepts money or other things of value for signing any petition, or any circulator who offers money or other things of value in exchange for a signature upon any petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713, *shall be guilty of a Class IV felony.*

(Emphasis supplied.)

After ruling that the defendants had standing to raise the constitutional issues alleged in their motions to quash, the district court found that §§ 32-705 and 32-713, when read

jointly, are unconstitutional, and made specific findings in declaring parts of the subject statutes unconstitutional.

Construing §§ 32-705 and 32-713 together, the district court found that a petitioner's qualifications to sign an initiative petition, as stated in § 32-713, differed from a circulator's qualifications expressed in § 32-705. Under § 32-713, one is qualified to sign an initiative petition if the petitioner-signer is "registered as an elector" (a registered voter) *or* signs an affidavit, accompanying the initiative petition, that the petitioner-signer is a qualified elector (voter). Thus, as provided by § 32-713, one is qualified to sign an initiative petition as a registered voter (elector) or a qualified voter (elector). Unlike the alternative qualification contained in § 32-713 for a petition signer, § 32-705 imposes dual requirements for qualification of a petition circulator. Under § 32-705, a circulator must be a "registered *and* qualified voter." That twofold requirement for a circulator's qualification also appears in § 32-705 concerning the contents of a circulator's affidavit and the mandatory paginal "warning," which states that the circulator must be a registered voter and "qualified" to circulate the petition, that is, a "registered and qualified voter." The district court concluded that the "registered voter" requirement of § 32-705, as an additional qualification to be a circulator of an initiative petition, would discourage circulation of an initiative petition and thereby curtail or discourage a form of political expression protected by the first amendment to the U.S. Constitution.

The district court also found that two parts of the required content for a circulator's affidavit, prescribed by § 32-705, discouraged the initiative process as an expression protected by the first amendment. First, the affidavit required the circulator's averment that the circulator was a "registered and qualified voter" of Nebraska and the county where signatures on the petition were obtained. The additional qualification of voter registration necessary to be a petition circulator, according to the district court, would reduce the number of circulators and would thereby unduly restrict activity for circulation of an initiative petition. Second, the affidavit required the circulator's assertion that each petition signer, at the time of signing, was a legal and qualified voter of Nebraska

as well as the county and was otherwise qualified to sign the petition. A circulator would undoubtedly rely on the signer's statements concerning such qualification. However, if a later development showed that the signer was not a legal and qualified voter and otherwise qualified to sign the initiative petition, the circulator would be confronted by the circulator's sworn declaration to the contrary. The only way the circulator could avoid such possible conflict would be an inspection of voter registration records to verify the qualifications of each signer of an initiative petition. The necessity of such precautionary measure by a circulator would unduly burden and discourage the initiative process.

Next, the district court found that the prohibition against a "hired and salaried" petition circulator was unconstitutional as an infringement of the right to freedom of expression under the first amendment and as a requirement which did not facilitate operation of the initiative process. See Neb. Const. art. III, § 4.

Finally, the district court found that the crime of "false swearing," as set forth in § 32-713, is "unconstitutionally vague and uncertain" for two reasons. First, the subject matter of the sworn falsity is not defined by § 32-713, and "[t]he average citizen would not know what act of his constitutes the crime." Second, § 32-713 does not "require either intent or knowledge to be a material element" of "false swearing."

In its basic elements, the affidavit of § 32-705 requires five sworn declarations by a petition circulator: (1) the number of signatures for the petition; (2) the circulator's status as a registered and qualified voter; (3) presence at the time each petitioner personally signed the initiative petition; (4) the signer's status as one qualified to sign the petition; and (5) each signer was informed by the circulator concerning the legal effect and nature of the initiative petition. Although the district court struck down the affidavit requirements concerning the circulator's and signer's qualificative status, the court made no finding that the three remaining requirements for a circulator's affidavit were unconstitutional. Thus, the requirement that a circulator swear "that each person whose name appears on the petition sheet personally signed the petition in the presence of [the circulator]" remained intact after the court's specific

findings concerning the contents of the circulator's affidavit required by § 32-705.

In examining what "speech" is protected by the first amendment, the U.S. Supreme Court expressed in *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982): "That Amendment embodies our trust in the free exchange of ideas as the means by which the people are to choose between good ideas and bad . . . ." See, also, *Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 632, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) ("communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes . . . are within the protection of the First Amendment"); *Cohen v. California*, 403 U.S. 15, 24, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("constitutional right of free expression"); *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967) ("exchange of ideas"); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) ("exposition of ideas"); *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) ("communication of information or opinion").

Therefore, speech protected by the first amendment to the U.S. Constitution includes the free expression or exchange of ideas, the communication of information or opinions, and the dissemination and propagation of views and ideas, as well as the advocacy of causes.

However, not all speech is protected by the first amendment. The U.S. Supreme Court stated, in *Konigsberg v. State Bar*, 366 U.S. 36, 49, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961):

> At the outset we reject the view that freedom of speech and association . . . as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.

The *Konigsberg* Court noted at 49-50 n.10:

> That view [freedom of speech is absolute], which of course cannot be reconciled with the law relating to libel,

> slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Consequently, as speech, fraud, misrepresentation, and deceit are unprotected by the first amendment.

Validity of a petitioner's signature is an integral part of the initiative, which establishes a direct and participatory democratic process to enact laws in Nebraska. With the requisite number of valid signatures, the proposed law which is the subject of the initiative petition is submitted to a vote of the people. See Neb. Const. art. III, § 2. Without a sufficient number of valid signatures, the initiative petition fails. Validity of signatures on an initiative petition might be established by a requirement that each petitioner sign the petition before one authorized to administer an oath. The impractical logistics of such requirement becomes apparent. To comply with the requirement of a signer's individual oath, each initiative petition would have to be accompanied by one authorized to administer an oath to the petition-signer, or the circulator and the signer would have to present themselves personally before the oath-giver for the purpose of the petitioner's signature on the initiative petition. A feasible alternative or substitute to a signer's individual oath is the oath of a circulator as one with personal knowledge that a petitioner has, in fact, signed the initiative petition, thus providing at least prima facie validity for signatures on an initiative petition. Without signature validation, even if only prima facie, the initiative process might be invoked and placed in motion without any semblance of compliance with the constitutional provisions governing the initiative. Essentially, then, fraud in invoking the initiative process is fraud perpetrated on Nebraska's Secretary of State and other public officials, who must determine the validity of the signatures on a petition, and ultimately on the people of Nebraska. To deter such fraud, criminal sanctions are applicable through § 32-713. Cf. *Spence v. Terry*, 215 Neb. 810,

340 N.W.2d 884 (1983) (Neb. Rev. Stat. § 23-2010 (Cum. Supp. 1982), providing for recall of a public official, required a minimum number of signatures on the original recall petition before an election commissioner's verification of signatures is required or a supplementary petition is permissible).

With the foregoing background on freedom of speech and the importance of valid signatures in the initiative process, we address the constitutionality of § 32-713, somewhat the reverse of the sequence utilized by the district court, which considered the alleged "overbreadth" of § 32-705 before reaching any question about "false swearing" as a crime under § 32-713.

The State contends that the defendants have no standing to attack the constitutionality of § 32-713, since they are charged with fraudulent conduct, "false swearing," prohibited by § 32-713. The State relies upon certain language in *Kay v. United States*, 303 U.S. 1, 6, 58 S. Ct. 468, 82 L. Ed. 607 (1938): "When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction." Hence, the State concludes: "The defendants have been charged with a fraudulent type of conduct, and by reason thereof, their claim that [§ 32-713 is] unconstitutional is inappropriate." Brief for Appellant at 6. In substance, the State's premise for the defendants' lack of standing is: A defendant, having undertaken to defraud the government, has no standing to attack the penal statute under which the defendant is later charged with perpetration of that fraud. In this appeal, the State's premise ravages the presumption of innocence as a part of due process and creates a curious constitutional conundrum. We point out that we are examining judicial action taken on the defendants' motions to quash the informations charging them. We have no record reflecting that the defendants have, in fact, undertaken to perpetrate any fraud in violation of § 32-713. Next, if a defendant is charged with violation of a fraud statute, but there is a problem with clarity in the definition of fraud in the charging statute, how can a defendant, denied standing as the result of the very nature of the charge, question the meaning

of the statute under which the defendant is charged?

Nevertheless, in an effort to defeat standing by the defendants in the present case, the State relies on *Kay v. United States, supra*, in which the petitioner was convicted of violating § 8(a) and (e) of the Home Owners' Loan Act of 1933, antifraud provisions contained in the act. Under the antifraud provisions of the act, the government charged Kay with making false statements to the Home Owners' Loan Corporation, which was created by the act. Kay challenged the "whole scheme" of the Home Owners' Loan Act, maintaining that Congress lacked constitutional authority to create the Home Owners' Loan Corporation to which Kay had made the false statements. Dismissing Kay's challenge to the constitutionality of all provisions of the Home Owners' Loan Act except § 8(a) and (e) as antifraud provisions, the Court stated:

> There is no occasion to consider this broad question as petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

303 U.S. at 6.

In *Kay*, the Court emphasized that "[a]part from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act . . . is clearly applicable." 303 U.S. at 7. Reviewing the separate antifraud provisions of the Home Owners' Loan Act, the Court considered Kay's due process (vagueness) challenge to § 8(a) and concluded: "The statute [§ 8(a)] defining the crime is sufficiently explicit." 303 U.S. at 7. Concerning Kay's constitutional attack (vagueness) on § 8(e) of the act, the Court held: "We think that the statute sets up an ascertainable standard and is 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' " (Citing and quoting from *United States v. Hill*, 90 F.2d 573 (1937).) 303 U.S. at 9. Therefore, the Court

acknowledged Kay's standing to assert a constitutional challenge (vagueness) to § 8(a) and (e) of the Home Owners' Loan Act, which the Court considered apart from the other provisions of the act.

Also, in maintaining that the defendants lack standing to raise a constitutional challenge to § 32-713, the State relies on *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966). In *Dennis*, the government charged petitioners with criminal conspiracy in fraudulently obtaining the services of the National Labor Relations Board (NLRB) for a union. The government alleged that petitioners filed false affidavits to satisfy § 9(h) of the National Labor Relations Act (NLRA), which stated that labor unions could not obtain NLRB investigation of employee representation unless each officer of the union and its parent organization filed "non-Communist" affidavits with the NLRB. Four of the six petitioners, representing that they had resigned from the Communist Party, filed non-Communist affidavits with the NLRB. As a result of the fraudulent filings, the union obtained the use of NLRB services. When they were convicted of criminal conspiracy, the petitioners argued that their convictions should be overturned in view of the unconstitutionality of § 9(h) of the NLRA, requiring the non-Communist affidavit.

The U.S. Supreme Court, in *Dennis*, refused to consider the petitioners' claim that the affidavit requirement in § 9(h) of the NLRA was unconstitutional, and declared:

> We need not reach this question, for petitioners are in no position to attack the constitutionality of § 9 (h). They were indicted for an alleged conspiracy, cynical and fraudulent, to circumvent the statute. Whatever might be the result where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts is not relevant here. This is not such a case. The indictment here alleges an effort to circumvent the law and not to challenge it—a purported compliance with the statute designed to avoid the courts, not to invoke their jurisdiction.

384 U.S. at 865.

The *Dennis* Court, relying on some of its prior decisions,

declined to consider the constitutionality of § 9(h) of the NLRA, since the petitioners, by use of fraudulent and deceitful means, attempted to "circumvent the law which they now seek to challenge." 384 U.S. at 866. The Court also rejected petitioners' attempt to distinguish the Court's prior decisions and show that petitioners' constitutional challenge went to the claimed core of the conviction, namely, petitioners' Communist Party membership and affiliation, which the petitioners falsely represented. The *Dennis* Court then stated:

> We regard this distinction as without force. The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. *This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional.*

(Emphasis supplied.) 384 U.S. at 867.

In *Dennis*, the government charged petitioners under a general criminal conspiracy statute—a conspiracy involving false affidavits as an attempt to circumvent the affidavit requirement of § 9(h) in the NLRA. To avoid conviction, the petitioners attempted a collateral attack on the constitutionality of the NLRA, which they were seeking to circumvent by their conspiracy. However, the government never applied the provisions of the NLRA to the petitioners' conduct, nor did a violation of the affidavit requirement in the NLRA constitute a crime. Hence, the *Dennis* Court, at 384 U.S. at 867, qualified its application of the "fraud and deceit" standing doctrine in recognizing that the prosecution was "not an action to enforce the statute claimed to be unconstitutional."

Consequently, *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938), and *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), are cases representing the Supreme Court's development of a standing doctrine, as part of federal law, which precludes a defendant's constitutional challenge to a particular statute, or statutory

scheme, when the defendant has fraudulently circumvented or avoided that particular statute and later, during prosecution for violation of a separate criminal statute prohibiting defendant's conduct, seeks to raise a constitutional question concerning the statute which the defendant had fraudulently circumvented or avoided.

The *Dennis* standing doctrine was reaffirmed in *Bryson v. United States*, 396 U.S. 64, 90 S. Ct. 355, 24 L. Ed. 2d 264 (1969), in which the Court confronted a substantially similar factual situation to that presented in *Dennis*. Bryson was convicted under 18 U.S.C. § 1001 (1982), a general criminal statute prohibiting fraudulent statements to the government. Bryson's fraudulent statement was his denial of affiliation with the Communist Party. More than 10 years after his conviction, Bryson, in a collateral proceeding, claimed that his conviction should be set aside as the result of various constitutional deficiencies in the National Labor Relations Act. Rejecting Bryson's claim, the Court stated: "We find the principle of *Dennis* no less applicable in the case before us. . . . [N]one of the elements of proof necessary for petitioner's conviction under § 1001 has been shown to depend on the validity of [the NLRA]." 396 U.S. at 68-69. However, the Court continued, in *Bryson*: "*Dennis* can hardly be read as instructing courts to impose an extra punishment on a defendant found to have been dishonest by refusing to consider a constitutional argument that is legally relevant to his defense." 396 U.S. at 73.

In view of *Bryson*, the *Dennis* standing doctrine may be applied to prevent a defendant's challenge to the constitutionality of a statute which is collateral and, therefore, irrelevant to the pending prosecution of the defendant. See, also, *United States v. Knox*, 396 U.S. 77, 90 S. Ct. 363, 24 L. Ed. 2d 275 (1969).

This court adopted and applied the rationale underlying the *Dennis* standing doctrine in *State ex rel. NSBA v. Douglas*, 227 Neb. 1, 416 N.W.2d 515 (1987), in which Douglas, a lawyer charged with violating the Code of Professional Responsibility, challenged the constitutionality of the Nebraska Political Accountability and Disclosure Act, Neb. Rev. Stat. §§ 49-1401 et seq. (Reissue 1984). Douglas failed to comply with the

reporting or disclosure requirements of that act. One specification of misconduct was based on Douglas' failure to report as required by the act. Douglas argued that the act was unconstitutional and, therefore, his conduct should be evaluated without any reference to the alleged violation of unconstitutional legislation.

In *Douglas*, this court rejected Douglas' constitutional challenge to the disclosure act and, noting at 34, 416 N.W.2d at 535, that "[t]he matter before us is not confined to the question [of] whether respondent has violated the act, but the matter of respondent's conduct," relied on *Dennis v. United States, supra*, for the conclusion that "[t]he issue of the constitutionality or unconstitutionality of the Nebraska Political Accountability and Disclosure Act is irrelevant" to the disciplinary issues placed before the court. 227 Neb. at 35, 416 N.W.2d at 535. The *Douglas* court concluded that Douglas did not have standing to assert his particular constitutional challenge and emphasized that

> [i]n *Dennis*, the prosecution was for the petitioners' fraud. It was not an action to enforce the statute claimed to be unconstitutional. The same is true with the case at bar. *It is a case directed at the respondent's actions, not a case to enforce the statute claimed to be unconstitutional.*

(Emphasis supplied.) 227 Neb. at 36, 416 N.W.2d at 536.

In the present case, the State ignores the U.S. Supreme Court's admonition in *Bryson*, namely, that "*Dennis* can hardly be read as instructing courts to impose an extra punishment on a defendant found to have been dishonest by refusing to consider a constitutional argument that is legally relevant to his defense." 396 U.S. at 73. Regarding the present appeals, the State has charged the defendants with falsely swearing to a signature on an initiative petition, a violation of § 32-713. However, defendants assert a direct constitutional challenge to § 32-713 and the crime of "false swearing" described in that statute. Unlike the situation in *Dennis v. United States*, 384 U.S. 855, 86 S. Ct. 1840, 16 L. Ed. 2d 973 (1966), but similar to *Kay v. United States*, 303 U.S. 1, 58 S. Ct. 468, 82 L. Ed. 607 (1938), this court is confronted with a direct due process (vagueness) challenge to the constitutionality of § 32-713, the

statute which is the basis for the prosecution of the defendants. Thus, in contradistinction to *Dennis*, the State prosecutes to enforce the statute challenged by the defendants as unconstitutional. Consequently, we conclude that application of *Dennis* is limited to situations in which a defendant attempts to circumvent or avoid conviction under a particular statute by asserting a constitutional challenge to another and collateral statute which is irrelevant to the prosecution. Cf. *Douglas, supra*. Therefore, the defendants in the present case have standing for a "vagueness" challenge to the constitutionality of § 32-713.

The vice of vagueness in a penal statute was denounced in *Kolender v. Lawson*, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983), by the U.S. Supreme Court's statement:

> As generally stated, 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. [Citations omitted.] Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." [Citation omitted.] Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." [Citation omitted.]

461 U.S. at 357-58. See, also, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972).

Thus, due process requires that a penal statute supply adequate and fair notice of the conduct prohibited and also supply an explicit legislative standard defining the proscribed conduct, to prevent arbitrary and discriminatory enforcement at the discretion of law enforcement officials. See, *Kolender v.*

Lawson, supra; *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987); *State v. Sailors*, 217 Neb. 693, 352 N.W.2d 860 (1984); L. Tribe, American Constitutional Law § 12-31 (2d ed. 1988).

Therefore, we must examine the "false swearing" prohibition of § 32-713 to determine whether that penal statute affords constitutionally required due process.

In substance and according to its legislatively expressed purpose, § 32-713 contains antifraud provisions, that is, statutory prohibition and protection against certain types of fraud, deception, and misrepresentation in the circulating and signing of an initiative petition. Specifically, § 32-713 prohibits a circulator's falsely swearing that every person whose name appears as an initiative petitioner personally signed that petition in the circulator's presence. Such prohibited conduct by a petition's circulator is defined by combining the language of § 32-713, "falsely swear to any signature upon any [initiative] petition," and the language of § 32-705 concerning the circulator's affidavit, namely, that the circulator must declare by affidavit "that each person whose name appears on the petition sheet personally signed the petition in the presence of [the circulator]." " 'The prohibition against vagueness does not invalidate a statute simply because it could have been drafted with greater precision. The test is whether the defendant could reasonably understand that his conduct was proscribed by the statute.' " *State v. Sailors, supra* at 695, 352 N.W.2d at 862.

By reading §§ 32-713 and 32-705 together, a petition circulator has adequate and fair notice of the subject matter of the falsity regarding a petitioner's signature placed on an initiative petition or the conduct condemned and prohibited at the peril of punishment.

In *State v. Copple, supra*, we encountered a defendant's question concerning the due process sufficiency of Neb. Rev. Stat. § 28-511(1) (Reissue 1985) in defining the crime of "theft," namely: "A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Copple contended the statute was vague because the word *unlawfully* is not contained in the body of § 28-511(1). Referring to other definitional statutes or sections in the Nebraska Criminal Code pertaining

to "theft," we held that § 28-511(1) is not vague, and stated at 685, 401 N.W.2d at 152:

> Apparently Copple views the Nebraska Criminal Code as absolutely unrelated statutes which, by design or chance, have been collected in chapter 28 of the Revised Statutes of Nebraska. However, the Nebraska Criminal Code is a systematic statutory statement, defining criminal offenses and prescribing penalties for commission of crimes. All facets of a criminal offense need not be embodied in one statute and that statute alone. Characteristic elements of some, but not all, criminal offenses are specified in a statute within the Nebraska Criminal Code, while another statute within the code may specify a meaning assigned to certain elements of a particular crime, and still other statutes prescribe penalties which may be imposed on conviction of a criminal offense. The result is a statutory synergism, supplying information to the ordinary person about conduct condemned as criminal and punishable in a prescribed form. The statutes contained in the Nebraska Criminal Code no more exist in individual isolation than do the people governed by that code. To an ordinary person, § 28-511(1) supplies fair notice concerning conduct which is condemned as criminal and, therefore, prohibited by the Nebraska Criminal Code.

Similar to *Copple*, "false swearing," prohibited by § 32-713, contains sufficient due process definition concerning the subject matter of the falsity condemned by that statute.

As described in § 32-713, "false swearing" is not unconstitutionally vague as the result of the absence of "knowledge" or "intent" expressed as elements for the crime of "false swearing."

Courts have generally determined that the word *false* or *falsely* means "intentionally untrue" or deceitful, implying an intention to perpetrate a fraud. See, *Nimmo v. State*, 603 P.2d 386 (Wyo. 1979); *State v. Tedesco*, 175 Conn. 279, 397 A.2d 1352 (1978) (*false* implies something more than mere untruth, and imports knowledge and a specific intent to deceive); *Commonwealth v. Kraatz*, 2 Mass. App. 196, 310 N.E.2d 368 (1974) (*false* in a statute prohibiting false statements in an

application for a driver's license required guilty knowledge as an essential element of the offense); *Laughlin v. Bon Air Hotel Incorporated*, 85 Ga. App. 43, 46, 68 S.E.2d 186, 189 (1951) ("falsely swearing" is "knowingly affirming"); *United States v. Achtner*, 144 F.2d 49 (2d Cir. 1944) (*falsely*, as used in a criminal statute, means something more than an untruth and includes the intent to defraud); *City of Boston v. Santosuosso*, 307 Mass. 302, 30 N.E.2d 278 (1940) (*falsely* means willfully untrue, showing consciousness of guilt).

In *Nimmo v. State, supra*, Nimmo claimed that Wyoming's "false swearing" statute was constitutionally deficient for due process because the statute did not require intent or knowledge as an element of criminal "false swearing." In determining that the statute provided due process and adequate notice concerning the act prohibited, the Supreme Court of Wyoming concluded that the word *false* supplies the element of criminal intent, and stated:

> This court could merely rely upon the word "false" in upholding the constitutionality of the statute. *Black's Law Dictionary*, pp. 721-722 (Rev. 4th Ed., 1968), demonstrates that when the word is used in varying situations it is given different definitions. However, the word is defined in *Black's Law Dictionary, supra*, in this manner: "In law, this word usually means something more than untrue; it means something designedly untrue and deceitful, and implies an intention to perpetrate some treachery or fraud. . . ." This definition has been adopted in *Lanier v. State*, Alaska, 448 P.2d 587, 593 (1968); and *Wilensky v. Goodyear Tire & Rubber Co.*, 1st Cir., 67 F.2d 389, 390 (1933). *Commonwealth v. Kraatz*, 2 Mass.App. 196, 310 N.E.2d 368, 372 (1974), not only adopts this definition, but makes the following observation: ". . . The term 'false' has generally been interpreted as connoting intentional untruth. [Citing authorities.] . . ."

603 P.2d at 390.

Thus, we conclude and hold that *falsely*, as used in § 32-713, means deliberately or intentionally and refers to an act, "to swear," done with the actor's knowledge. *Falsely*, as used in § 32-713, specifies the element of deliberate or intentional

untruth or deceit regarding a circulator's swearing to a petitioner's signature on an initiative petition, that is, the circulator's false swearing must be an intentional or deliberate act.

Section 32-713, defining the crime of "false swearing" in reference to an initiative petition, is not unconstitutional for vagueness. The district court's finding that § 32-713 is vague and, therefore, unconstitutional is incorrect and must be set aside.

We recall that some speech, such as fraud, deception, and misrepresentation, is unprotected by the first amendment. The defendants have contended, and the district court ruled, that "freedom of speech" protected by the first amendment was effectively prohibited by certain provisions in § 32-705, namely, the enhanced requirement for qualification as a petition circulator, the contents of a circulator's affidavit concerning the circulator's and signer's qualification with respect to the circulated petition, and the prohibition against a "hired and salaried" circulator of an initiative petition. The defendants have questioned those parts of § 32-705, although the particular crime charged against the defendants, "false swearing" prohibited by § 32-713, does not contain any element consisting of the specific provisions of § 32-705 found constitutionally objectionable by the district court.

> For standing to contest constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the statute in question and must show that, as a consequence of the statute's alleged unconstitutionality, the contestant is deprived of a constitutionally protected right. . . .
>
> . . . .
>
> Courts will not decide a question concerning the constitutionality of a statute unless such question has been raised by a litigant whose interests are adversely affected by the questioned statute. A court has no power to summarily pass upon the constitutionality of a legislative act, but has power only to decide justiciable disputes. A court's power to declare a statute unconstitutional may be invoked only when the challenged statute affects a

> litigant's right under the Constitution. [Citations omitted.]

In re Estate of West, 226 Neb. 813, 829-30, 415 N.W.2d 769, 780-81 (1987).

" 'The province of a court is to decide real controversies and to determine rights actually controverted, and "[t]he judicial power does not extend to the determination of abstract questions." ' " *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 36, 388 N.W.2d 93, 99 (1986) (citing and quoting from *Fremont Cake & Meal Co. v. Wilson & Co.*, 183 F.2d 57 (8th Cir. 1950)).

We are mindful of the U.S. Supreme Court's recognition of third-party standing in certain cases, as expressed in *Schaumburg v. Citizens for Better Environ.*, 446 U.S. 620, 634, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980):

> Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. [Citations omitted.] In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

Under § 32-713, "false swearing" pertains only to a circulator's deceitful or false declaration that the circulator was present when a petitioner signed his or her name on the initiative petition. As an antifraud provision, § 32-713 aims at the noncommunicative impact of the defendants' conduct and seeks to regulate or eliminate a particular harm not caused by an expression or exchange of ideas, information, or other speech protected by the first amendment. See L. Tribe, American Constitutional Law § 12-2 (2d ed. 1988). The falsity condemned by § 32-713 and charged against the defendants nowise involves or relates to a person's qualification for circulating or signing an initiative petition under § 32-705. The State has not charged these defendants with prohibited payment to a circulator. Simply stated, there is no reasonable

and legal connection between the crime charged against the defendants and the challenged provisions of § 32-705. To have third-party standing to assert that a statute is overbroad and prohibits or impermissibly restricts freedom of speech, a defendant's conduct, as "speech," must be within the purview of the statute claimed to be overbroad. No such nexus exists between the defendants' conduct charged in the present case and the provisions of § 32-705, which were found to be unconstitutional as a violation of the first amendment. Notwithstanding and irrespective of any questioned constitutionality of the specific parts of § 32-705, considered and determined by the district court, prosecution of the defendants would be unaffected and is maintainable under § 32-713 for "false swearing."

The doctrine of third-party standing in first amendment cases, nevertheless, requires that a court must be "[g]iven a case or controversy," see *Schaumburg, supra* at 634, before third-party standing exists. Deciding whether a statute is unconstitutional, when a party's conduct is not even related to or implicated in the questioned statute, becomes a question about the hypothetical or abstract and might be characterized as a purely advisory opinion without resolution of any real controversy between litigants.

> Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

Regan v. Time, Inc., 468 U.S. 641, 653, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984).

This court has adopted a four-part test for severability of provisions found to be unconstitutional in an act:

> (1) Whether, when absent the invalid portions, a workable plan remains. . . . (2) Whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid

> parts that the valid parts would not have passed without the invalid parts. . . . (3) Whether the severance would do violence to the intent of the Legislature. . . . [And] (4) Whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion.

State ex rel. Douglas v. Sporhase, 213 Neb. 484, 486, 329 N.W.2d 855, 856-57 (1983).

Assuming existence of the defendants' third-party standing, the provisions of § 32-705 found unconstitutional by the district court are clearly severable from the remaining provisions of that statute. The provisions of § 32-705 concerning the contents of a circulator's affidavit, which were not found unconstitutional, would still afford a plausible affidavit as a part of the procedure for circulating and signing an initiative petition. Even without the parts of § 32-705 found to be unconstitutional by the district court, a crime still has been charged against the defendants under a constitutional penal statute, § 32-713, which prohibits "false swearing."

Because the provisions of § 32-705 were not the basis of the prosecution against the defendants in the present cases for "false swearing," see § 32-713, the defendants have failed to show that they are, or may be, adversely affected by the provisions of § 32-705 and, hence, have failed to demonstrate that § 32-705 will deprive the defendants of a constitutionally protected right as the result of the pending prosecution. In view of the particular charge against the defendants, "false swearing" prohibited by § 32-713, the district court's ruling concerning § 32-705 was unnecessary for disposition of the defendants' constitutional challenge to § 32-713 as vague. Inasmuch as the defendants did not have third-party standing to challenge the constitutionality of § 32-705, the district court's ruling concerning that statute must be set aside. Also, the defendants lack standing to challenge § 32-705 as an alleged violation of Neb. Const. art. III, § 4, which directs that the constitutional provisions regarding the initiative "shall be self-executing, but legislation may be enacted to facilitate their operation." See, *In re Estate of West*, 226 Neb. 813, 415 N.W.2d 769 (1987); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388

N.W.2d 93 (1986).

Consequently, we conclude that the district court erred by considering the defendants' constitutional challenges to the various provisions of § 32-705. However, we express no opinion concerning the constitutionality of any provision in § 32-705, inasmuch as the appeals now before us present no case and controversy regarding § 32-705, but see, *State v. Radcliffe, post* p. 868, 424 N.W.2d 608 (1988), which this court has issued today, and *Meyer v. Grant,* 56 U.S.L.W. 4516 (U.S. June 6, 1988) (No. 87-920), both of which contain the constitutional conclusion that a statutory prohibition against the use of paid circulators for an initiative petition abridges the initiative proponent's right of free speech in political expression protected by the 1st and 14th amendments to the U.S. Constitution.

Therefore, we sustain the State's exceptions to the district court's judgment, vacate the findings and judgment of the district court, and remand this matter to the district court for further proceedings.

EXCEPTIONS SUSTAINED, AND CAUSE REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., and BOSLAUGH, J., concur in the result.

STATE OF NEBRASKA, APPELLEE, V. TIMOTHY McCURRY, APPELLANT.

424 N.W.2d 364

Filed June 17, 1988. No. 87-563.

1. **Motions to Suppress: Appeal and Error.** In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress.
2. _____: _____. At a hearing to suppress evidence, the court, as the trier of fact, is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence.

3. _____: _____. In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
4. **Confessions: Proof.** The State bears the burden of proving that a defendant's statement was voluntarily made, before that statement is admissible as evidence against the defendant. In determining whether the State has satisfied its burden, a court examines the totality of the circumstances to ascertain whether the defendant's statement is the product of a rational intellect and a free will.
5. **Police Officers and Sheriffs: Confessions.** A law enforcement officer's communication to a defendant which expresses the officer's intention to take a course of conduct permissible under the law is not, by itself, coercion preventing voluntariness of the defendant's statement in response to the officer's communicated intention.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Timothy McCurry appeals from his conviction by a jury in the district court for Douglas County on the charge of first degree sexual assault in violation of Neb. Rev. Stat. § 28-319 (Reissue 1985). McCurry contends that the district court erred in not suppressing his statements to police officers, which statements, over McCurry's renewed objections at trial, were received into evidence through the officers' testimony. The background for the statements in question was supplied at the hearing on McCurry's suppression motion.

The victim was sexually assaulted in her apartment bedroom on the evening of November 16, 1986. As the result of their investigation, police arrested McCurry for that assault and brought him to police headquarters for questioning. At the outset of their conversation with McCurry, the officers did not know the particular color of the victim's residence. However, the officers had other information concerning the sexual

assault under investigation, such as the victim's description of her assailant and identification of the assailant from a number of police photographs, data from police records concerning McCurry's prior arrest for rape, a disinterested witness' tentative identification of McCurry based on a publicized description of the victim's assailant, and footprints at the scene of the sexual assault. Sgt. Kenneth Bavasso asked to see the bottoms of McCurry's tennis shoes and took McCurry's shoes after noticing that the pattern on the bottoms of those shoes fit the pattern of footprints found outside the victim's residence. Bavasso then joined Officer Michael Hoch and McCurry in an interview room, where Hoch told McCurry that the officers wanted to talk to him about the sexual assault which had occurred in McCurry's neighborhood. Hoch then read McCurry his "rights" pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). When asked whether he understood each of the rights in the *Miranda* warning, McCurry answered "yes." The officers never physically abused McCurry or threatened any form of physical abuse of McCurry, who, throughout the ensuing interview, talked coherently with the officers.

In the course of conversation, Hoch stated that McCurry had been identified as the sexual assailant and that the officers wanted to inform McCurry about their evidence against him. Hoch explained that the officers wanted McCurry to voluntarily submit samples of his blood, saliva, and hair. Hoch then told McCurry that, if he would not voluntarily furnish the samples, the police would obtain a court order requiring McCurry to supply the bodily samples requested. See Neb. Rev. Stat. §§ 29-3301 et seq. (Reissue 1985) ("Identifying Physical Characteristics Act," which prescribes a procedure for obtaining data from an individual for identification). At that point in the conversation, which had dealt only with the matter of obtaining samples of McCurry's "blood, saliva and two hair samples," McCurry stated: " 'Well, I have to talk to my attorney about that.' " Hoch responded: " 'That's fine. . . . But if it's necessary, we'll get a Court order,' " and continued to describe the evidence linking McCurry with the sexual assault. As Hoch recounted the episode:

> I went on to advise him [McCurry] about the footprints found at the scene, around the scene and on the door of the scene, at which time he made a statement concerning his footprints being at the scene, and also the color of a house which the sexual assault occurred at which neither Sgt. Bavasso or myself had indicated to him.

Sergeant Bavasso related the conversation during Hoch's description of the footprints found by police at the scene of the assault:

> Officer Hoch was saying that we found footprints in and around and inside the house where the assault occurred, and Timothy McCurry responded, "Well, that's not unusual. I'm always in that area. I cut through that area and I know that house" and I [Bavasso] said, "What house?" And he described this gray house which at the time I [Bavasso] did not even know it was a gray house . . . .

When asked how he knew the victim's house was gray, McCurry "mumbled something . . . . It wasn't very clear what he said." Otherwise, McCurry spoke freely with the officers and at no time refused to talk with them.

Pursuant to Neb. Rev. Stat. § 29-115 (Reissue 1985) (suppression of a defendant's statement), McCurry moved for suppression of his oral statements to police, claiming that his statements were the product of custodial interrogation without the prerequisite *Miranda* warning and that his statements were not freely and voluntarily made to the police. The district court overruled McCurry's suppression motion.

At trial, when the State offered testimony concerning McCurry's statements about his footprints and his knowledge that the victim's residence was gray, McCurry's lawyer "renewed" his "previous objection," apparently a somewhat inarticulate reference to the objections to admissibility assigned in McCurry's suppression motion. The court overruled that objection and allowed Officers Hoch and Bavasso to testify concerning McCurry's statements regarding his footprints found at the victim's gray house. The officers' additional testimony regarding their interrogation of McCurry was substantially the same as that given at the suppression hearing.

Other testimony and physical evidence at trial established that a sexual assault had occurred and linked McCurry with that crime. Although McCurry denied that he had sexually assaulted the victim, the jury found McCurry guilty as charged.

In his appeal, McCurry acknowledges that his statement, "Well, I have to talk to my attorney about that," related specifically and only to Officer Hoch's indication that a court order would be obtained for samples of McCurry's blood, saliva, and hair, if McCurry refused to furnish such samples voluntarily. Therefore, in his appeal McCurry does not contend that his oral statements about his footprints at the victim's residence, which he described as a gray house, were the product of custodial interrogation without the prerequisite *Miranda* warning, although the question about compliance with *Miranda* was raised in McCurry's suppression motion. As we have noted above, McCurry does not contend that his reference to consultation with a lawyer was tantamount to a request for a lawyer which must be "scrupulously honored" in conjunction with custodial interrogation by police. See *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Therefore, McCurry concedes that there is no *Miranda* problem or issue in his case. Rather, as his solitary assignment of error, McCurry claims that evidential use of his coerced statements was a denial of due process guaranteed by Neb. Const. art. I, § 3, and U.S. Const. amends. V and XIV. In his brief, McCurry argues:

> Although it is clear that Hoch's reference is only to the blood, hair, and saliva samples, Defendant's argument turns syllogistic at this point. . . . Certainly, it would not be hard to understand how the Defendant would be led to believe that a COURT ORDER COULD BE OBTAINED TO FORCE HIM TO DO ANYTHING, INCLUDING ANSWER FURTHER QUESTIONS.

Brief for Appellant at 6.

> " ' "In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the 'trier of fact' and takes into consideration that the trial court has observed witnesses testifying regarding such motion to

> suppress." ' " *State v. Vrtiska*, 225 Neb. 454, 459, 406 N.W.2d 114, 119 (1987). See, also, *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).
>
> At a hearing to suppress evidence, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given to their testimony and other evidence. See *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986). In reviewing a court's ruling as the result of a suppression hearing, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence. Cf. *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985).
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> " 'In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. . . .' " *State v. Vrtiska*, [225 Neb.] at 459, 406 N.W.2d at 119.

State v. Blakely, 227 Neb. 816, 820, 420 N.W.2d 300, 303 (1988). See, also, *State v. Gibson, ante* p. 455, 422 N.W.2d 570 (1988).

The gist of McCurry's argument is that police indication that a court order would be obtained for samples of McCurry's blood, saliva, and hair was coercion preventing voluntariness in McCurry's statements, preventing constitutional admissibility of a defendant's statement.

As we observed in *State v. Bodtke*, 219 Neb. 504, 510, 513, 363 N.W.2d 917, 922-23 (1985):

> As expressed by Justice Frankfurter in *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961): "The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." . . .
>
> . . . Use of an accused's involuntary statement . . .

> offends due process and fundamental fairness in a criminal prosecution, because one acting with coercion, duress, or improper inducement transports his volition to another who acts in response to external compulsion, not internal choice. With voluntariness as the ultimate test regarding an accused's statement, the focal point of inquiry into voluntariness is whether the statement is "the product of a rational intellect and a free will." [Citations omitted.]
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> . . . .
>
> . . . To be admissible, a statement or confession must have been freely and voluntarily made. [Citations omitted.]

In *State v. Norfolk*, 221 Neb. 810, 819, 381 N.W.2d 120, 127 (1986), we stated:

> The State bears the burden of proving that a defendant's statement was voluntarily made, before that statement is admissible as evidence against the defendant. See *State v. Joy*, 218 Neb. 310, 353 N.W.2d 23 (1984). In determining whether the State has satisfied its burden, a court examines the totality of the circumstances to ascertain whether the defendant's statement "is 'the product of a rational intellect and a free will.' " [Citation omitted.]

See, also, *State v. Dixon*, 222 Neb. 787, 387 N.W.2d 682 (1986).

Officer Hoch told McCurry that, in the absence of McCurry's voluntarily furnishing the samples of blood, saliva, and hair, the officers would "get a court order" requiring that McCurry supply the bodily samples relative to identifying the assailant in the sexual assault case being investigated. Sections 29-3301 to 29-3307, as the Identifying Physical Characteristics Act, contain a definite procedure for law enforcement officers to obtain a court order authorizing acquisition of an individual's bodily or physical evidence in efforts to identify a perpetrator of a crime. In particular, § 29-3303 prescribes the contents of a peace officer's affidavit necessary for issuance of the court order under the Identifying Physical Characteristics Act, including a required showing of probable cause. Officer Hoch did not represent that police had already obtained a court order for the samples from McCurry, but simply stated what the

law entitled the officers to do—request a court order for bodily samples from McCurry.

In reference to the Identifying Physical Characteristics Act, this court stated in *State v. Swayze*, 197 Neb. 149, 153, 247 N.W.2d 440, 443 (1976):

> The procedure followed in obtaining a sample of the defendant's blood for testing was analogous to obtaining a search warrant. The peace officer must file an affidavit with a judge or magistrate. Upon a showing of probable cause, the judge or magistrate has the power to issue the order. . . . The entire Identifying Physical Characteristics Act is rife with safeguards designed to protect the individual from whom physical evidence is sought.

In *State v. Rathburn*, 195 Neb. 485, 239 N.W.2d 253 (1976), Rathburn contended that he did not consent to a search of his automobile's trunk, because he had originally refused to open the trunk but later opened the trunk only after a police officer stated: " 'Okay, I'll get a warrant.' " 195 Neb. at 489-90, 239 N.W.2d at 256. This court rejected Rathburn's claim that the officer's statement about obtaining a search warrant constituted coercion, which vitiated Rathburn's consent to search of his automobile, and stated:

> There is no doubt that false assertions that one already *has* a warrant will vitiate a consent to search. Bumper v. North Carolina, [391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968)]. However under the facts of the instant case, all the officer said was that he would *get* a warrant. In situations where the searching officer has stated that he could obtain or was in the process of getting a warrant, the courts have never found such a statement coercive per se. Rather, the courts have generally looked at the statement made by the officer to determine if it was coercive in the particular factual situation.

(Emphasis in original.) 195 Neb. at 490, 239 N.W.2d at 256. See, also, *People v. Gurtenstein*, 69 Cal. App. 3d 441, 138 Cal. Rptr. 161 (1977): An officer's statement that he could either apply for a search warrant or the defendant could consent to a search of the defendant's house was not coercive, since the statement merely informed the defendant what the officer had a legal

right to do; *State v. Lange*, 255 N.W.2d 59 (N.D. 1977): officer's statement that, without defendant's consent, the officer would " 'get a warrant and search [defendant's car] anyway' " was not inherently coercive, 255 N.W.2d at 64 (citing *State v. Rathburn, supra*); *People v. Hancock*, 186 Colo. 30, 525 P.2d 435 (1974): where police officers informed defendant's wife that they had reason to believe that her husband was involved in a crime and that she possessed the right to refuse their entrance into the home, and where wife signed consent waiver form that was read to her, the consent to the search was intelligently and freely given, even though she had been told that a warrant would be sought if consent was not obtained.

Thus, as we have already pointed out, Officer Hoch informed McCurry about what course of action, authorized by the Identifying Physical Characteristics Act, could and would be taken in response to McCurry's refusal to furnish the samples of blood, saliva, and hair. Analogizing McCurry's case with the above-mentioned decisions dealing with consent to a search after an officer has indicated he would obtain a search warrant in the absence of consent to the search, we hold that a law enforcement officer's communication to a defendant which expresses the officer's intention to take a course of conduct permissible under the law is not, by itself, coercion preventing voluntariness of the defendant's statement in response to the officer's communicated intention. Under the circumstances, Officer Hoch's statement, indicating a prospective course of action permissible under the law, did not, by itself, constitute coercion which prevented voluntariness of McCurry's statements. In view of all the circumstances surrounding McCurry's statements in question, we cannot reach a conclusion other than the statements were " ' "the product of a rational intellect and a free will." ' " *State v. Norfolk*, 221 Neb. 810, 819, 381 N.W.2d 120, 127 (1986); *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

We note that the court instructed the jury concerning McCurry's custodial statements to law enforcement officers and gave NJI 14.52A, which, in substance, directs the jury to disregard a defendant's custodial statement to law enforcement officers unless the jury finds, beyond a reasonable doubt, that

the *Miranda* warning was administered to the defendant before the custodial statement and that the defendant waived each of the rights specified in the *Miranda* warning. In *State v. Rife*, 215 Neb. 132, 337 N.W.2d 724 (1983), this court stated that admissibility of a defendant's custodial statement in relation to the *Miranda* warning was a question of law. Courts in other jurisdictions have reached the same conclusion. See, *State v. Hampton*, 61 N.J. 250, 294 A.2d 23 (1972); *State v. Perry*, 14 Ohio St. 2d 256, 237 N.E.2d 891 (1968); *People v. Sanchez*, 65 Cal. 2d 814, 423 P.2d 800, 56 Cal. Rptr. 648 (1967). Whether the *Miranda* warning has been properly administered and whether the defendant has waived those rights specified in the *Miranda* warning are questions of law affecting the admissibility of evidence and, as such, are matters for judicial determination, not questions of fact for the jury. See Neb. Evid. R. 104 (Neb. Rev. Stat. § 27-104(1) (Reissue 1985)). Cf., *State v. Bodtke, supra* (voluntary character of a statement is a question of fact for the jury, notwithstanding a court's determination, as a matter of law, that the statement is voluntary and, therefore, admissible); *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965).

As a final note, we hasten to add that we realize, in the sequence of events which involved McCurry at police headquarters, the officers administered the *Miranda* warning before there was any reference to samples of blood, saliva, and hair from McCurry. One should not read into our opinion more than the opinion itself states. We do not tacitly require or otherwise imply that the *Miranda* warning is an indispensable prerequisite to acquisition of data pursuant to the Identifying Physical Characteristics Act to identify the perpetrator of a crime, such as the blood, saliva, and hair requested in McCurry's situation. Most will readily recognize that the requirement of the *Miranda* warning pertains to an individual's right to remain silent and the admissibility of a defendant's statement which is the product of custodial interrogation by law enforcement officers, see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), whereas the identificatory data, such as that within the purview of the Identifying Physical Characteristics Act, does not involve a defendant's statement.

See *State v. Swayze*, 197 Neb. 149, 247 N.W.2d 440 (1976).

The district court properly overruled McCurry's suppression motion and correctly admitted the statements as evidence against McCurry.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM M. KATZMAN, APPELLANT.

424 N.W.2d 852

Filed June 17, 1988. No. 87-573.

1. **Motions for New Trial: Appeal and Error.** The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal.
2. **Motions to Dismiss: Evidence.** On a defendant's motion to dismiss, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence.
3. **Criminal Law: Directed Verdict.** In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
4. **Motions for Continuance: Appeal and Error.** This court will not reverse an order granting or refusing a continuance except where there has been an abuse of discretion by the trial court.
5. **Trial: Evidence: Appeal and Error.** It is within the court's discretion to admit or exclude evidence, and such rulings on the evidence will be upheld upon appeal absent an abuse of discretion.
6. **Sentences: Appeal and Error.** A sentence imposed within the limits prescribed by the statute in question will not be disturbed on appeal in the absence of an abuse of discretion.
7. **Constitutional Law: Prosecuting Attorneys: Discrimination.** To support a defense of selective or discriminatory prosecution, the defendant must show not only that others similarly situated have not been prosecuted but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent his exercise of his constitutional rights.
8. **Discrimination: Presumptions: Proof.** A discriminatory purpose will not be presumed; there must be a showing of clear and intentional discrimination.

9. **Criminal Law: Evidence: Other Acts.** Generally, it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Gregory M. Schatz of Stave, Coffey, Swenson, Jansen, & Schatz, P.C., for appellant.

Robert M. Spire, Attorney General, and William L. Howland, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

The defendant, William M. Katzman, was found guilty by a jury in the district court of five counts of false swearing to an initiative or referendum petition contrary to the provisions of Neb. Rev. Stat. § 32-713 (Reissue 1984). He assigns as error that (1) the statutory scheme under which he was convicted is unconstitutionally vague and overbroad; (2) his equal protection rights had been denied because of "arbitrary selection" of him by the prosecutor in filing charges; (3) his motion for a continuance was denied; (4) certain evidence was incorrectly admitted; (5) the evidence was insufficient to support a conviction; and (6) improper terms of the conditions of probation were imposed. We affirm.

Katzman was a member of Lottery Consultants of Nebraska, Inc., in March of 1986, which organization was retained to aid in a petition drive to place the issue of a statewide lottery on the general election ballot in November of 1986. It was required by law that circulators of the petitions be registered voters of the county in which the petition signers resided. In addition, it was required by Neb. Rev. Stat. § 32-705 (Cum. Supp. 1986) that the circulator of each petition sign an affidavit swearing to the authenticity of each signature obtained on a petition. Section 32-713 provided that any person "who shall falsely swear to any signature upon any such petition" shall be guilty of a Class IV felony.

In spite of the claim of insufficiency of the evidence, there seems to be little dispute as to the pertinent facts. Katzman himself testified that he "whited out" the name of the county on the top of petitions which had the wrong county written in. Another witness testified that Katzman was also whiting out circulator signatures and that he had asked one of his (Katzman's) employees to sign some Douglas County petitions since the employee was a registered voter in Douglas County. Katzman himself testified that he re-signed petitions on the circulator line after the previous circulator's signature was whited out, because the previous circulator was not a registered voter in the county and he was.

The activities that led to the charges against Katzman took place on July 3, 1986, the day of the deadline for the return of the petitions. On that day, Katzman instructed two of his employees to take some unsigned or "whited out" petitions to one of H&Z Vending's clients, Jane Janssen, a bar owner registered as a voter in Sarpy County, so that she, the bar owner, could sign as a circulator. H&Z Vending was a business involved with the ownership and distribution of video lottery machines, in which Katzman had an interest. It was these unlawfully signed petitions which led to the filing of five counts of false swearing against Katzman.

The district court found that certain provisions of the statutes previously mentioned were unconstitutional: the requirement that circulators swear that they are registered *and* qualified voters; the provision that requires circulators to swear "that each petitioner when he or she signed this petition was a legal and qualified voter of the state and county and qualified to sign the same"; and the provision prohibiting the payment of circulators. However, the court held that these unconstitutional provisions were severable and that the section of the statute which was the gravamen of the State's complaint, namely, the requirement that a circulator swear that the petition signers signed in his presence, was constitutionally sound. Accordingly, the trial court, prior to trial, had overruled Katzman's motion to quash the information against him, and, following the conviction, the court also overruled the motion for a new trial and the motion in arrest of judgment.

In our review of this case, we are governed by the following general rules of law:

The granting or refusal of a motion for new trial is left to the sound discretion of the trial court, and in the absence of an abuse of that discretion, the determination will not be disturbed on appeal. *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987).

On a defendant's motion to dismiss, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

In a criminal case a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *Id.*

This court will not reverse an order granting or refusing a continuance except where there has been an abuse of discretion by the trial court. *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987).

It is within the court's discretion to admit or exclude evidence, and such rulings on the evidence will be upheld upon appeal absent an abuse of discretion. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988).

A sentence imposed within the limits prescribed by the statute in question will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

With respect to the defendant's first assignment of error, i.e., that the statutory scheme under which he was convicted is unconstitutionally vague and overbroad, all of defendant's contentions in that regard are considered, discussed, and decided adversely to the defendant in *State v. Monastero, ante* p. 818, 424 N.W.2d 837 (1988), decided today.

Katzman's pretrial motion to dismiss the information on the basis of a violation of equal protection rights because of alleged selective prosecution was denied. He insists that the evidence disclosed that the prosecutor's motive in charging Katzman was

Katzman's video lottery game business interests. The State simply argues that Katzman was instrumental in the petition drive and that the prosecutor's selection of Katzman for prosecution was therefore warranted.

The general rule regarding prosecutorial discretion in law enforcement is that, unless there is proof that a particular prosecution was motivated by an unjustifiable standard based, for example, on race or religion, the use of such discretion does not violate constitutional protections. *State v. Sprague*, 213 Neb. 581, 330 N.W.2d 739 (1983); *State v. Bartlett*, 210 Neb. 886, 317 N.W.2d 102 (1982); *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980). This means that in order to establish arbitrary discrimination inimical to constitutional equality, there must be more than an intentional and repeated failure to enforce legislation against others as it is sought to be enforced against the person claiming discrimination. *Long, supra*; *Arrigo v. City of Lincoln*, 154 Neb. 537, 48 N.W.2d 643 (1951). Also, there must be more than a showing that a law or ordinance has not been enforced against others and that it is sought to be enforced against the person claiming discrimination. *Long, supra*; *City of Omaha v. Lewis & Smith Drug Co., Inc.*, 156 Neb. 650, 57 N.W.2d 269 (1953). To support a defense of selective or discriminatory prosecution, the defendant must show not only that others similarly situated have not been prosecuted but that the selection of the defendant for prosecution has been invidious or in bad faith, based upon considerations such as race, religion, or the desire to prevent his exercise of his constitutional rights. *Long, supra*; *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974).

Katzman has failed to show, first of all, that others who were *similarly situated* were not prosecuted. Katzman was one of the "ringleaders" of the petition drive. He was responsible for the formation of Lottery Consultants of Nebraska, Inc., which was in turn responsible for the funding of the petition drive; the drive was coordinated from his business office in Omaha; much of the illegal whiting out and re-signing was done in his presence, at his business address, and with his cooperation; he instructed the temporary-help circulators to sign petitions which they had not circulated or to refrain from signing

petitions which they had circulated; and he personally solicited many businesses to have petitions available for their customers to sign. Katzman was an instrumental force in the petition drive. There is no evidence that he was the only leader of the drive who was prosecuted; the evidence is to the contrary.

There were, of course, many, many others who were involved in the petition drive in some manner and were not prosecuted. However, the majority of those who were involved to the extent that Katzman was *were* charged (e.g., Labedz, Pappas, McCullough, etc.). Thus, Katzman has failed to meet the preliminary step of showing that those who were similarly situated were not equally treated.

Moreover, Katzman has not shown that the prosecutor's decision was based on an impermissibly discriminatory reason. Race, religion, nationality, sex, and political affiliation were obviously not factors in the decision to prosecute. Katzman argues instead that it was probable that he was "singled out" for prosecution because of his involvement with the video lottery game business. He asserts that this is an impermissible basis for prosecution, as it interferes with his constitutional right to conduct his business.

There has been no showing that Katzman was "singled out" because of his video lottery business. Although the prosecution may have been aware of Katzman's business activities, there was simply no evidence presented at the hearing that the charges against Katzman were brought to interfere with his business. A discriminatory purpose will not be presumed; there must be a showing of clear and intentional discrimination. *State v. Long, supra*; *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 397, 88 L. Ed. 497 (1944). This assignment of error is without merit.

Katzman complains that he was first allowed to see exhibits 1 and 2 on March 5, 1987, a little less than 2 weeks before trial. These exhibits consisted of the investigative reports made by the Nebraska State Patrol in the case. Because of the large amount of material contained in those exhibits, the defense asked that the trial be continued so that it would have adequate time to look at the reports.

Although the volumes are large, they easily could have been reviewed in the days remaining before trial. Much of the

material contained in the exhibits consisted of petitions, administrative data forms, police reports, and other documents which do not require much reading. Moreover, there has been no showing how the information in the exhibits could have helped in the defense at trial; at trial, Katzman essentially admitted his participation in the illegal activities. This court will not reverse an order refusing a continuance except where there has been an abuse of discretion by the lower court. *State v. Carter*, 226 Neb. 636, 413 N.W.2d 901 (1987). It was not an abuse of discretion for the trial court to deny the motion for continuance.

The defendant complains of the admission by the trial court of exhibits 29 through 36. These were petitions signed by Tyler Anderson as circulator. Anderson, an employee of H&Z Vending, had been asked to sign the petitions by Katzman. Anderson signed the petitions, some of which had been whited out on the circulator line, because Katzman needed a registered voter of Douglas County to sign as circulator of those Douglas County petitions.

The exhibits were allowed by the court as bearing on Katzman's credibility and his knowledge of the falsity of the petitions in issue. The State also argued that the exhibits were admissible to show "a common scheme or plan, so close in time or similar in nature that it's relevant." The defense maintained that, although the petitions may have been relevant, the probative value was outweighed by the possibility of prejudice.

It is within the court's discretion to admit or exclude evidence, and such rulings on the evidence will be upheld on appeal absent an abuse of discretion. *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988). There was no abuse of discretion in the admission of exhibits 29 through 36.

The exhibits were indeed prejudicial, as the defense argues. However, the exhibits were also of such probative value that their probative value outweighed their potential prejudicial effect. As the record reveals, the circumstances which led to Katzman's decision to ask Anderson to sign petitions were very similar to the circumstances surrounding Katzman's request to have Janssen sign petitions; i.e., Katzman was trying to get as many valid petitioner signatures as possible in the last few hours

of the drive, and sought registered voters of the petition signers' county in order to "validate" those petitions. If a distinctive pattern or procedure similar to the charged crime is found in the separate act, the separate act may have probative value in determining the guilt of the defendant. *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). Moreover, " 'it is a matter left to the discretion of the trial court as to whether the prior offenses are sufficiently similar to the one charged in the case on trial so that evidence thereof has probative value.' " (Emphasis omitted.) *State v. Keithley*, 218 Neb. 707, 709-10, 358 N.W.2d 761, 763 (1984). Although the defense is correct in arguing that *unfairly* prejudicial evidence, even if otherwise admissible, may not be admitted, nevertheless, " '[W]here the highly prejudicial evidence also has great probative worth and plays a crucial role in the prosecutor's case, exclusion of the evidence may destroy his case and result in an unjustified acquittal.' " *State v. Ellis*, 208 Neb. 379, 393, 303 N.W.2d 741, 750 (1981).

Whether the exhibits were admitted for the purpose of showing Katzman's knowledge or credibility, or whether they were admitted to show a common plan, motive, etc., the fact remains that the exhibits were highly relevant and of great probative value. Any prejudice which resulted from the admission of these exhibits was outweighed by their probative value. The lower court did not abuse its discretion in admitting the exhibits.

The argument of Katzman that the evidence was insufficient to support the verdicts is wholly without merit.

At the outset, it is important to note that on a defendant's motion to dismiss, the State is entitled to have all its relevant evidence accepted or treated as true, every controverted fact as favorably resolved for the State, and every beneficial inference reasonably deducible from the evidence. Furthermore, a court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or evidence is so doubtful in character, or lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988).

Katzman was convicted of "false swearing" in connection with his activities in aiding and abetting the signing of petitions

by Jane Janssen. Katzman had Janssen sign five petitions as circulator, although he knew that she had not in fact circulated the petitions and was thereby falsely signing them. He now argues that there was no evidence to show that he knew that Janssen had not actually circulated the petitions in question; that is, that he did not have the requisite knowledge of falsity to sustain his conviction.

The defense maintains that it is conceivable that Katzman believed that Janssen had actually circulated those five petitions, and that she therefore was not falsely swearing to them.

The evidence contradicts the defense's argument. Katzman was well aware that petitions were being whited out and re-signed on the circulator line; he himself participated in this activity. There was evidence that he had asked Tyler Anderson to sign petitions which Anderson had not circulated, merely because Anderson was registered in the proper county. There was also evidence that Katzman had instructed the temporary-help circulators not to sign certain petitions and that he would "take care of it" later. Finally, the petitions themselves were sufficient to alert Katzman that they had not been circulated by Janssen but, rather, were to be *re*-signed by her. Exhibits 7 and 8 obviously had been whited out over a previous circulator's signature.

The evidence is sufficient to sustain the finding of the jury that Katzman aided and abetted Janssen in falsely swearing to the petition signatures.

Finally, it is contended, in effect, that the sentence imposed by the court was without authorization.

In sentencing Katzman, the court ordered him to serve 2 years on probation for each count, to run concurrently. The conditions of probation included a fine and community service work, as well as a provision that Katzman "shall not act as a circulator of any initiative or referendum petition during the period of probation, nor shall he actively promote the circulation of any such petition . . . ." The court expressly did *not* restrict Katzman's right to sign any initiative or referendum petition.

Section 32-713 provides that a person who is found guilty of

violating Neb. Rev. Stat. §§ 32-702 to 32-713 (Reissue 1984 & Cum. Supp. 1986) shall be guilty of a Class IV felony, punishable by "Maximum-5 years imprisonment, or ten thousand dollars fine, or both. Minimum-none." Neb. Rev. Stat. § 28-105 (Reissue 1985). In addition, § 32-705 provides a warning which suggests that violations of §§ 32-702 to 32-713 be punished by a fine not exceeding $500, by imprisonment not exceeding 2 years, or both. In either case, the 2-year probation period ordered by the court falls within the recommended sentencing guidelines. A sentence imposed within the limits prescribed by the statute in question will not be disturbed on appeal in the absence of an abuse of discretion. *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988).

However, Katzman argues that the condition of his probation restricting his circulation activities does not comply with Neb. Rev. Stat. § 29-2262 (Cum. Supp. 1986). Section 29-2262 states:

> (1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.
>
> (2) The court, as a condition of its sentence, may require the offender:
>
> . . . .
>
> (p) To satisfy any other conditions reasonably related to the rehabilitation of the offender.

Thus, it is within the court's power to restrict Katzman's activities by imposing any reasonable condition designed to promote his respect for the law and to facilitate his rehabilitation.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES E. PAPPAS, APPELLANT.
424 N.W.2d 604

Filed June 17, 1988. No. 87-632.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Robert M. Spire, Attorney General, and William L. Howland, and Michael G. Heavican, Lancaster County Attorney, and John A. Colborn, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The defendant, James E. Pappas, was charged in a third amended information with aiding and abetting Kimberly Peters to willfully and falsely swear to a signature upon an initiative petition for a state-run lottery in violation of Neb. Rev. Stat. §§ 32-705 (Cum. Supp. 1986) and 32-713 (Reissue 1984). The defendant's motion to quash the information, on the grounds that the statutes were unconstitutional as vague and overbroad, that they infringed upon the defendant's right to freedom of speech and to petition the government, and that they violated Neb. Const. art. III, §§ 2, 3, and 4, was overruled.

A jury was waived and the case submitted to the trial court upon a stipulation of facts. The defendant was found guilty, fined $2,000, and placed on probation for 2 years.

The defendant has appealed and has assigned as error the ruling on the motion to quash and the sufficiency of the evidence to sustain the finding of guilty.

The stipulation of facts shows that the Nebraska Taxpayers Lottery Committee was formed by Senators Bernice Labedz, John DeCamp, and the defendant, pursuant to Neb. Rev. Stat. §§ 32-702 et seq. (Reissue 1984 & Cum. Supp. 1986). In the spring of 1986, the committee filed a copy of the form of an initiative petition to allow a state-run lottery with the Secretary of State. During this time, the defendant was a resident and registered voter in Lincoln County, Nebraska, and was not a

bonded circulator in the initiative petition drive. Kimberly Peters, who was employed in the office of the defendant, Senator Pappas, was a resident and registered voter in Lancaster County, Nebraska, and became a bonded circulator in the petition drive.

Walter Radcliffe, a lobbyist hired by Lottery Consultants of Nebraska, Inc., of Omaha, assisted in the petition effort.

In June of 1986, the defendant signed the affidavit as a circulator on a number of initiative petitions which had been circulated in Lincoln County, Nebraska. Also in June of 1986, the defendant was informed by Bruce Cutshall, a lobbyist sharing offices with Walter Radcliffe, that it was Cutshall's understanding that the Secretary of State had interpreted the petition laws to prohibit the defendant from circulating petitions to Lincoln County residents while the defendant was in Lancaster County, Nebraska.

On July 1, 1986, Peters told the defendant that Radcliffe had offered her $1,000 if she could secure 1,000 signatures on petitions. Peters said that she would like to have July 2, 1986, off from work to collect signatures. The defendant said that it sounded like a good way to make some money, and she could have the day off from work. Peters asked the defendant if he could get her some signatures to help her get 1,000 signatures, and he said he would see what he could do.

On July 2, 1986, while in North Platte, Nebraska, the defendant presented Lincoln County petition No. 111 to a number of persons who signed the same as petitioners. Later on that date, the defendant returned to Lincoln, Nebraska, and delivered the petition to Kimberly Peters. At the time the petition was delivered to Peters, the affidavit of the circulator had not been signed.

The defendant knew that Peters had not been present in North Platte, Nebraska, when he had obtained the signatures of the petitioners, nor had Peters communicated with any of the petitioners regarding their signing of the petition. Further, the defendant knew that Peters intended to execute the petition as circulator after he had delivered it to her.

On July 3, 1986, Peters took the initiative petition to the defendant's office in Lancaster County, Nebraska, where she

completed the affidavit as circulator, signing her name as circulator. At that time Christie Dibbern, a notary public for the State of Nebraska, notarized the signature of Kimberly Peters and signed her own name as notary on the petition.

On July 3, 1986, the defendant, while in Lincoln, Lancaster County, Nebraska, presented Lancaster County petition No. 93 to a number of persons who signed the petition as petitioners. As a part of that process, the defendant, at approximately 4:15 p.m. on July 3, 1986, presented the petition to Ronald Goldenstein in the NSEA building in Lincoln, Lancaster County, Nebraska. Further, at that time the defendant told Goldenstein that " 'it was close and near the deadline and every vote would count.' " Peters was not present within the NSEA building at the time the petition was signed by Goldenstein, nor did she explain the legal effect and nature of the petition to Goldenstein. The defendant then took the petition to the office of Walter Radcliffe in Lancaster County, Nebraska. Present in Radcliffe's office, among other persons, was Peters, who then completed the affidavit as circulator of Lancaster County petition No. 93 and signed her name as circulator of the petition. Further, Peters completed the affidavit as circulator on the petition knowing that she had not in fact presented the petition to Goldenstein for his signature and that she had not explained to him the legal effect and nature of the petition in question.

The petition was signed by Peters as circulator prior to 4:55 p.m. on July 3, 1986, while at the office of Walter Radcliffe in Lancaster County, Nebraska, and her signature was notarized by Bernice Labedz, who signed her name as notary public on the petition.

At approximately 4:55 p.m. on July 3, 1986, Lancaster County petition No. 93 was filed with the Secretary of State of the State of Nebraska. Lincoln County petition No. 111 was filed with the Secretary of State of the State of Nebraska on a date and time prior to 5 p.m. on July 3, 1986. True and correct copies of Lincoln County petition No. 111 and Lancaster County petition No. 93 were attached to the stipulation.

Section 32-705 provides as follows:

> Every sheet of every petition mentioned in sections

32-702 to 32-704 containing signatures shall have upon it and below the signatures an affidavit in substantially the following form:

STATE OF NEBRASKA)
) ss.
COUNTY OF _____)

_____, being first duly sworn,
Name of Circulator

deposes and says that he or she is the circulator of the foregoing petition containing _____ signatures; that he or she is a registered and qualified voter of the State of Nebraska and county wherein the signatures were obtained; that each person whose name appears on the petition sheet personally signed the petition in the presence of affiant; that the date to the left of each signature is the correct date on which the signature was affixed to the petition and that the date was personally affixed by the person signing such petition; that affiant believes that each signer has stated his or her name, street, and street number or voting precinct, and his or her city, village, or post office address correctly; that each petitioner when he or she signed this petition was a legal and qualified voter of the state and county and qualified to sign the same, and that affiant stated to each petitioner before he or she affixed his or her signature the legal effect and nature of such petition.

_____
Circulator

_____
Address

Subscribed and sworn to before me, a notary public, this _____ day of _____, 19___, at _____, Nebraska.

_____
Notary Public

Every sheet of every petition mentioned in sections 32-702 to 32-704 containing signatures shall have upon it and above the signatures a statement in substantially the following form:

WARNING: Any person signing any name other than his or her own to any petition, any person knowingly signing his or her name more than once for the same measure at one election, any person who is not, at the time of signing or circulating the same, a registered voter and qualified to sign or circulate the same, any person who falsely swears to any signature upon any such petition, any person who accepts money or other things of value for signing the petition, any circulator who offers money or other things of value in exchange for a signature upon any such petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713 shall be guilty of a felony and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, by imprisonment in the Department of Correctional Services adult correctional facility not exceeding two years, or by both such fine and imprisonment. Such statement shall be printed in boldfaced type.

If the circulator has given the bond provided for in this section, the words and county wherein the signatures were obtained may be omitted from the statement of the circulator's voting qualification in the foregoing form of affidavit.

Every circulator of a petition shall be of the constitutionally prescribed age or upwards, and a resident and a registered and qualified voter of the State of Nebraska and of the county wherein the petitioners reside, except that any person, otherwise qualified, may circulate one or more petitions outside of the county of his or her residence if he or she shall first have filed with the Secretary of State a bond, approved by the Attorney General, in the sum of five hundred dollars, conditioned that in the procuring of signatures to such petition or petitions he or she will conform to all the requirements of sections 32-702 to 32-713. Such bond shall set forth the complete name and address of the bonded circulator. No petition or petitions other than those whose titles appear in the bond application shall be circulated by such bonded circulator. Any circulator circulating petitions under

sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions. A circulator may be paid for his or her expenses incident to circulation of petitions, such as meals, travel, and lodging. All signatures secured in a manner contrary to sections 32-702 to 32-713 shall not be counted. Clerical and technical errors in a petition shall be disregarded if the forms herein prescribed are substantially followed.

Section 32-713 provides as follows:

> Every person who is a qualified elector of the State of Nebraska may sign an initiative or a referendum petition of any measure upon which he or she is legally entitled to vote; *Provided*, that no elector shall be qualified to sign or circulate any initiative or referendum petition unless he or she shall be registered as an elector at the time of signing, or unless he or she shall file with the petition an affidavit setting forth the fact that he or she is a qualified elector. Each signer shall at the time of signing, personally affix the date, his or her surname, and Christian or given name in full, except that the middle name or initial may be omitted, and if the Christian or given name is an initial only, the signer shall so state below the name at the time of signing. In addition to the date and his or her signature and printed name, except that no printed name shall be required if his or her signature is legible, the signer shall personally affix the street and street number, or if no street or number exists then a designation of a rural route, or the voting precinct and city or village or post office address. No signer shall use ditto marks as a means of personally affixing the date or address to any petition. A wife shall not use her husband's Christian or given name when she signs a petition, but rather, she shall personally affix her Christian or given name along with her surname. The petition shall conform with the requirements of section 32-4,156. The express purposes of the provisions of this section are to aid and assist the Secretary of State and the county clerk or election commissioner in determining the validity of signatures, the electoral qualifications of the signers, and sufficiency of the petition, and to prevent

> fraud, deception, and misrepresentation in the circulation and signing of a petition. Any person signing any name other than his or her own to any petition, or knowingly signing his or her name more than once for the same measure at one election, or who is not, at the time of signing or circulating the same, a legal voter and qualified to sign or circulate the same, or any person who shall falsely swear to any signature upon any such petition, or any person who accepts money or other things of value for signing any petition, or any circulator who offers money or other things of value in exchange for a signature upon any petition, or any officer or person willfully violating any provision of sections 32-702 to 32-713, shall be guilty of a Class IV felony.

Each of the affidavits which Peters executed on the petitions referred to in the stipulation recited that she was the circulator of the petition; that she was a registered voter in the county where the signatures were obtained; that each person who signed the petition did so in her presence; and that she stated to each petitioner, before the petitioner's signature was affixed, the legal effect and nature of the petition.

The stipulation clearly shows that Peters was not the circulator of either petition; that Peters was not a resident or elector of Lincoln County, Nebraska; that none of the petitioners signed the petition in her presence; and that she did not explain the legal effect and nature of the petition to any of the petitioners. It is equally clear that the defendant aided, abetted, and procured her false swearing to the signatures upon the petitions. The evidence was sufficient for the trial court to find the defendant guilty beyond a reasonable doubt.

With respect to the defendant's other assignments of error, all of the defendant's contentions are considered and discussed in *State v. Monastero, ante* p. 818, 424 N.W.2d 837 (1988), decided today. For the reasons stated in the *Monastero* case, we determine that the defendant's other assignments of error are without merit.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. WALTER H. RADCLIFFE, APPELLEE.

424 N.W.2d 608

Filed June 17, 1988. No. 87-645.

1. **Constitutional Law: Initiative and Referendum.** The citizens of Nebraska are empowered by Neb. Const. art. III, § 2, to initiate constitutional amendments to be adopted by the people independently of the Legislature by petition signed by 10 percent of the electors of the state so distributed as to include 5 percent of the electors of each of two-fifths of the counties of the state.
2. **Criminal Law: Statutes.** The definition of a crime is controlled by the statute in effect at the time of the offense charged.
3. **Constitutional Law: States: Due Process.** U.S. Const. amend. I prohibits the Congress from making any law which abridges the freedom of speech. That guarantee is made applicable to the states by the requirement of U.S. Const. amend. XIV that no state deprive any person of liberty without due process of law.
4. **Constitutional Law.** The freedom of speech guaranteed by the first amendment embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.
5. **Constitutional Law: Initiative and Referendum: Statutes.** The circulation of an initiative petition involves the type of interactive communication concerning political change that is appropriately described as "core political speech"; accordingly, statutes limiting the power of the initiative are to be closely scrutinized and narrowly construed.
6. **Constitutional Law: Statutes: Appeal and Error.** The Nebraska Supreme Court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Exception overruled.

Robert M. Spire, Attorney General, and William L. Howland, and Michael G. Heavican, Lancaster County Attorney, and John A. Colborn, for appellant.

Alan E. Peterson of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

CAPORALE, J.

As the result of an effort to initiate an amendment to the Constitution of this state so as to permit a state-run lottery,

defendant-appellee, Walter H. Radcliffe, was charged with hiring and paying a salary to circulators of initiative petitions, once on June 26, 1986, and again on July 2, 1986, in violation of Neb. Rev. Stat. §§ 32-705 (Cum. Supp. 1986) and 32-713 (Reissue 1984). The district court sustained Radcliffe's motion to quash the information on the ground, inter alia, that the portion of § 32-705 Radcliffe is charged with having violated abridges his freedom of speech and thus violates the first amendment to the U.S. Constitution. The plaintiff State excepted to the district court's ruling and, pursuant to leave, appealed to this court under the provisions of Neb. Rev. Stat. § 29-2315.01 (Reissue 1985). We overrule the State's exception.

The citizens of this state are empowered by Neb. Const. art. III, § 2, to initiate constitutional amendments to be "adopted by the people independently of the Legislature . . . by petition . . . signed by ten per cent of [the electors of the state] . . . so distributed as to include five per cent of the electors of each of two-fifths of the counties of the state . . . ." Neb. Const. art. III, § 4, provides that the "whole number of votes cast for Governor at the general election next preceding the filing of an initiative . . . petition shall be the basis on which the number of signatures to such petition shall be computed." This section further outlines the method by which an initiated constitutional amendment is to be placed before the electorate for adoption or rejection.

The statutory language in question is part of the legislative scheme implementing the initiative process, which is mainly found at Neb. Rev. Stat. §§ 32-702 through 32-713.01 (Reissue 1984 & Cum. Supp. 1986). The portion of § 32-705 (Cum. Supp. 1986) at issue reads: "Any circulator circulating petitions under sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions." Section 32-705 does, however, permit paying a circulator those "expenses incident to circulation of petitions, such as meals, travel, and lodging." Section 32-713 (Reissue 1984) provides that any person "willfully violating any provision of sections 32-702 to 32-713, shall be guilty of a Class IV felony." We recognize that by the enactment of 1988 Neb. Laws, L.B. 716, which becomes effective July 9, 1988, the Legislature will have changed certain

portions of the language under consideration. Those changes, however, are not material to our inquiry, for not only does the enactment itself provide that the changes it makes shall not apply to prior offenses, which "shall be construed and punished" according to the law existing at the time of the offense, but the definition of a crime is controlled by the statute in effect at the time of the offense charged. See, *State v. Tully*, 226 Neb. 651, 413 N.W.2d 910 (1987); *State v. Country*, 194 Neb. 570, 234 N.W.2d 593 (1975); *Berry v. Wolff*, 193 Neb. 717, 228 N.W.2d 885 (1975); *Debney v. State*, 45 Neb. 856, 64 N.W. 446 (1895).

U.S. Const. amend. I provides in part that "Congress shall make no law . . . abridging the freedom of speech . . . ." That guarantee is made applicable to the states by the requirement of U.S. Const. amend. XIV that no state "deprive any person of . . . liberty . . . without due process of law . . . ." *Meyer v. Grant*, 56 U.S.L.W. 4516 (U.S. June 6, 1988) (No. 87-920); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978); *Wood v. Tesch*, 222 Neb. 654, 386 N.W.2d 436 (1986).

The U.S. Supreme Court, in *Meyer v. Grant, supra*, recently reaffirmed that the freedom of speech guaranteed by the first amendment embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The *Meyer* Court went on to observe that the circulation of an initiative petition of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change. Recognizing that a petition circulator need not necessarily persuade a potential petition signer that a particular proposal should prevail, the Court observed that, nonetheless, a circulator would, in order to obtain a signature, at least have to persuade a potential signer that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. The Court reasoned that in almost every case this will involve an explanation of the nature of the proposal and why its advocates support it, and thus concluded that the circulation of an initiative petition "involves the type of interactive communication concerning

political change that is appropriately described as 'core political speech.' " 56 U.S.L.W. at 4518. As such, statutes limiting the power of the initiative are to be " 'closely scrutinized and narrowly construed.' " *Id.* Accordingly, the *Meyer* Court ruled that a Colorado statute which contained an absolute ban on the compensation of circulators violated the first amendment and was thus void.

The Court noted that it is often more difficult to get people to work without compensation than it is to get them to work for pay. Proceeding from that premise, the *Meyer* Court concluded that the Colorado statute restricted political expression both by limiting the number of circulators and, thus, the size of the audience reached by those who sought to initiate an amendment to the Colorado Constitution so as to exempt motor carriers from certain regulation, and by reducing the likelihood of garnering the number of signatures required to place the issue on the ballot, thereby limiting the ability of its proponents to make the issue the focus of statewide discussion.

The Court rejected the notion that whatever burden the Colorado statute imposed on the first amendment was permissible because other means of expression remained open to the proponents of the measure. It disapproved as well the contention that the state is free to limit the right of initiative, since it is state-created. Nor was the Court persuaded by the argument that the payment ban was justified by Colorado's interest in assuring that an initiative has sufficient grassroots support to be placed on the ballot. The Court observed that such interest was adequately protected by the requirement that no initiative proposal might be placed on the ballot unless the required number of signatures (at least 5 percent of the qualified voters) was obtained. Finally, the Court, expressing an unwillingness to assume that a paid circulator would be more likely to falsely verify the authenticity of signatures than would be a volunteer, rejected the proposition that the ban served the state's interest in protecting the integrity of the initiative process.

It is to be noted that the Colorado statute involved in *Meyer* differs from § 32-705 in that, while the former prohibits the payment of " 'any money or other thing of value in

consideration of or as an inducement to the circulation of' " an initiative petition, 56 U.S.L.W. at 4516 n.1, the latter permits the payment of expenses. However, given the rationale employed by the U.S. Supreme Court in reaching its decision, it cannot be reasoned that this difference provides any basis for exempting the portion of § 32-705 at issue from the *Meyer* holding.

Accordingly, we must conclude that the portion of § 32-705 which reads, "Any circulator circulating petitions under sections 32-702 to 32-713 shall not be hired and salaried for the express purpose of circulating petitions," violates the first amendment and is for that reason void and of no force or effect.

We do not overlook the fact that Radcliffe raises a number of other issues bearing on the constitutionality of various aspects of the statutory scheme implementing the initiative power contained in this State's Constitution. Those issues, however, are not germane to the resolution of the issue presented by this appeal. It has long been the rule that this court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action. *Sommerfeld v. City of Seward*, 221 Neb. 76, 375 N.W.2d 129 (1985). Thus, we decline to pass upon the extraneous issues sought to be interjected. (For a treatment of some of the issues raised, see *State v. Monastero, ante* p. 818, 424 N.W.2d 837 (1988), decided today.)

EXCEPTION OVERRULED.

STATE OF NEBRASKA, APPELLEE, V. JON M. RICHARD, APPELLANT.

424 N.W.2d 859

Filed June 17, 1988. No. 87-713.

1. **Evidence: Identification Procedures.** Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the out-of-court declarant is present at the trial and subject to cross-examination, whether or not the out-of-court declarant made a positive in-court identification.
2. **Constitutional Law: Due Process: Identification Procedures.** A claimed

violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it.

3. **Constitutional Law: Due Process: Evidence: Identification Procedures.** The admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability.
4. **Criminal Law: Identification Procedures.** Factors to be considered in evaluating the likelihood of misidentification are the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.
5. **Witnesses: Evidence: Impeachment: Extrajudicial Statements.** The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made.
6. **Trial: Witnesses.** It is within the discretion of the trial court to permit a hostile witness to be examined by leading questions and questions to refresh his memory.
7. **Trial: Rules of Evidence.** The Nebraska Evidence Rules require a timely objection to the admission of evidence stating the specific ground of the objection if a specific ground is not apparent from the context within which the question was asked.
8. **Trial: Appeal and Error.** Questions not presented to or passed upon by the trial court will not be considered on appeal.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Jerry L. Soucie, for appellant.

Robert M. Spire, Attorney General, and Jill Gradwohl Schroeder, for appellee.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

After trial to a jury the defendant, Jon M. Richard, was convicted of robbery, use of a weapon in the commission of a robbery, and felon in possession of a firearm. He was sentenced to 5 to 12 years on count I, 2 to 5 years on count II, and 1 to 2 years on count III, the sentences on counts II and III to run concurrently and to run consecutive to the sentence on count I.

The defendant has appealed and contends the trial court erred in failing to suppress the in-court identification of the defendant by the witness Shaun Adams, in allowing the State to examine the witness Scott Schneider concerning his prior conversation with a detective, in allowing the State to impeach the witness Gregory Merryman concerning a prior identification of the defendant, and in allowing the State to mislead the jury concerning the immunity granted to the witness Russell Kreinbrook.

The record shows that on September 30, 1986, at approximately 9:30 p.m., Shaun Adams, Gregory Merryman, and Theresa Oakeson were working at the Taco John's restaurant, located at 1110 South Street in Lincoln, Nebraska, when a masked gunman entered through the rear entrance of the establishment and demanded money. According to the employees, the robber told them to get the money from the cash register, at which time Oakeson and Adams began placing the money in a sack. After they emptied the cash register, the robber ordered the employees to get the money from a safe, which was unlocked and located directly beneath the cash register. Adams then took the sack of money to the robber, during which time he concentrated on observing the robber so as to be able to provide an accurate physical description to the police.

After receiving the money, the robber left through the rear entrance and headed north. The employees telephoned police, and shortly thereafter officers arrived at the scene. Adams provided a physical description of the assailant to the police.

The following day, the defendant was arrested and taken to the police station, where he was questioned about the robbery. While in custody, photographs were taken of the defendant and approximately $200 was found in his wallet. After about 3 hours the defendant was released from custody. That same day, investigating officers assembled a photographic lineup, which included a photograph of the defendant, and presented the photographs to Adams. After reviewing the photographs, Adams identified the defendant as the robber. Adams said that the eyes of the individual in the photograph were identical or very close to those of the person who committed the robbery and that the hair was the same length and the same color, and

also noted similarities in his complexion. Oakeson was unable to identify the assailant, and Merryman was unsure of the robber's identity.

After a preliminary hearing, the defendant filed a motion to suppress "any and all evidence, observations, or things of whatever type that were seized from the Defendant, Defendant's person, or place in which the Defendant had a reasonable expectation of privacy" because, according to the defendant, his arrest was warrantless and lacked probable cause. Additionally, the defendant moved to suppress in-court and out-of-court identifications of the defendant on the basis that photographs taken of the defendant while in custody were taken in violation of his 4th and 14th amendment rights. The trial court found that the defendant's arrest was illegal and ordered the evidence seized pursuant to the arrest, including the photographs, suppressed. The trial court did not order the in-court identification of the defendant by Adams suppressed because the identification was found to be independently based and not influenced by the pretrial photo display.

The defendant asserts through his first and second assigned errors that the in-court identification of the defendant by Adams was tainted and should have been suppressed. The defendant argues that the taint arose from two sources—one being the prior identification of the defendant at the preliminary hearing, and the other being the identification made after Adams viewed the photographic lineup.

In regard to the identification at the preliminary hearing, the defendant alleges that the scenario constituted a suggestive one-on-one showup, where the only people involved were the county attorney, defense counsel, and the defendant, who was in custody of the sheriff's deputy. The defendant argues that the suggestive confrontation at the preliminary hearing was the basis of Adams' trial identification of the defendant.

The usual definition of a showup is that it is a one-on-one confrontation where the witness views only the suspect. Additionally, a showup is commonly "conducted at the scene of the crime, shortly after the arrest or detention of the suspect and while the incident is still fresh in the witness' mind." 19 Am. Jur. Proof of Facts 2d *Pretrial Identifications* § 2 at 442-43

(1979).

In *Holmes v. State*, 10 Md. App. 253, 269 A.2d 175 (1970), the victim of a robbery identified the defendant as the assailant by way of photographs and again identified the defendant at the preliminary hearing. The defendant contended that the preliminary hearing identification violated his due process rights. The court rejected this claim and held at 257-58, 269 A.2d at 177:

> Evidence of an extrajudicial identification is admissible when made under circumstances precluding the suspicion of unfairness or unreliability and where the out-of-court declarant is present at the trial and subject to cross-examination whether or not the out-of-court declarant made a positive in-court identification. . . . We see nothing in the record here compelling the conclusion that the extrajudicial identification was impermissibly suggestive. It was made at a preliminary hearing at which appellant was represented by counsel and under the impartial eye of the presiding judge. . . . As far as is disclosed by the record the identification procedure at the preliminary hearing was in substance no different than the normal procedure under which a judicial identification is made during a trial on the merits.

(Citations omitted.)

The defendant in *Minor v. State*, 437 So. 2d 651 (Ala. Crim. App. 1983), asserted a claim similar to that made by the defendant in this case when he moved to suppress an in-court identification on the basis that the identification constituted a "counselless line-up." *Id.* at 654. The victim had not identified the defendant as the perpetrator until the day before trial. The following day she positively identified the defendant in court. The court found the lack of identification by the victim prior to trial was not controlling and said:

> It is true that the witness did not give a prior description of the defendant, but this is not sufficient in the opinion of this court to eliminate the testimony of this witness. Reliability of the testimony of the witness in the identification process is the "linchpin" in determining the admissibility of identification testimony.

Id. Additionally, the court rejected the defendant's assertion that the in-court identification constituted a lineup: "We do not think that this is a 'line-up' contemplated by the courts in the cases which lay down the rules to be followed for the protection of rights of the accused." *Id.* at 655.

It is improper to characterize the preliminary hearing in this case as a one-on-one showup. It was not a hearing held for purposes of identification. At the time of the hearing, 2 months had passed since the robbery, and during that time, Adams had provided detailed physical descriptions of the robber. The fact that the preliminary hearing was the first face-to-face confrontation between the defendant and the victim is not controlling. Adams' previous descriptions of the defendant and his testimony provided sufficient indicia of reliability to negate any impropriety or suggestiveness that the defendant contends occurred at the preliminary hearing.

The U.S. Supreme Court in *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967), held: "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned. However, a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it . . . ." See, also, *Foster v. California*, 394 U.S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). Implementation of the totality of the circumstances approach

> permits the admission of the confrontation evidence if, despite the suggestive aspect, the out-of-court identification possesses certain features of reliability. . . . This . . . approach . . . is ad hoc and serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact.

Manson v. Brathwaite, 432 U.S. 98, 110, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Individual defendants appear to have due process claims whenever the likelihood of misidentification becomes greater than the assurances of reliability. As a result, suggestive confrontations have met with disapproval because "they

increase the likelihood of misidentification . . . ." *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972); *Simmons v. United States*, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). However, "[t]he admission of testimony concerning a suggestive and unnecessary identification procedure does not violate due process so long as the identification possesses sufficient aspects of reliability." *Manson, supra* at 432 U.S. at 106.

In *Biggers, supra*, the Court set forth factors to be considered in evaluating the likelihood of misidentification:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

409 U.S. at 199-200. See, also, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986). It is against these factors that we are to weigh the "corrupting effect of the suggestive identification itself." *Manson, supra* at 432 U.S. at 114.

A review of the *Biggers* factors leads to the conclusion that although the identification of the defendant at the preliminary hearing may have taken place under suggestive conditions, Adams' previous observation and description of the defendant was reliable and negated any substantial chance of misidentification.

(1) Opportunity to view the criminal. Not only did Adams view the defendant from a distance of 6 to 7 feet, he also was within an arm's length of the defendant at one point during the robbery. The victim was specifically asked at trial about his ability to observe the defendant:

> Q. At some point in time during the commission of the robbery on September 30th of last year, did you attempt to start trying to make some specific observations about the robber?
>
> A. Yes, I did.
>
> Q. When did you start doing it?
>
> A. As I was bringing the money back mainly. It started going through my head to think —

Q. Why did you decide to do that?

A. Because of the prior robbery.

(2) Degree of attention. Adams' statement shows that he was not a casual observer but, rather, that his attention was focused on observing the physical characteristics of the defendant.

(3) Accuracy of prior description. Adams provided a physical description to police immediately following the robbery. The record does not show any discrepancies between observations made by Adams during the robbery and the actual physical characteristics of the defendant.

(4) Degree of certainty. The degree of certainty can best be inferred from the fact that at no time did Adams fail to identify the defendant as the perpetrator, nor did he identify any individual other than the defendant as the person responsible for the crime. In his deposition taken after the preliminary hearing Adams stated the following:

> Q. What was it about it at the preliminary hearing that made you testify that that was the man that robbed you? What about his appearance that struck you?
>
> A. I saw his physique from the back. I didn't even see his face till I walked up and sat down in the witness chair. When I sat down he was sitting up there, and I saw the physique. But when I walked by him and saw his face it was something about his face or eyes or something that I was just positive that, you know, that was the man who I had seen.
>
> . . . .
>
> A. Well, you know, his physique and everything were right. But I think the thing that made me sure of it was his eyes. His around his eyes features that, you know — it, just something about him made me go, that's him, you know.

(5) Length of time between crime and confrontation. The confrontation and identification at the preliminary hearing occurred 2 months after the crime. The testimony of Adams at his deposition shows the comparisons he made between the defendant and the robber.

The *Biggers* factors go to the matter of a victim's independent recollection of the identity of the perpetrator. The rule which is

applicable in this case is that an in-court identification should not be suppressed if based on independent recollection untainted by the intervening identifications. *United States v. Crews,* 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980). In *Crews,* the Court held that the defendant's illegal arrest did not render the victim's ability to give accurate identification testimony invalid:

> Based upon her observations at the time of the robbery, the victim constructed a mental image of her assailant. At trial, she retrieved this mnemonic representation, compared it to the figure of the defendant, and positively identified him as the robber. No part of this process was affected by respondent's illegal arrest. In the language of the "time-worn metaphor" of the poisonous tree, *Harrison v. United States*, 392 U. S. 219, 222 (1968), the toxin in this case was injected only after the evidentiary bud had blossomed; the fruit served at trial was not poisoned.
>
> This is not to say that the intervening photographic and lineup identifications— both of which are conceded to be suppressible fruits of the Fourth Amendment violation— could not under some circumstances affect the reliability of the in-court identification and render it inadmissible as well. Indeed, given the vagaries of human memory and the inherent suggestibility of many identification procedures, just the opposite may be true. But in the present case the trial court expressly found that the witness' courtroom identification rested on an independent recollection of her initial encounter with the assailant, uninfluenced by the pretrial identifications, and this determination finds ample support in the record. In short, the victim's capacity to identify her assailant in court neither resulted from nor was biased by the unlawful police conduct committed long after she had developed that capacity.

445 U.S. at 472-73.

The defendant's argument that the in-court identification was tainted as a result of the photographs taken of the defendant during his illegal arrest fails for the same reasons. The record supports the finding of the court that the

observation made of the defendant during the commission of the robbery was the basis for the subsequent identifications.

The third and fourth assigned errors relate to alleged impeachment efforts of the prosecution. First, the defendant contends that during the direct examination of Scott Schneider by the State, inadmissible hearsay statements, in the guise of impeachment, were received in evidence. Schneider was an acquaintance of the defendant whose testimony was compelled after he was found to be a material witness. Schneider's testimony related to conversations with the defendant about the robbery and his motorcycle, which was to be used as the getaway vehicle.

Essentially, the defendant contends that the trial court erred in allowing the State to call and impeach its witness Scott Schneider for the purpose of introducing inadmissible hearsay evidence. Neb. Rev. Stat. § 27-607 (Reissue 1985) allows an attack on the credibility of a witness by any party, including the party calling him. However, as stated by this court in *State v. Brehmer*, 211 Neb. 29, 44, 317 N.W.2d 885, 893 (1982),

> "The rule allowing a party to impeach his own witness may not be used as an artifice by which inadmissible matter may be gotten to the jury through the device of offering a witness whose testimony is or should be known to be adverse in order, under the name of impeachment, to get before the jury for its consideration a favorable ex parte statement the witness had made."

Furthermore, where "the need for impeachment is small or nonexistent and the danger that the prior inconsistent statement will be considered substantively is great, the statement should be excluded." *State v. Marco*, 220 Neb. 96, 101, 368 N.W.2d 470, 474 (1985).

Before trial, the State moved to compel Schneider's attendance at trial as a material witness. An affidavit filed in support of the motion recited, in part, the following:

> Detective Larry Barksdale of the Lincoln Police Department reported to Jan W. Sharp that on November 6, 1986 he interviewed Scott Schneider regarding his knowledge of the above described robbery. Scott Schneider told Detective Barksdale that either on the day

of the robbery of Taco John's or the day before the robbery that Jon Richard asked Scott Schneider to drive Jon Richard's motorcycle for him *during the commission of a robbery*. Scott Schneider stated that Jon Richard told him that all he would have to do is park about a block away by an alley near a store and let the motorcycle run. Scott Schneider stated that Jon Richard said that he, Jon Richard, would go in and do the robbery and that he would come back out and get on the motorcycle and they would drive away. Scott Schneider stated Jon Richard told him that it would only take 5 or 10 minutes and that he was going to commit the robbery at a place that had a bunch of "young kids" working there. Jon Richard told him that he would "stick a gun in their face" and he would just be "in and out." Scott Schneider told Detective Barksdale that he refused to take part in the robbery and advised Jon Richard of that fact.

Jan W. Sharp further deposes and states that he has made several attempts to compel Scott Schneider's attendance at various court hearings that have been held in this matter. On November 26, 1986 the State filed a praecipe for subpoena asking that the Clerk of the County Court of Lancaster County, Nebraska issue a subpoena directing Scott Schneider to appear and testify at the preliminary hearing set for December 1, 1986. The court records in the above-entitled matter indicate that Scott Schneider was personally served with a subpoena on November 29, 1986, however, he *failed to appear at the preliminary hearing* on December 1, 1986 or at the continuation of that hearing on December 19, 1986. Jan W. Sharp deposes and states that he received a phone call from Scott Schneider sometime after November 29, 1986, but prior to December 1, 1986. Scott Schneider informed Jan W. Sharp that *he would refuse to testify against Jon Richard*.

Jan W. Sharp further deposes and states that the above-entitled matter was tentatively called for trial during the jury term commencing on April 6, 1987. The court records indicate that on April 3, 1987 Scott

> Schneider was personally served with a subpoena directing him to appear in District Courtroom No. 2 on April 19, 1987 at 9:00 a.m. to give testimony in this matter. Jan W. Sharp deposes and states that Scott Schneider *did not appear pursuant to that subpoena* and further that Scott Schneider telephoned Jan W. Sharp after being served on April 3, 1987 and informed Jan W. Sharp that *he would refuse to testify against Jon Richard*. Jan W. Sharp informed Scott Schneider that the above-entitled matter would probably be called for trial during the jury term commencing on May 11, 1987 and asked Scott Schneider to pick up a subpoena at the Sheriff's Office requiring him to appear at that jury term since Jan W. Sharp was unaware of Scott Schneider's address at that time. Although *Scott Schneider continued to maintain that he would not testify against Jon Richard* he did state that he would stop by the Sheriff's Office and pick up the subpoena.
>
> The court records in the above-entitled matter indicate that a praecipe was filed by the State on April 14, 1987 requesting that a subpoena be issued directing Scott Schneider to appear in District Courtroom No. 2 on May 11, 1987 at 9:00 a.m. to give testimony in this matter. Jan W. Sharp deposes and states that on or about May 11, 1987 he telephoned the Lancaster County Sheriff's Office and was advised by that office that *Scott Schneider never picked up the final subpoena.*

(Emphasis supplied.)

The pretrial conduct and statements of Schneider established that he was opposed to *testifying* against the defendant. His repeated refusals to honor subpoenas, as well as numerous phone calls made to the prosecutor, all tend to establish the fact that he did not want to testify. However, after Schneider was found to be a material witness and his testimony was compelled, the State had a reasonable expectation that he would testify in conformity with his previous statements to Detective Barksdale. At no time did Schneider indicate that he would perjure himself if forced to take the stand. After Schneider was compelled to appear and to testify, it was not

beyond reason for the State to assume that after he was placed under oath and made subject to the penalties of perjury, he would testify consistent with his statements to police.

It is obvious that Schneider was a hostile witness. As such the State was permitted to ask leading questions. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987); *State v. Brown*, 220 Neb. 849, 374 N.W.2d 28 (1985).

In fact, Schneider admitted everything except that the defendant had asked him to drive the motorcycle in connection with the robbery. Schneider's testimony revealed that he at least suspected there was some illegal purpose behind the defendant's request for him to drive the motorcycle.

The defendant also argues that there was error by the trial court during the examination of Gregory Merryman by the State. Merryman was an employee of Taco John's who was on duty at the time of the robbery. Following the robbery, Merryman was unable to identify the defendant in a photographic lineup. Although Merryman was acquainted with the defendant and had seen him on several occasions prior to the robbery, he told the police that he did not know or have an opinion as to who was responsible for the robbery.

At some time after the robbery, Merryman came in contact with the defendant and made comparisons between the robber and the defendant, at which time he "started thinking it was him." Merryman stated that at this time he was not positive that the defendant was the robber, and, in fact, when talking to the police shortly after making the comparisons, Merryman said he did not know if the defendant was involved. In that same conversation, however, Merryman eventually admitted that he believed the defendant could have been the robber and explained at trial that his reluctance to disclose this information was because of a previous threat made to Merryman by the defendant.

There were numerous objections during the testimony of Merryman, most of which were based on questions of relevancy. On appeal, however, the defendant challenges the admission of the testimony on grounds of improper impeachment, but the arguments in his brief relate not to impeachment but to issues of relevancy. Neb. Rev. Stat.

§ 27-103 (Reissue 1985) of the Nebraska Evidence Rules requires a timely objection to the admission of evidence stating the specific ground of the objection if a specific ground is not apparent from the context within which the question was asked. The reason for the requirement of specificity is to permit both court and counsel to better deal with the objection, either by way of counsel's correction of the claimed error, or as assistance to the court for a fair and more accurate ruling.

Langenheim v. City of Seward, 200 Neb. 740, 745, 265 N.W.2d 446, 450 (1978).

In *Havlicek v. State*, 101 Neb. 782, 784-85, 165 N.W. 251, 251-52 (1917), we stated:

> It is the duty of counsel to make his objections so specific that the court may understand the point intended to be raised . . . .
>
> "Unless the objection to offered evidence be sufficiently specific to enlighten the trial court and enable it to pass upon the sufficiency of such objection and to observe the alleged harmful bearing of the evidence from the standpoint of the objector, no question can be presented therefrom in the court of appeal."

The relevancy objections made by defense counsel were not adequate to raise a question of improper impeachment. The trial court had no opportunity to rule on such an issue, and, thus, the alleged error was not properly preserved for an appeal. "Questions not presented to or passed upon by the trial court will not be considered on appeal." *Schwaninger v. Schwaninger*, 192 Neb. 681, 687, 223 N.W.2d 829, 833 (1974).

From our examination of the record we have concluded there was no error prejudicial to the defendant committed by the trial court during the examination of Merryman.

The final assignment of error relates to the State's granting of use immunity to the witness Russell Kreinbrook, pursuant to Neb. Rev. Stat. § 29-2011.02 (Reissue 1985).

About 4 to 5 days after the robbery, the defendant asked Kreinbrook to store a 9-millimeter handgun for the defendant. Apparently, it was the weapon used in the robbery. Kreinbrook put the gun, inside a gray toolbox, under his bed. He was

eventually contacted by the police, at which time he turned the box over to them. He did not inform them at this time that a gun was inside the box because Kreinbrook himself was a convicted felon and was aware that it was illegal for him to possess a handgun. Since Kreinbrook was the only individual who could connect the gun used in the robbery to the defendant, his testimony was of importance to the State.

The defendant contends that although the State characterizes the immunity given Kreinbrook as use immunity, Kreinbrook was actually given total and absolute immunity from prosecution and as a result the jury was misled, which violated the defendant's due process rights to a fair trial.

The defendant claims that because Kreinbrook testified without immunity at the preliminary hearing, at that time admitted to being a felon in possession of a firearm, and yet no charges were filed against him after that testimony, in fact Kreinbrook was testifying at trial under a grant of transactional and not use immunity. We do not agree.

The jury was fully apprised of the nature and effect of the immunity granted to Kreinbrook through the following dialogue:

> Q. Mr. Kreinbrook, is it correct that at the present time you have been — your testimony — the state has agreed that your testimony, that is, *what you are saying here in court today*, cannot be used against you in any subsequent criminal prosecution accept [sic] for perjury, lying under oath. Do you understand that to be the circumstance?
>
> A. Yes.
>
> Q. You do realize you could be prosecuted for perjury?
>
> A. Yes.
>
> Q. And you also realize that *you could be prosecuted for being a felon in possession of a firearm it's just that the state couldn't use your testimony that you give here today in court against you*. Do you realize that?
>
> A. No.
>
> Q. Do you think you could be prosecuted for being a felon in possession of a firearm if we did not use your testimony against you?
>
> A. I don't understand.

MR. SHARP: May we approach, Your Honor?
THE COURT: You may.

. . . .

Q. (BY MR. SHARP) Mr. Kreinbrook, I want to try to make this clear for the record. *You can still be prosecuted for being a felon in possession of a firearm.* Do you understand that?

A. Yes.

Q. *The testimony that you are giving here today, however, could not be used in that prosecution.* Do you understand that?

A. Yes.

Q. If you lied under oath, you could be prosecuted for perjury, do you understand that?

A. Yes.

. . . .

Q. [By Mr. Soucie] Mr. Kreinbrook, *have you been charged with being a felon in possession of a firearm*?

A. No.

Q. Has anyone associated with the prosecution, either law enforcement officers or prosecuting attorneys, discussed with you whether you are going to be prosecuted for being a felon in possession of a firearm?

A. No.

Q. Did you ever discuss that with any prosecutors?

A. No.

Q. Did you ever discuss it with any prosecutors, immunity?

A. Yes.

Q. When did you discuss with them immunity?

A. This morning.

Q. What type of discussions did you have with them?

A. Just what was going to go on in here today.

Q. What kind of immunity did you ask for?

A. I didn't ask.

Q. Did you mention the word immunity?

A. No.

Q. What did you ask for?

A. I didn't ask for nothing.

Q. Maybe I misunderstood your question — or your answer. Did you have some discussions with prosecutors this morning regarding immunity?

A. Yes.

Q. Just tell me in your own words what the discussion was?

A. He told me that he would try to use some type of immunity for me to sit up here today.

Q. And what was your understanding as to what that immunity would involve?

A. That if —

Q. What were you going to get?

A. *That I wouldn't be prosecuted for what was said today.*

Q. And what do you understand that to mean, that you wouldn't be prosecuted for what you say today?

A. Yes.

Q. What does that mean to you?

A. That *no charges on what was going on in here today would be brought up against me.*

Q. What is your understanding regarding whether you will be charged or could be charged with being a felon in possession of a firearm tomorrow or sometime in the future?

A. I don't know.

Q. Do you think that you are not going to be charged or that you will be charged or you can be charged? What's your understanding?

A. *I understood I could be charged.*

Q. You are not going to be charge [sic]?

A. *I could be charged.*

Q. You could be charged but your understanding at the present time you have not been charged, is that right?

A. Yes.

(Emphasis supplied.)

The witness was extensively examined and cross-examined on the issue of immunity. There were no ambiguities from which the jury could be misled concerning the extent of the immunity granted.

The fact that Kreinbrook has not been prosecuted as a result of testimony elicited at the preliminary hearing does not foreclose the possibility that such a prosecution might take place. That fact is not determinative of the extent of immunity actually granted. We find this assignment meritless.

The judgment is affirmed.

AFFIRMED.

HASTINGS, C.J., participating on briefs.

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